1

BASIC CONCEPTS

1. Whether zinc dross and flux skimming are excisable articles?

CCEx. v. Indian Aluminium Co. Ltd. (2006) 203 ELT 3 (SC)

The Assessee manufactures aluminium sheets, the raw material where for is aluminium oxide. In the melting furnance, the top layer of the molten metal is exposed to atmosphere and gets oxidized. As a result of oxidation, a thin layer/film is formed which is removed by skimming. The second layer so removed is called dross. Indisputably, the percentage of metal in dross will vary and there would be some quantity of aluminium metal therein.

The Supreme Court had held in the case of *Union of India v. Indian Aluminium Co. Ltd. (1995) 77 ELT 268 (SC)* that dross and skimming arises during the process of manufacture but does not amounts to manufacture. It also held in *Collector v. Tata Iron & Steel (2004) 165 ELT 386 (SC)* that dross and skimming are capable of being sold but only because the article may have some saleable value, the same would not render it to be a 'manufactured product'. Therefore, the Supreme Court had not contended that article was obtained during the manufacturing process. Hence, Zinc dross and flux skimming are not exigible to duty.

2. Whether dues of the secured creditors will have priority over the central excise dues?

Sicom Ltd. v. Union of India (2006) 203 ELT 34 (Bom.)

The SICOM is the secured creditor, holding mortgage security in its favour. The mortgaged property seized by the Customs. In view of the Apex Court judgment in the case of *Bank of Bihar v. State of Bihar A.I.R. 1971 SC 1210* and *Dena Bank v. Bhikanbhai Prabhudas Parekh & Co. (2000) 5 SCC 69* the claim of secured creditor will have a priority over the dues of the Customs. Therefore, the claim of the Customs cannot rank higher than that of the secured creditors. The liability of the Customs is subsequent to the execution of the mortgage deed. In this view of the matter, Customs cannot claim priority over the dues of the SICOM, the secured creditor.

3. **Whether the storage cabinets, kitchen counters, conference tables and reception tables erected at the site of customers are excisable as furniture?**

Craft Interiors Pvt. Ltd. v. CCEx. , Banaglore (2006) 203 ELT 529 (SC)

The appellant is a private limited company which undertakes various activities, which includes civil works, painting, ceiling work, electrical work, laying of vinyl flooring, tables, chairs, sofa sets, erection of immovable items etc. depending on the customer's requirements. The customer places a purchase order to the appellant on a turnkey basis for the entire activity. The customer usually gives a bare open floor which has an exterior wall and internal columns to the appellants for undertaking the work. The appellant also manufactures furniture as part of the above-mentioned activities. The Central Excise authorities issued show cause notice to the appellants alleging that the appellants had manufactured and assembled excisable goods i.e. furniture and furniture parts falling under Chapter 9404 in the premises of various customers.

The Supreme Court held that storage units, running counters, overhead unit, rear and side unit, wall unit, kitchen unit etc. are ordinarily immovable property and cannot be removed without cannibalizing. Therefore, these items cannot be treated as furniture. However, items like tables, desks, chairs etc. are furniture and hence excisable.

4. **Whether the process of conversion of aluminium ingots into aluminium billets during the intermediate stage by the process of re-melting and adding other alloys amounts to 'manufacture' within the meaning of Section 2(f) of the Central Excise Act, 1944?**

CCEx. , Jaipur v. Mahavir Aluminium Limited (2007) 212 ELT 3 (SC)

The Supreme Court held that the manufacture takes place when there is transformation into a new commodity which is commercially distinct. The said commodity has its own character and name which is whether as a result of one process or several processes, liability to excise duty under section 4 is attracted. The assessee is not only captively consuming aluminium billets for the production of irrigation pipes but is also selling such commodity in open market. Ingots and Billets are thus two different commercial commodities. They have separate, distinct and identifiable marketability and saleability. The entry under Chapter 76 also makes it clear which as follows:

Chapter 76

Heading No.	Sub-Heading No.	Description of Goods	Rate of Duty
76.01	7601.10	ingots, billets	16%

Therefore, the said process amount to manufacture and the assessee was liable to pay excise duty.

5. **Whether refrigeration plant/cold storage plant/central air-conditioning plant/caustic soda plant can be subjected to duty under Central Excise Act, 1944?**

   CCEx. , Indore v. Virdi Brothers (2007) 207 ELT 321 (SC)

   The stand of the appellant is that the fabrication of such plants out of duty paid bought out items amounts to manufacture of a new marketable commodity and therefore excise duty is payable. The CEGAT held that no excise duty is leviable and thus these plants are not subject to excisability. It accepted stand of the respondents that these plants are basically systems comprising of various components and thus are in the nature of systems and are not machines as a whole. The Supreme Court held that the Government of India, Ministry of Finance, has issued Circular No. 58/1/2002-CX dated 15th January 2002. The Circular indicates that it was intended to clarify the question of excisability of plant and machinery assembled at site. The circular has been issued in exercise of power conferred under Section 37B of the Act. Hence, the view of the CEGAT cannot be faulted.

6. **Whether twisting and doubling of cellulosic filament yarn with a blended yarn comprising polyester and viscose would amounts to manufacture?**

   CCEx. , Mumbai-IV v. Swastik Rayon Processors (2007) 209 ELT 163 (SC)

   The point involved in this appeal had specifically been dealt with by the Supreme Court in *Porritts and Spencer (Asia)* Ltd*. v. Collector (1999) 106 ELT 18 (SC)* in which it was held that doubling or multi folding of yarn does not result in the emergence of a new commodity and that the yarn continues to be yarn. Therefore, this process does not amount to manufacture.

7. **When a product can be held a by-product?**

   Somaiya Organic (India) v. CCEx. , Allahabad (2007) 214 ELT 176 (All.)

   By-product is a product, which is obtained midway during the process of manufacture of main product. It would remain a by-product even if the product so obtained midway were required to undergo some small amount of further treatment or processing to bring it to a finished or marketable form. However, where what so obtained midway is required to undergo considerable processing before it can be brought to a finished or marketable form, and more so when additives have also to be added during such further processing, it may travel outside the concept of by-product and may well become a different final product.

8. **Whether the process of excavating granites from mines and cutting into pieces and polishing would amounts to manufacture?**

   CIT, Chennai v. Yak Granite Industries P. Ltd. (2007) 214 ELT 508 (Mad.)

   The assessee is engaged in the business of excavating granites and cutting them into pieces, polishing them and then exporting them to foreign country. The assessee contended that this process of cutting and polishing is manufacturing activity that has brought the finished product from the raw materials excavated from the mines and claimed deduction under section 80HHC of the Income tax Act, 1961. However, the Assessing Officer disallowed the deduction claimed by the assessee under Section 80HHC of the Income tax Act, 1961 on the ground that the assessee's activity of excavation, cutting and polishing the granites does not amount to manufacture. The High court relying upon the judgment of the Apex court in the case of *Gem Granites v. CIT (2004) 271 ITR 322 (SC)* held that excavating granites from mines, cutting into pieces and polishing does not amount to manufacture.

9. Whether the process of preparing masala powder by grinding and mixing of various spices and condiments would amounts to manufacture and liable to be further taxed?

A.P. Products v. State of Andhra Pradesh (2007) 214 ELT 485 (SC)

The appellant is engaged in the business of purchasing various spices from the registered dealers and the said items are subjected to sales tax at the first point of sale. The appellant by mixing and grinding all these spices together produces masala powder which is used for enhancing the taste of food. The appellant had claim exemption on the ground that the ingredients used for the preparation of masala powder have already been taxed, the masala powder is not further exigible to sales tax.

The Supreme Court held that the ingredients that are used in preparation of masala after grinding and mixing lost their own identify and character and a new product separately known to the commercial world comes into existence. Hence, process of preparing the masala powder after grinding and mixing of various spices and condiments in certain proportion amounts to manufacture and liable to sales tax.

10. Whether blending of tea amounts to manufacture?

CIT v. Tara Agencies (2007) 214 ELT 491 (SC)

The Supreme Court has held that blending of different qualities of tea to smoothen its marketability is not manufacture but processing. The production of tea happens in the tea gardens. The manufacture happens when tea leaves are plucked from the tea bushes and by mechanical process, converted to tea. The blending of different qualities of tea is its processing.

The Apex Court explained that the word 'production' when used in juxtaposition with the word 'manufacture' covers bringing into existence new good by a process which may or may not amount to manufacture. It covers all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods. Processing is only an intermediate stage of production and/or manufacture.

2

CLASSIFICATION OF EXCISABLE GOODS

1. **How should the glass fibre reinforced plastics as such be classified?**

   Kemrock Industries and Exports Limited v. CCEx. , Vadodara (2007) 210 ELT 497 (SC)

   The assessee is the manufacturer of Glass Fibre Reinforced Plastics. The assessee wanted to classify impugned goods under Heading No. 70.14 of the Schedule to the Central Excise Tariff Act, 1985. According to the Revenue, the said item is classifiable under Heading 39.20 of Central Excise Tariff Act, 1985.

   The Supreme Court held that the item is a composite item. The glass fibre mat when impregnated with plastic gains certain amount of stiffness, which helps manufactures of roofs and partitions. In the present case, since the article in question is a composite article, the test of essentiality shall apply. This test of essentiality refers to "essential character". The test states that, if the manufactured goods has the essential character, mainly of stiffness, required for the manufacture of roofs, partitions etc. then one has to treat the item in question as an article of plastic. Therefore, the item will fall under Heading No. 39.01, since plastic gives higher degree of insulation quality.

2. **Whether the manufacturing of a new product from betel nuts should be classified under Chapter sub-heading 2107.00 or under Chapter sub-heading 0801.00 of the Central Excise Tariff?**

   Crane Betel Nut Powder Works v. CCEx. , Tirupathi (2007) 210 ELT 171 (SC)

   The Supreme Court held the process of manufacture employed by the appellant-company did not change the nature of the end product that was *'betel nut remains a betel nut'*. The observation of the Tribunal depicts the status of the product prior to manufacture and thereafter. The observation that manufacture implies a change, but every change not manufacture and yet every change of an article is the result of treatment, labour and manipulation is appropriate to the situation at hand. The process involved in the manufacture of sweetened betel nut pieces does not result in the manufacture of a new product as the end product continues to retain its original character though in a modified form. Hence, the process of cutting betel nuts into small pieces and addition of essential/non-essential oils, menthol, sweetening agent etc. did not result in a new and distinct product having a different character and use.

3. **How should the roasted peanuts and moongfali masala mazedar as such be classified under the schedule to the Central Excise Tariff?**

   Amrit Agro Industries Ltd. v. CCEx. , Ghaziabad (2007) 210 ELT 183 (SC)

   According to the appellant, roasted peanuts falls under Heading 21.01, hence they are entitled to exemption. The Tribunal had made a finding that the process of roasting does not change the essential structure of the peanut. The appellant merely applies salt to roasted peanuts which does not obliterate the essential character of the roasted peanut. A roasted peanut is not a product commonly known as namkeen and cannot be compared with a bhujia. They are products which are prepared or preserved by the processes like roasting. The roasting is not one of the enumerated processes in Chapter 20. The heading 20.01 specifically refers to preparations of vegetables fruit, nuts or plants. The sub-heading 2001.90 refers to the word 'Other'. In these circumstances, the Supreme Court held that roasted peanuts fall under Chapter 20 and not under Chapter 21.

   As regards the moongfali masala mazedar, the Supreme Court held that the preparation of moongfali masala mazedar is very similar to bhujia. Moongfali masala mazedar is the mixture of material other than the nuts. It is an oil preparation and makes use of gram flour (besan). It undergoes the process of deep-frying. When such a process is applied one cannot apply the principle of predominance. The only difference between aloo bhujia and moongfali masala mazedar is that in the former case the namkeen is essentially made of aloo whereas in the later case it is a namkeen essentially made from a pulses (dal) which are known as namkeens in the market. In these circumstances, it can be held that moongfali masala mazedar falls under Chapter 21 and, therefore, the assessee is entitled to exemption.

4. **How should the plastic nameplates as such be classified: parts and accessories of motor vehicles or as other plastic products?**

   Pragati Silicons Pvt. Ltd. v. CCEx. , Delhi (2007) 211 ELT 534 (SC)

   An 'accessory' by its definition is something supplementary or subordinate in nature and need not be essential for the actual functioning of the product. Applying the test laid down in the case of *Mehra Bros. v. Joint* Commercial *Officer (1991) 51 ELT 173 (SC)*, it cannot be denied that the nameplates add for the convenient use of the motor vehicle. Nameplates serve a very useful purpose inasmuch as it gives an identity to the vehicle. Each vehicle comes with different brand name and in different models having distinct features. The manufacturers of different type of models of vehicles market them under a name and the vehicles are recognized and referred to by the nameplate affixed on them. Nameplates convey to the consumers the distinct features it carries. Undoubtedly, they add effectiveness and value to the vehicle and are at the very least accessories of the vehicle. Thus, even if there were any difficulty in the inclusion of the plastic nameplates as ‘parts’ of the motor vehicles, they would most certainly have been covered by the broader term ‘accessory’. Hence, the Supreme Court held that the plastic nameplates are parts and accessories of motor vehicles.

5. **How should the Vim Dish Wash bar as such be classified as soap or as an organic surface-active product?**

CCEx. , Trichy v. Naga Ltd. (2007) 212 ELT 452 (SC)

According to the Department, Vim Dish Wash Bar is in the form soap and therefore, it falls in Chapter subheading 3401.20. According to the assessee, Vim Dish Wash Bar falls under Chapter subheading 3405.40 which refer to scouring pastes and powders and other scouring preparations which attracts duty at the rate of 20%.

The Supreme Court held that heading no. 34.01 broadly refers to soap as one of the products covered by that Heading, the other product that is covered by 34.01 as organic surface-active product and preparation for use as soap. These are two distinct products. The product is neither soap nor an organic surface-active product for use as soap. Vim Dish Wash Bar is a mixture of detergent and abrasive powders. In these circumstances, Rule 3(b) of the Rules of interpretation would also apply and in the present case the chemical examiners indicate that pre-dominantly the above product in question contains abrasive powder to the extent of 62% to 72%. Hence, the product should be classifiable under sub-heading 3405.40 of Central Excise Tariff and not under sub-heading 3401.20.

3

VALUATION OF EXCISABLE GOODS

1. Whether the cash discount and finance cost are admissible deduction as per new Section 4 of the Central Excise Act, 1944?

CCEx. , Ahemdabad-III v. Arvind Mills Ltd. (2006) 204 ELT 570 (Tri. -L.B.)

The difference between the old section 4 and the new section 4 is regarding the deemed price and the actual price payable in respect of each transaction i.e. under the old section 4, the normal price at which the goods are ordinarily sold was to be applied to all transactions irrespective of the actual price charged, while under the new section 4 each price charged for each transaction whether in wholesale or retail is to be considered as the assessable value. However, the other elements like price for delivery at the time and place of removal remains the same. The transaction value for delivery at the time and place of removal is the price actually charged i.e. the lesser price payable for making prompt payment at the time of delivery. The difference in price has to be considered as representing an element of interest on account of delay in payment and unless it is established that such difference in price is so vast that it actually amounts to charging part of the price in the form of interest, the same cannot be rejected, and shall be the price applicable even in respect of those cases where cash discount is not availed of. The interest element cannot be added in the transaction value as long as the rate of interest was exorbitant or beyond the normal level of interest rate charged in such business transaction or that there were stringent conditions put on for availing cash discount which make the availment of cash discount more illusory than real.

The Tribunal further note that the earlier decisions under the old section were not on the ground that the goods were normally sold at a lesser price and therefore the cash discount was admissible even in those cases where it was not availed of as we find that the Tribunal in the case of *Bhartia Cutler Hammer Ltd* v. *CCE (1988) 34 ELT 373 (Tri.)* found that the sales at higher price was to the extent of 65% without availing cash discount but still held that the lesser price after allowing cash discount will be applicable even in those cases where cash discount has not been availed of. The same shall be the case with respect to the cost of finance where such cost is only relatable to the delay in receiving the payment and such goods are actually sold at the price declared as the price actually paid or payable i.e. the declared price at the time of removal. We are therefore in agreement with the views expressed by the Tribunal in the case of *CCE* v. *Pace Marketing Specialities Ltd. (2004) 167 ELT 401(Tri.)* and hold that cost of finance and cash discount whether availed of or not are to be granted as abatement.

2. **Whether the assessable value in respect of goods that are transferred to another plant of the same assessee is required to be determined as per Rule 4 of the Central Excise Valuation Rules, 2000 or as per Rule 8 of the said rules, in a case where the same goods are also sold to independent buyers?**

Ispat Industries Ltd. v. CCEx., Raigad (2007) 209 ELT 185 (Tri.- LB)

The assessees were transferring a part of its production to its units and the balance production was being sold to independent buyers. The Larger Bench held that the provisions of Rule 8 of the Valuation Rules would not apply in a case where some part of the production is cleared to independent buyers. The provisions of Rule 4 are in any case to be preferred over the provisions of Rule 8 not only for the reason that they occur first in the sequential order of the Valuation Rules but also for the reason that in a case where both the rules are applicable, the application of Rule 4 will lead to a determination of a value which will be more consistent and in accordance with the parent statutory provisions of Section 4 of the Central Excise Act, 1944.

3. **Whether proviso (ii) to Section 4(1)(a) of Central Excise Act, 1944 are applicable in case Bihar Molasses Control Act, 1947 had fixed a particular price for molasses?**

New Swadeshi Sugar Mills v. CCEx. , Patna (2007) 212 ELT 294 (SC)

The appellant had sold sugar molasses at the rate of Re. I/- per quintal. According to the Department, the Bihar Government had statutorily fixed the price of the said commodity at Rs. 15/- per quintal and, therefore, the assessable value ought to have been calculated at the rate of Rs. 15/- per quintal. According to the assessee, under the Bihar Molasses (Control) Act, 1947, it was stipulated that no owner, manager or occupier of a factory should sell molasses at a price exceeding those prescribed in Schedule A and Schedule B. Hence, the assessee was free to sell molasses at a price within the range of Rs. 1/- to Rs. 15/- per quintal.

The Supreme Court held that sugar is an essential commodity under the Essential Commodities Act. The Bihar Molasses (Control) Act, 1947 is a regulatory measure enacted in order to regulate the supply, storage and pricing of molasses produced by factories is the State of Bihar. It has merely fixed a range/ceiling within which the factory was entitled to charge the price of the molasses. In the present case, proviso (ii) of the Section 4(1)(a) of the Central Excise Act, is not applicable since under the Bihar Molasses (Control) Act, 1947, there is no fixed control price stipulated. As stated above, under the said Act, a price range is demarcated subject to the ceiling of Rs. 15/- per quintal. In the circumstances, proviso (ii) to Section 4(1)(a) of the Central Excise Act is not applicable to the present case.

4. **Whether in computing the assessable value of the points and crossings manufactured on job work basis, the value of the scrap should be added?**

General Engineering works v. CCEx. , Jaipur (2007) 212 ELT 295 (SC)

The appellant had manufactured points and crossings on behalf of the railways. The points and crossings are manufactured on job work basis. The railways supply the raw material and after manufacturing the points and crossings are handed over to the railways. In the process of manufacturing points and crossings waste/scrap to the extent of 5% arises. The waste/scrap has not returned to the railways but is sold off by the appellants.

The Supreme Court held that in computing the assessable value of points and crossings value of scrap sold has to be taken into account, as the contract indicates that the price (conversion charges) have been worked out on the basis that 5% wastage would be available to appellants which indicates that price has been affected by sale of scrap. The element of raw material is a separate element from the element of conversion charges. The value of the entire raw material used has to be taken into consideration. The profit/conversion charges have to be added to the value of raw material used. The job work charges being separate from the value of raw material, if it is shown that the job work charges/conversion changes get reduced then the value of scrap has got to be included in the value of the conversion charges. The decision in *Hindustan Engineering and Industries Ltd. v. Commissioner (2002) 144 ELT 418 (Tribunal)* will stand overruled.

4

CENVAT CREDIT

1. **In case finished goods were destroyed in fire and remission of duty has been granted, whether the modvat credit involved in the inputs utilized in the manufacture of such finished goods, has to be reversed?**

   Grasim Industries v. CCEx., Indore (2007) 208 ELT 336 (Tri.-LB)

   Rule 21 of Central Excise Rules, 2002 provides for remission of duty in respect of goods lost or destroyed by natural cause or by unavoidable accidents or in case goods become unfit for consumption or for marketing at any time before removal but does not provide reversal of credit in respect of inputs used in the manufacture of such goods. Therefore, the Tribunal approve the view of the Tribunal taken in the case of *Inalsa Ltd. v. Commissioner (1997) 90 ELT 417 (Tribunal)* and overrule the decision of the Tribunal in case of *Mafatlal Industries Ltd. v. Commissioner (2003) 154 ELT 543 (Tribunal)* and held that the assessee has to reverse the credit taken on inputs used in such goods on which remission was granted.

2. **Whether the assesses was entitled to Modvat credit under erstwhile Rule 57A of Central Excise Rule, 1944 (now rule 2(k) of the Cenvat credit Rules, 2004) on Low Sulphur Heavy Stock (LSHS) and furnace oil used for generating electricity captively consumed for the manufacture of final products such as cement, soda etc.?**

   CCEx. v. Solaris Chemtech Limited (2007) 214 ELT 481 (SC)

   The assessee used Low Sulphur Heavy Stock (LSHS) as fuel for generating electricity which in turn captively consumed for the production of caustic soda and cement. The assessee contended that LSHS falls within the Explanation clause (c) of erstwhile Rule 57A of Central Excise Rule, 1944 (now rule 2(k) of the Cenvat credit Rules, 2004). The Department's contention was that these inputs are utilized for manufacturing electricity, which is not excisable and hence cannot be considered as input used as fuel.

   Erstwhile rule 57A had an Explanation clause (c) which stated as to what inputs are included in MODVAT credit. As per this clause inputs used as fuel for generation of electricity captively consumed will qualify for Modvat credit only if they are used 'in or in relation to manufacture of final product'. In the present case, the fuel would either utilized directly or for generating electricity, as an intermediary product, is integrally collected with several operations which results in the emergence of the final product, namely, cement/caustic soda. Without continuous supply of such electricity generated in the plant it is not possible to manufacture cement, caustic soda etc. Therefore, LSHS would come within the ambit of the expression "used in or in relation to the manufacture of the final product". In the present case, the LSHS is used to generate electricity which is captively consumed. Hence, keeping in mind the expression used in relation to the manufacture in erstwhile Rule 57A (now rule 2(k) of the Cenvat credit Rules, 2004) the assessee was entitled to MODVAT credit on LSHS.

3. Whether interest is recoverable from the assessee party on wrongly credited Modvat credit?

CCEx. , DELHI -III v. Maruti Udyog Ltd. (2007) 214 ELT 173 (Punj. & Har,)

The assessee had wrongly claimed Modvat credit which was not allowable and credited the amount in RG-23A Part-II. The Tribunal held that the assessee was not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not utilised. In the absence of utilisation of credit, the assessee was not liable to pay interest. The High Court upheld the Tribunal’s decision.

5

DEMAND, ADJUDICATION AND OFFENCES

1. Whether the show cause notice under Section 11A of Central Excise Act, 1944 can be issued before finalisation of provisional assessment?

CCEx. & Cus. , Mumbai v. I.T.C. Ltd. (2006) 203 ELT 532 (SC)

M/s. ITC Ltd. had manufactures cigarettes and gets the work done by way of job work through various factories. The Department had issued a provisional price list and issued a show cause notice. The assessee contented that the show cause notices issued prior to finalisation of the provisional assessment was invalid.

Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. The power under Section 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months (now one year) from the relevant date which in terms of sub-section (3)(ii)(b) of Section 11A of the Act provides that where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

Whereas provisional duty is levied in terms of Sub-Rule (1) of erstwhile rule 9B of Central Excise Rules, 1944 (now rule 7 of Central Excise rules, 2002) final assessment is contemplated under Sub-Rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event, the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the case may be. Ultimately, thus, the liability of the assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

Therefore, the Supreme Court held that on a plain reading of the provisions of the Act and the Rules framed there under, the impugned show cause notices were illegal.

2. **Whether CESTAT was correct in reducing the penalty amount which was earlier imposed as an equivalent amount of duty under Section 11AC of the Central Excise Act, 1944?**

CCEx. , Delhi-IV, Faridabad v. ILLPEA Paramount Pvt. Ltd. (2006) 204 ELT 22 (P& H)

The assessee was engaged in the manufacture of Pulsator. They received item Bush from M/s. Electrolux Voltas Limited. While determining assessable value of the product Pulsator, they did not include value of Bush. On this account, demand of duty with equal amount of penalty under Section 11AC of the Central Excise Act, 1944 was levied which was confirmed by the adjudicating authority for inclusion of value of Bush into the value of pulsator for determining the assessable value. The Commissioner (Appeals) affirmed the finding of the adjudicating authority. However, the demand of duty was set-aside on the ground of limitation. The Tribunal set aside the finding of the Commissioner (Appeals) and held that the demand was within limitation and reduced the amount of penalty.

The Apex Court held that the language of the statute is clear. If the situation demands imposition of penalty, the same has to be equal to the amount of duty. The element of mens rea is statutorily insisted upon. Once mens rea is established, the quantum is not left to the discretion of the authority. Though, such inflexible rule may not be valid in every situation but condition precedent for levy of penalty is statutorily laid down and in the said situations, making a provision for minimum penalty cannot be held to be arbitrary in any manner.

3. **Whether the Tribunal was right in reducing the amount of penalty, as the respondent had paid the amount of duty before the issue of show cause notice?**

CCEx. v. Malbro Appliances P. Ltd. (2007) 208 ELT 503 (Del.)

The respondent was engaged in the manufacture of LPG gas stoves under the brand name ‘Surya Flame’ and availing the benefit of the notification granting exemption to small-scale units. The assessee was not entitled to the benefit as the said brand name belonged to some other industries. A show cause notice was issued to the respondent and duty and penalty of an equal amount of duty was imposed. The respondent had paid the duty amount before the show cause notice was issued.

The High Court held that as per the first proviso of Section 11AC of the Central Excise Act, 1944 where the duty demanded is paid within 30 days of the date of communication of the order determining such duty, the amount of penalty that may be imposed upon the notice could be 25% of the duty so determined. In the present case, the respondent had paid the duty before the assessment order was made and in fact even before the show cause notice was issued. Under such circumstances, there was no reason to levy a penalty of 100%. Therefore, the penalty of Rs. 40,000 that has been imposed by the Tribunal works out close to 25% of duty determined and there is no error in the view taken by the Tribunal and no substantial question of law arises.

6

REFUND

1. **Whether the 8% of the price of non-dutiable items recovered from the buyer is liable to be deposited with the Central Government in view of the provisions of Section 11D of the Central Excise Act even though the amount already paid to the Government as per erstwhile rule 57CC?**

   Unison Metals Ltd. v. CCEx. , Ahmedabad (2006) 204 ELT 323 (Tri. -LB)

   The assessee was engaged in the manufacture of both dutiable and non-dutiable items. The non-dutiable final products are not entitled to Modvat credit in respect of duty paid on inputs. However, the assessees producing both dutiable and non-dutiable final products can avail Modvat credit on all inputs, (including the inputs going into the production of non-dutiable goods) subject to the condition that they shall "pay an amount equal to 8% of the price" of the goods which are not dutiable (Rule 57CC). In the present case, the assessees made payment at 8% while selling the non-dutiable goods. The assessees recovered that 8% from their buyers.

   The Tribunal held that the section 11D containing the provisions for "every person who is liable to pay duty...and has collected any amount from the buyer of any goods in any manner representing as duty of excise, shall forthwith pay the amount so collected to the credit to the Central Government" has application only when equivalent duty had not been deposited at the time of removal of the goods. In the present case, since the 8% amount already paid to the revenue, and the assessee retains no amount, section 11D has no application.

   Note: As per Rule 6 of the Cenvat Credit Rules, 2004, the manufacturer shall pay an amount equal to 10% of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

2. **Whether the assessee will be entitled to refund of duty paid by it at the time of disposal of the goods, merely for the reason that the rate at which goods were supplied was reduced later even though at the time of clearance of goods, procedure envisaged under Rule 9B of the Central Excise Rules, 1944 was not followed?**

   CCEx. , Delhi-IV v. CESTAT (2007) 207 ELT 33 (Punj. & Har.)

   The Apex court held relied in view of the judgment in the case of *M/s. Mauria Udyog Ltd.*

v. *Commissioner of Central Excise and another* (2007) 207 E.L.T. 31 (P & H)], therein it was held that the subsequent reduction in price could not be a ground for claiming refund, particularly, where the duty had neither been paid on provisional basis nor the goods had been cleared on provisional basis, as in the present case also, the claim of the assessee could not be upheld. Accordingly, the Apex Court answer the question of law in favour of the revenue and set aside the impugned order.

3. Whether 8% of the amount as per the erstwhile Rule 57CC of Central Excise Rules, 1944 (now Rule 6 of Cenvat Credit Rules, 2004) is required to be discharged, before removal of by products/subsidiary products when such products are exempted from whole of duty?

Rallies India Ltd. v. CCEx. , Salem (2007) 208 ELT 25 (Tri.-LB)

The appellant had used common inputs in the manufacture of dutiable and exempted products. The appellant main contention is that the erstwhile rule 57CC (now Rule 6 of Cenvat Credit Rules, 2004) is applicable only when a particular input is used in the manufacture of final products which are chargeable to duty as well as exempted goods. In appellant case the entire quantity of HCL is used in the manufacture of gelatin and emergence of mother liquor is incidental. The mother liquor is in the nature of a by-product and hence cannot be considered to be a final product manufactured by the appellant.

The Tribunal held that it is clear from the reading of the erstwhile Rule 57CC (now Rule 6 of Cenvat Credit Rules, 2004) that it applies to the final product, dutiable or exempted and makes no distinction between an intended final product and unintended emergence of by-product. The said rule in simple terms, requires the assessee to pay an amount equal to 8% of the value of the goods cleared at nil rate of duty, even where the inputs have been used directly or indirectly in the manufacture of such final product. The HCL has been used in the manufacture of final product phosphoryl 'A' & 'B', which attract nil rate of duty, the provisions of erstwhile Rule 57CC would apply.

Note: As per Rule 6 of the Cenvat Credit Rules, 2004, the manufacturer shall pay an amount equal to 10% of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

4. Whether bar of unjust enrichment apply to claim refund in case where initial payments of duty were made under protest?

CCEx. , Jaipur v. Birla Corporation Ltd. (2007) 208 ELT 481 (SC)

The assessee was engaged in the manufacture of cement, which is classifiable under Chapter 25 of the Schedule to the Central Excise Tariff Act, 1985. It claimed the benefit of rebate of Central Excise duty under Notification No. 36/87-C.E., dated 1-3-1987 which was denied by the Department. Thereafter, he paid duty at the applicable rates under protest. Initially, he was held to be entitled to the benefit of the notification in terms of the order passed by the Collector (Appeals), Central Excise. He requested the jurisdictional Assistant Collector to grant refund in compliance of the order passed by the Collector (Appeals). The Assistant Collector, *inter alia*, held that the assessee had failed to prove that the duty incidence had not been passed on to the customers. Hence, the principle of unjust enrichment would apply to the present case.

The Supreme Court held in his judgment in the case of *Allied Photographics India Ltd. (2004) 166 ELT 3 (SC),* section 11B dealt with claim for refund whereas erstwhile Rule 9B (now Rule 7) dealt with making of refund, where the assessee was not required to comply with section 11B. Section 11B and erstwhile Rule 9B (now Rule 7) operated in different spheres and, consequently, in cases where duty was paid under erstwhile Rule 9B (now Rule 7) and refund arose on adjustment under erstwhile Rule 9B(5) [now under Rule 7(3)], then such refund would not be governed by section 11B. However, if an independent refund claim was made after adjustment on final assessment under erstwhile Rule 9B(5) [now Rule 7(3)], agitating the same issue, then such claim would attract section 11B. Therefore, the contention that there was no difference between duty paid under protest and duty paid under provisional assessment was erroneous. Refund of duty paid under protest after final assessment attracted bar of unjust enrichment whereas bar of unjust enrichment was not applicable to refund consequent upon finalisation of provisional assessment.

Note: The Notification No. 36/87-C.E., dated 1-3-1987 expired on 31.03.1990.

7

APPEALS

1. **Whether the Tribunal and High Court were right in rejecting the plea for dispensation of pre-deposit and stay of demand?**

   Benara Valves Ltd. v. CCEx. (2006) 204 ELT 513 (SC)

   The appellant were removing excisable goods secretly without payment of duty and without raising Central Excise invoices/ bills to their front trading firms which they called "houses" and consequently to the ultimate customer. The searches were conducted at the premises of manufacturing units and incriminating documents were allegedly recovered from various premises. The Commissioner of Central Excise, issue notice and raise demand and penalty of equal amount was imposed under Section 11AC of the Act. The appellant preferred an appeal before the Tribunal challenging the determination and pray for stay of demands raised till the disposal of the appeal. The Tribunal directed the applicant to pre-deposit the amounts under section 35F of the Act.

   The Supreme Court held that there can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. There are two significant expressions used in the provisions of Section 35F that are undue hardship to such person and to safeguard the interests of revenue. Therefore, while dealing with the application twin requirements of considerations have to be kept in view. The Tribunal has rightly observed that the rival stands have to be examined in detail with reference to material on record. Considering the nature and disputes in the matter, the appellant was directed to pay part amount as pre-deposit within time stipulated by Tribunal.

2. **Whether the Commissioner can direct Deputy Commissioner to file an appeal against the adjudication order passed by the Joint Commissioner under Section 35E(2) as adjudicating authority?**

   CCEx. , v. Maza Cosmetics (2007) 207 ELT 200 (Del.)

   The Commissioner gave a direction to the Deputy Commissioner to file an appeal against the adjudication order passed by the Joint Commissioner. Afterwards, he came to the conclusion that the Commissioner only can directed the Joint Commissioner as the adjudicating authority to file an appeal under section 35E(2) of the Act and could not have issued such a direction to the Deputy Commissioner.

The Apex Court opined that the provisions of Section 35E(2) and Section 35E(4) of the Act cater to two different stages in the process. In terms of Section 35E(2) of the Act, the Commissioner can only give a direction to the adjudicating authority to file an appeal. After such a direction is given, then the provisions of Section 35E(4) of the Act will apply and the appeal may then be filed by the adjudicating authority or by any other authorised officer. In the present case, the Commissioner did not issue any direction to the adjudicating authority under Section 35E(2) of the Act, he directly authorised the Deputy Commissioner to file an appeal before the Commissioner (Appeals) and thereby completely by-passed the adjudicating authority. Therefore, the action of the Commissioner in bypassing Section 35E(2) of the Act and straightway resorting to action under Section 35E(4) was not permissible.

3. **Whether the encashment of bank guarantee by the department (given for provisional assessment), before filing of stay application will render the remedy under section 35F ineffective?**

Castrol India Ltd. v. UOI (2007) 208 ELT 490 (Bom.)

The petitioner had furnished a bank guarantee through HDFC Bank during the course of provisional assessment of their excise duty. The provisional assessment has been finalised and order-in-original has been passed. The revenue had lodged their claim with the bank for encashing the bank guarantee. The petitioner has a remedy of filing an appeal under section 35 of the Central Excise Act, 1944 which it can file within 60 days and can also apply for stay of the impugned order in original. Section 35F provides that a party against whom such duty is levied can apply for an order not to insist on this deposit on the ground of undue hardship. The petitioner submits that this remedy will become infructuous if the bank guarantee is allowed to be encashed. The Excise Manual published by the Central Board of Excise & Customs provides that if the assessee against the order in original files a stay application, no coercive action shall be taken to realise the dues till the disposal of the stay application.

Therefore, the High court allow this petition and quash and set aside the communication for the simple reason that any such high handed action on the part of the concerned Officer will render the remedy available under the statute infructuous. The Officer must note that they must be vigilant in collecting dues but they should not take steps that will nullify the remedy which are otherwise available under the statute.

4. **Whether the provisions of Section 37C of the Central Excise Act, 1944 requiring service of decisions passed under Act, would also apply to decisions handed down by CESTAT?**

Neha Cosmetics v. CCEx. (2007) 208 ELT 494 (Del.)

Section 37C does not exclude the orders passed by the CESTAT in appeal. The word ‘service of decisions’ occurring in the title of the section and the word ‘decisions’ occurring throughout under section 35C is intended to govern the decisions handed down by the CESTAT as well. It is true that Rule 35D deals with the procedure to be followed by CESTAT, and the Rules of procedure have also been framed separately. However, Rule 35 are only supplementary to the statutory provisions. The Rules cannot supplant the statutory requirement under Section 37C that requires that the decisions passed under the Act, shall be served on the parties in the manner indicated in that provision. Under Section 37C(2) of the Act, which is similar to Section 27 of the General Clauses Act, 1897 service of the decision is deemed on the date on which the decision is tendered or delivered by post. Therefore, the High Court held that the provisions of Section 37C of the Act requiring the service of the decisions passed under the Act, would also apply to the decisions handed down by the CESTAT. This interpretation harmonises Rule 35 of the CEGAT (Procedure) Rules, 1982 with Section 37C. While Section 37C deals with the aspect of service of the decision/order, Rule 35 deals with its despatch. Both Section 37C and Rule 35 will, therefore, have to be complied with.

8

REMISSION OF DUTY AND DESTRUCTION OF GOODS

1. Whether the terminology 'lost' or 'destroyed', used in Section 23 of Customs Act, 1962 would encompass the act of 'theft'?

Himalaya Granites Ltd. v. Asst.CCEx., Chennai (2007) 211 ELT 542 (Mad.)

A theft had occurred in the bonded warehouse of the petitioner. The terminology used in the provision 'lost' or 'destroyed' is not applicable to the facts of the present case, as it is stated that there was a theft, occurred in the bonded warehouse of the petitioner. The petitioner had not been able to show that the incident of theft would come within the purview of the terminology 'lost' or 'destroyed'.

9

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. Whether grant of registration certificate with retrospective effect under Trade Marks Act, 1999 would automatically provide benefit of exemption to SSI unit?

Meghraj Biscuits Industries Ltd. v. CCEx. , U.P. (2007) 210 ELT 161 (SC)

The appellant were selling biscuits under the brand name "Meghraj". A show cause notice was issued alleging that the appellant had sold the biscuits under the brand name "Meghraj", which was a registered trade mark of Kay Aar Biscuits (P) Ltd. who was using the said trade mark on manufacture of biscuits themselves, and, therefore, the appellant were not eligible to the benefit of SSI Notification. After the impugned decision of the Tribunal, the appellant moved an application for rectification. In the rectification application it was further stated that the appellant had applied for ownership of the brand name "Meghraj" the said application for registration was pending before the competent authority. Later on the registrar of trademarks had issued registration certificate with retrospective effect.

The Supreme Court had reiterate that the object of the exemption notification was neither to protect the owners of the trademark nor the consumers from being misled. The object of the exemption notification was to grant benefits to those industries that do not have the advantage of a brand name. The effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of such mark. This deeming fiction cannot be extended to the Excise Law. It is confined to the provisions of the Trade Marks Act. In a given case there is evidence with the Department that the trade mark being owned by M/s. Kay Aar Biscuits (P) Ltd. and there is evidence that the appellant being trading on the reputation of M/s. Kay Aar Biscuits (P) Ltd. which is not rebutted by the appellant. Hence, issuance of registration certificate with retrospective effect cannot confer the benefit of exemption notification to the appellant.

1
LEVY AND EXEMPTIONS FROM DUTY

1. Whether the assessee was entitled to claim exemption under para 3 of the notification in case earlier the said benefit withdrawn under para 2 of the notification?

Share Medical Care v. Union of India (2007) 209 ELT 321 (SC)

Share Medical Care is a Society registered under the Andhra Pradesh Public Societies Act. The society imported certain medical equipments for the use in its charitable hospital. The society had applied for the benefit of exemption notification under para 2 of the table. The benefit of exemption was granted. The said exemption benefits were withdrawn for non-fulfillment of free treatment obligations and the appellant represented its case as an after thought to category under para 3 of the table of exemption notification. The Deputy Director General (Medical), DGHS rejected the application of the appellant.

The Supreme Court held that in the instant case, earlier exemption was sought under category 2 of exemption notification, not under category 3 of exemption notification and exemption under category 2 was withdrawn. The well settled law is that in case the applicant is entitled to benefit under two different notifications or under two different heads, he can claim more benefit and it is the duty of the authorities to grant such benefits if the applicant is otherwise entitled to such benefit. Therefore, non-consideration on the part of the Deputy Director General (Medical), DGHS to the prayer of the appellant in claiming exemption under category 3 of the notification is illegal and improper. The prayer ought to have been considered and decided on merits. Grant of exemption under category 2 of the notification or withdrawal of the said benefit cannot come in the way of the applicant in claiming exemption under category 3 if the conditions laid down there under have been fulfilled.

2

VALUATION UNDER THE CUSTOMS ACT, 1962

1. **Can technical know-how charges paid by the related companies included in the value of materials?**

   CCus. , Mumbai v. Clariant (India) Limited (2007) 210 ELT 481 (SC)

   The respondent is a manufacturer of leather chemical products. It entered into three agreements with M/s. Sandoz Quinn. One of the agreements is Technical Collaboration Agreement, according to which the respondent import raw materials for manufacture of leather chemical products along with transfer of Technical Know-how and technical assistance for upgardation of importer's manufacturing plant in India. The Adjudicating Authority held that there was no mutuality of interest between the respondent company and M/s. Sandoz Quinn, and that the technical know-how charges paid were not includible in the assessable value of the raw material. The respondent contended that the import was on principle-to-principle basis and that the price was the sole consideration. The import of raw material had no nexus with the collaboration agreement and that the import of raw material was not a condition of the collaboration agreement.

   The Supreme Court held that the third agreement provides for import of raw material for manufacture of leather chemical products. Therefore, the question as to whether the said payment was the condition for import of quality raw material needs to be examined, particularly in the light of the relationship between the parties. Merely because the two parties are related to each other will not amount to under valuation *per se*. It will depend on the facts and circumstances of each individual case.

2. **Whether the amount of royalty paid for exploitation of films should be included in the assessable value for the purpose of valuation of imported goods?**

   Indo Overseas Films v. Union of India (2007) 210 ELT 348 (Mad.)

   Rule 9(1)(c) of the Valuation Rules, 1988 provides that in determining the transaction value, there shall be addition to the price actually paid or payable for the imported goods, royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the transaction value. It further provides that payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods.

In the present case, the petitioner had to pay not only the cost of movie materials, but also the royalty and the rights specified in the distribution agreement as a condition of sale. Without the right of exploitation, the print or trailer could not be of any use to the petitioner to enjoy theatrical or video right. Hence, in the light of the statutory provisions and peculiar facts and circumstances of the present case, royalty paid is includible in the assessable value of imported film.

3. Whether depreciation should be allowed on the car for the purpose of valuation for the post import period?

M.S. Shoes East Ltd. v. CCus. , New Delhi (2007) 210 ELT 641 (SC)

The appellant had imported 1993 model Rolls Royce car in 1996. The appellant on 31-8-1996 filed the Bill of Entry of the car at the customs barrier. He got the clearance of the car after nine years in 2005. Section 14 of the Customs Act, 1962 provides that the valuation of the car must be based on the price at the time of the import of the goods. Section 15 of the Act makes it clear that the rate of duty and tariff valuation has to be determined on the date on which the Bill of Entry in respect of such goods is presented under Section 46 of the Act.

The Supreme Court held that the post import depreciation cannot be taken into account, despite the fact that while the Bill of Entry of the car was presented in 1996, and the clearance was given on 28-3-2005. The submission of the appellant that there was delay of nine years in releasing the car from the date of import has no relevance at all as the value has to be determined under Section 14 of the Customs Act for delivery at the time and place of importation, which is 31-8-1996. Therefore, the transaction value had to be declared by the appellant as on 31-8-1996.

4. Whether under valuation can be claimed by casting suspicion on invoice produced by the importer?

CCus. v. South India Television (P) Ltd. 2007 (214) ELT 3 (SC)

In this case, the Department had contended that the importer had lowered the invoice price and thus under-valued the imported goods. Such charge was framed on the basis of the price quoted in a declaration by the supplier in the exporting country.

The Apex Court explained that the charge of under-invoicing should be supported by evidence of prices of contemporaneous imports of like goods. Under section 2(41) of the Customs Act, the word “value” is defined in relation to any goods to mean the value determined in accordance with the provisions of section 14(1). Section 14 talks of deemed value, i.e. the price at which such goods are ordinarily sold or offered for sale, for delivery at the time and place of importation in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or for offer for sale.

Therefore, the Supreme Court stated that the Department should consider the value or cost of the imported goods at the time importation, i.e., at the time when the goods reach the customs barrier. Thus, the invoice price was not sacrosanct though it formed the basis of the transaction value. However, the Supreme Court opined that casting suspicion on invoice produced by the importer was not sufficient to reject it as evidence of value of imported goods. Under-valuation had to be proved. If the charge of under-valuation could not be supported either by evidence or information about comparable imports, the benefit of doubt must go to the importer.

The Apex Court stated that if the Department relied on any declaration for proving under-valuation, it had to show that how such declaration was procured. In this case, the exporters were being offered incentives by their Government in proportion to the quantum of exports made by them. Therefore, over-invoicing of export value by the foreign supplier in order to obtain incentives from his Government could not be ruled out. Further, there was no other evidence with the Department which showed contemporaneous imports at higher price. Thus, the Supreme Court held that invoice value could not be rejected as incorrect.

Note: *Sub-section (1) of section 14 of the Customs Act, 1962 provides that valuation of goods shall be based on the concept of 'deemed value'. However, the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 provide that the value of the imported goods shall be based on the concept of transaction value. The Finance Act, 2007 has substituted a new section 14 for existing section 14 with an aim to rectify this anomaly. Thus, the concept of deemed value contained in section 14 has been substituted with the concept of transaction value.*

5. Whether technical and installation charges which are part of post clearance agreement should be includable in the assessable value?

CCus. v. Galaxy Entertainment (I) P. Ltd. 2007 (214) ELT 14 (SC)

The assessee had imported certain equipment from a foreign supplier after a hectic bargain for US $ 15000. The equipment required specialized knowledge for its installation. Such expertise was available with the subsidiary of the said foreign supplier which signed Technical and Installation Charges Agreement with the importer. The agreement provided that the importer would pay Rs.59 lakh as technical and installation fee to the said subsidiary of the foreign supplier over a period of three years.

The Department contended that the whole practice was undertaken to bifurcate the cost of the equipment in order to pay less duty. Department relied on nine imports of similar equipments during the relevant period. However, none of the transactions relied by the

Department were of the same technical specification as that of the one imported by the assessee.

The Apex Court did not accept the Department's plea that technical and installation charges were a disguise to cover the true cost of equipment as there was no evidence of any flowback or extra-consideration deflating the price. The Supreme Court held that the Technical and Installation Charges Agreement was a post clearance revenue generation agreement which had no nexus with the sale proceeds of the equipment. Thus, the Court held that in this case, rule 4(1) of the Customs Valuation Rules would apply and not rule 5(1)(c) of the said rules.

6. Whether the royalty payment connected with the imported components of colour TV was includible in the assessable value of such components?

Matsushita Television & Audio (I) Ltd. v. CC (2007) 211 ELT 200 (SC)

Under Rule 9(1)(c) of the Valuation Rules, 1988, only such royalty which is related to the imported goods and which is a condition of sale of such goods could be added to the declared price. However, in the present case, payment of continuing royalty was payable at the rate of 3% of the net ex-factory sale price of the colour T.V. exclusive of taxes, freight and insurance but including the cost of imported components. In other words, the royalty payment was to be computed not only on the domestic element of the net sale price of the colour T.V. but also on the cost of imported components. A bare reading of the agreement shows that payment under the said agreement related not only to the production of the goods in India but also to imports. In the present case, the cost of imported components was expressly included in the net ex-factory sale price of the colour T.V. Further, when payment to party was at the rate of 3% of the sales turnover of the final product, including cost of imported component, it became a condition of sale of the finished goods. In this case both the conditions of Rule 9(1)(c) of the Valuation Rules, 1988, are satisfied. Hence, such royalty payment includible in the assessable value under Rule 9(1)(c) of Customs Valuation Rules, 1988.

3

WAREHOUSING

1. Whether the interest under section 61 has to be computed from date of actual physical warehousing or from date on which order for permission given under Section 60 of Customs Act, 1962?

Jindal Vijayanagar Steel Ltd. v. CCus., Mangalore (2007) 207 ELT 65 (Tri-Bang.)

The appellant had imported certain goods and filed Warehousing Bills of Entry. The Assistant Commissioner of Customs (Bonds) ordered warehousing of the goods under Section 60 of the Customs Act. The appellant completed all the formalities and had paid interest under Section 61 at a flat rate of 24% instead of the slab rate as per law. Hence, they were entitled for refund of the excess interest paid. They applied to the competent authority for grant of refund. The competent authority held the view that the amount had been correctly paid. The appellant approached the Commissioner (Appeals), relying on the Board's instructions, held that interest under Section 61 is payable only at slab rates. Further, he held that interest starts from the date on which the goods were entered at the Gateway Port for warehousing. The appellant are highly aggrieved over the impugned order of the Commissioner (Appeals). Hence, they have come before the Tribunal for relief.

In the similar case before the Calcutta High Court in case of *Sanjoy Chandrani v. Union of India (1996) 85 ELT 25 (Cal.)*, held that the question of charging interest on imported goods under Section 61(2) comes into play only when the goods were actually and/or physically deposited in a warehouse. In that case, it was held that the petitioner was not liable to pay any interest during the period when the goods were actually lying in the dock and not kept/deposited in a warehouse. Hence, following the ratio of the above decision, for calculation of interest, the period commences only on the date of actual physical warehousing and not on the date on which an order for permission is given under Section 60 of the Customs Act.

4

DEMAND AND APPEALS

1. **Whether the expression 'relevant date' and 'date of adjustment of duty after the final assessment' in Section 28(3)(b) of the Customs Act means the date on which the refund cheque is issued or the date on which the duty paid provisionally is actually credited into the Government treasury?**

   Gujarat Alkalies & Chemicals Ltd. v. CCus. (2006) 204 ELT 237 (Bom.)

   Section 18 of the Customs Act provides that in certain cases the proper officer may permit clearance of the goods on payment of duty as provisionally assessed and it further provides that for the complete mechanism to be followed on finalisation of the provisional assessment. As per Section 18(2)(a) of the Customs Act, the duty assessed finally is adjusted from the duty paid provisionally, the excess or shortfall is determined and only on such adjustment the obligation to make good the deficiency or entitlement for refund arises.

   As per the law laid down by the Apex Court, *CIT, v. Messrs Ogale Glass Works Ltd., Ogale Wadi A.I.R. 1954 S.C. 429,* once the cheque is encashed it relates back to the date on which the cheque was issued. Accordingly, in the facts of the present case even if the date on which the refund cheque was issued were held to be the relevant date of adjustment of duty, the show cause notice would be time-barred as the same was issued beyond six months. Hence, it was held that the 'relevant date of adjustment of duty' is the date on which the refund order was issued to the assessee.

5

PROVISIONS RELATING TO ILLEGAL IMPORT, CONFISCATION, PENALTY & ALLIED PROVISIONS

1. Whether the agent of the exporter can be held responsible for misdeclaration when goods are liable to be confiscated, which are not packed by the agent?

Inderjit Singh and Others v. UOI (2007) 212 ELT 189 (Del.)

The petitioner had export a consignment of ladies boots packed in cartons. On examination of the consignment by the respondents it was discovered that there was a substantial shortfall in the total number of boots sought to be exported and in the remaining cartons biri, gutka and zarda had been packed, which had not mention in the declaration. The petitioner contended that, as the Freight Movers, who have been duly licensed by the Customs Department, were duty-bound to make a proper declaration. Therefore, the petitioner could not be held culpable or responsible. The Apex court held that the freight movers acted, as agent of the petitioner and packaging was not done by them. Therefore, it is the petitioner who must remain responsible for the mis declaration. Further, the presence of biris, gutka and zarda should have been clearly spelt-out and this should not have been vaguely stated to be in the nature of samples. Hence, section 113 is attracted.

2. Whether in Section 112 of Customs Act 1962 by which the penalty is levied, the burden of proof that the importer had acted *bona fide* is on the importer?

CCEx. v. Bansal Industries (2007) 207 ELT 346 (Mad.)

The assessee imported Tin Free sheets Waste and the goods were originally assessed based on the declaration made by the assessee. The consignments were intercepted, detained and re-examined in the presence of independent witnesses. The samples were tested and it was found that the consignments could not be classified as Tin Free steel sheets, but they could be classified as Prime sheets. Since there was mis-declaration and under-valuation of goods, summons was issued to the assessee. The assessee stated that there was mistake in the despatch of goods at the port of loading and that the overseas supplier committed the offence and agreeing to pay the differential duty. The Tribunal, accepting the stand taken by the assessee that it was the supplier who by mistake loaded tin sheets waste, not ordered by the assessee and finding that the revenue has not shown that the assessee wilfully suppressed the facts and misdeclared the goods with intention to evade duty and set aside the order of the original authority.

The High Court had accepted the Tribunal's finding that it was the supplier who by mistake loaded tin sheets waste, which were not ordered by the assessee. The Tribunal decisions were on the basis that the revenue has not shown that the assessee had wilfully suppressed the facts and had misdeclared the goods with intention to evade duty. The Apex court in *Chairman, SEBI v. Shriram Mutual Fund (2006) 5 SCC 561* held that mens rea is not an essential ingredient for contravention of the provisions of civil Act. The order of the Tribunal mainly proceeded on the footing of intention of the assessee to evade duty, which, in our view, is not correct in the matter of breach of a civil obligation attracting levy of penalty. Therefore, the order of the Tribunal is liable to be set aside.

3. Whether the applicant bank is a "person aggrieved" under Section 129A of the Customs Act?

Lakshmi Vilas Bank Ltd. v. CCus. , Chennai (2007) 213 ELT 166 (Mad.)

The appellant bank happened to be the financier to the Corporation, whose proprietor himself has denied his right on the imported goods that were confiscated. The appellant bank cannot claim to be the person aggrieved against the order of confiscation passed by the Commissioner of Customs for filing an appeal under Section 129A of the Act, because they do not have any legal grievance against the confiscation proceedings even though they may have a lawful claim against the importer-Corporation. Even the extract from the Hand Book of Import-Export Procedures would only protect the right of the banker to honour its commitments with the foreign supplier and not in the confiscation proceedings initiated under Section 124 of the Act in the case of misdeclaration of description of goods and undervaluation of the imported goods attracting Section 111 of the Act, based on which the Department is entitled to initiate penal action under Section 112 of the Act for the commission and omission of the importer.

In the instant case, the appellant cannot claim any right against the confiscation claiming that he is legally entitled to import the goods because he is not the importer and therefore, the words "any person aggrieved" employed in Section 129A of the Act should be given a wider meaning in a statute like Customs Act, which provides remedies for protection of the importer alone against the proposed confiscation proceedings with regard to the deprivation of his legal right of importing the goods legally.

6

SETTLEMENT COMMISSION

1. Whether the Settlement Commission was justified in remanding the matter to the adjudicating authority by holding that in case the interest is payable against the contractual liability and once the applicant agreed under an agreement to pay interest, he has no legal right to claim waiver of the interest amount?

Rivaa Exports v. Union of India (2007) 210 ELT 664 (Guj.)

An agreement was entered into between Parag Exports and The President of India, through the Assistant Commissioner, who acted on behalf of His Excellency the President of India. The Assistant Commissioner has given exemption under the agreement on the export obligations discharged by the Parag Exports, and if it fails to discharge the obligations, then M/s. Parag Exports is required to pay duty and interest thereon. The petitioner submitted that only an undertaking has been given and there was no contractual obligation between the parties to pay interest.

The Apex court held that it is an agreement in the form of undertaking agreed between two parties. Therefore, it cannot be treated as mere undertaking. The Assistant Commissioner has agreed to grant exemption on the terms and conditions specified in the notification and licence and failure to comply with the terms and conditions would necessarily cast a liability on M/s. Parag Exports to pay duty as well as interest and merely adopting the terms and conditions of notification by the parties does not mean that this is an agreement. It cannot be said that the agreement entered into between the parties has become statutory agreement. Therefore, while petitioners agreed to pay interest under the agreement in the form of undertaking, it is a contractual liability. When it is a contractual liability, the Settlement Commission has rightly not entertained the application of the petitioner.

1

PRELIMINARY LEGAL PROVISIONS

1. Whether the cash discount given to clients and incentives for target achieved are liable to be included as value of the taxable services?

Euro RSCG Advertising Ltd. v. CCST, Bangalore (2007) 7 STR 277 (Tri.- Bang.)

The appellant provide advertising services to their various clients. In order to provide the above services they get in touch with media for booking of time slot on various satellite channels to their clients. The service tax has been demanded on the amounts received as cash discount and target incentives. The appellant have stated that some of the publications request for their payments before the advertisements are released and have agreed discount on these advance payments. These amounts have been received from the media not from the clients of the service provider there is no liability of service tax on these amounts. Thus cash discount is an income from payment of bills in advance and not from services rendered to clients and does not attract service tax.

The appellant s received incentives from certain publications after they reached certain targets of advertising business given to them. This incentive is called target incentives. It is in no way connected to the service rendered to the clients nor is billed to the clients. The Tribunal has observed that there is no dispute that the cash discount and incentives are not received by the assessee in relation to the service provided by them to their clients. Hence, not liable to service tax.

2

GAMUT AND COVERAGE OF TAXABLE SERVICES

1. Whether the activity of supplying labours to their clients would fall within the category of cargo handling service?

S.N. Uppar & Co. v. CCEx. , Belgaum (2006) 4 STR 368 (Tri.-Bang.)

The Tribunal noticed that the appellants were supplying labours and they were paid commission for supplying the labours and were not carrying the cargo handling service. The issue is covered by the judgment rendered by the CESTAT, Northern Bench, New Delhi in the case of *J & J Enterprises* v. *Commissioner of Central Excise, Raipur (*2006) 3 STR 655 *(Tri. -Del.)* wherein in similar circumstances, the service tax imposed on assessee was set aside. The stay application is allowed unconditionally by granting waiver of pre-deposit in the matter.

2. Whether the services provided for marketing and product support would be in the nature of clearing and forwarding agent services?

Larsen & Tourbo Ltd. v. CCEx. , Mumbai-I (2006) 4 STR 466 (Tri.-Del.)

The appellant had providing marketing and products support in respect of earth moving equipments. The department would submit that the agreement between the parties has aspects, which are in the nature of clearing and forwarding service. The Tribunal observed that on perusal of the agreement and the invoices it is clear that sales and dispatch of the equipment in question are directly from the manufacturing factory to the buyer. The appellant, in no way, takes delivery of the equipment or arranges for its dispatch. The pre-delivery inspection carried out by the appellant is to ensure that the product is without defects and is as per the order. Even if pre-delivery inspection has an aspect of clearing or forwarding, it does not satisfy the essential requirements of that service. The significance attached to risk during transport does not make the appellant a clearing and forwarding agent. Though, the risk cover is in relation to the risk during clearing, forwarding and transport, it is clearly a separate activity from clearing and forwarding. Hence, Tribunal held that the appellant not acts as clearing and forwarding agent.

3. **Whether the supply of foods and beverages to aircrafts for service to passengers on board would fall within the category of caterer?**

Saj Flight Services (P) Ltd. v. Superintendent of Central Excise (2006) 4 STR 432 (Ker.)

Section 65(24) of the Finance Act, 1944 specifically says, 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 accountrements of any purpose or occasion. Outdoor caterer means a caterer engaged in providing 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. The petitioner is admittedly engaged in the supply of foods and beverages to aircrafts for service to the passengers on board. Hence, the High Court held that the transaction would attract service tax.

4. **Whether the technical testing and analysis services and blood sample collection would fall under the category of Technical testing and analysis service or Business auxiliary service?**

Dr. Lal Path Lab Pvt. Ltd. v. CCEx. , Ludhiana (2006) 4 STR 527 (Tri. -Del.)

The appellant run sample collection centers for specialised laboratories. They maintain the collection center, draw/collect samples, process the samples to the extent required and forward the samples to the test laboratories. The collection centers are paid a percentage for the service rendered by them. The appellant contended that services were actually "Technical Testing and Analysis Service" or part of those services and remain excluded from the levy of service tax, as providing testing or analysis of human beings. The Department contended that the services rendered by these collection centers are Business Auxiliary Services that attract service tax.

The Tribunal held that the services rendered by the appellant drawing, processing and forwarding of samples are integral to testing. The agreements make it clear that the appellant are not engaged for promotion or marketing of testing and analysis service. The appellant business is organised for drawal of samples and for processing and forwarding of those samples. It is well settled that once there is a specific entry for an item in the tax code, the same cannot be taken out of that specific entry and taxed under any other entry. The legislature, through definition, has excluded "testing or analysis of human beings or animal" outside the levy of service tax.

5. **Whether the services provided by the assessee appointed as consignment agents for handling rejected/scrap materials are in the nature of clearing and forwarding agent services?**

CCEx., Chandigarh v. Adhunik Steels Ltd. (2006) 4 STR 542 (Tri. – Del.)

As per the provisions of Section 65 of the Finance Act, 1994, the definition of clearing and forwarding agent means any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent.

The Larger Bench of the Tribunal held that whether services provided in either clearing and forwarding or both will fall within the definition of clearing and forwarding agent. Further, Tribunal found as per the contract, the respondents are appointed as consignment agent and the consignment agent is included in the definition of clearing and forwarding agent.

6. **Whether the services of unloading of coal wagon tippling system, stacking/reclaiming of coal to stacker/reclaimer system and feeding of coal to boiler bunkers through conveyor system are covered under the category of Cargo Handling Services?**

S.B. Construction Company v. Union of India (2006) 4 STR 545 (Raj.)

According to the petitioner the services rendered by it cannot be brought under the definition of Cargo Handling Services as it is engaged only in handling of coal from railway wagons to required destination of Thermal Power Station through wagon tippling system or through conveyor system, wherein machines are used with the aid of some manpower and manual loading and unloading and stacking, but in no way by transportation.

The High Court held that the service tax has been levied under the Cargo Handling, on such services which undertakes the activities of packing, unpacking, loading, unloading of goods to be transported by any means of transportation namely truck, rail, ship or aircraft. In the instant case the service provided by the petitioner under the contract is distinct i.e. transporting coal from wagons to Thermal Power Station by conveyor belt and not by any means of transportation. Thus, the service rendered by the petitioner does not fall under the ambit of Cargo Handling Services and as such it is not liable to service tax.

7. **Whether the training given to employees of purchasers and supervision and inspection charges would come within the ambit of Consulting Engineer's services?**

Bharat Fritz Werner Ltd. v. Dy. CCE (ST. Division), Bang.-III (2007) 5 STR 218 (Tri.-Bang.)

The appellant had stated that they are not collecting any fee and they are not providing consulting services but they are only giving training to the employees of the purchasers, which does not come within the ambit of consulting engineer services. The Tribunal held that the revenue has not established that the training given to the employees of the purchasers would come within the category of consulting engineers. Therefore, the decision of the lower authorities is set aside.

In so far as includibility of the supervision and inspection charges are concerned, the Tribunal held in the case of *Yokogawa Blue Star Ltd. v. CCE (2005) 1 STT 107 (Bang.-CESTAT)* that both the elements are not to be included in the category of consulting engineers. Hence, the demands raised on these elements are set aside.

8. Whether introduction of clients for sale of real estate would amounts to real estate agent service and liable to service tax?

Prem Steels Pvt. Ltd. v. CCEx. , Meerut (2007) 5 STR 231 (Tri. -Del.)

The applicant had received an amount of Rs. 30 lakhs on sale of plot. The revenue contended that the applicant is liable to service tax as real estate agent. The applicant admitted that they had received an amount of Rs. 30 lakhs in respect of introduction of two clients for sale of real estate. Real Estate Agent covers a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting of real estate and includes a real estate consultant. In these circumstances, the applicants are directed to deposit whole amount of service tax.

9. Whether payment of royalty towards technical assistance and licence agreement was covered within the category of consulting engineer service?

Amara Raja Batteries Ltd. v. CCEx. , Tirupati (2007) 5 STR 268 (Tri. – Bang.)

The company had paid royalty towards technical assistance and licence agreement that the revenue wants to bring within the category of consulting engineer. The Tribunal relies on the ruling in the case of *Navinon Ltd. v. CCE, Mumbai-VI (2006) 3 STR 397 (Tri.)* holding that such payments cannot be treated as come within the ambit of consulting engineer. Further, the revenue had raised demands for the period from 2002 to 2004. It was held that for the relevant period, such payments were not leviable for service tax as such category was brought under the net of service tax with effect from 10-9-2004.

10. Whether providing the services as the registrar to an issue (RTA) and share transfer agent (STA) would amounts to business auxiliary service?

CCEx. , Indore v. Ankit Consultancy Ltd. (2007) 6 STR 101 (Tri. – Del.)

The Tribunal held that handling dematerialisation of securities under a well structured and codified agreement and SEBI regulations do not amount to customer care/ promotion/ marketing of service incidental or auxiliary support service. Hence, it cannot be covered under the business auxiliary service.

11. Whether tour in relation to visit of temples not performed by tourist vehicle covered within the category of Tour Operator Service?

Usha Breco Ltd. v. CCEx. , Meerut (2007) 6 STR 117 (Tri.- Del.)

The Tribunal relied upon the judgment in the case of *Usha Breco Ltd. v. CCEx., Meerut-I*

(2006) 4 STR 88 (Tri.) held that there was no tour performed in a tourist vehicle as contemplated in the statute so as to attract the levy, a duty demand made under the impugned order is not sustainable.

12. Whether appellant handling cargo of export goods are liable to pay service tax as Cargo Handling Services?

CCEx. , Mangalore v. Kanara Export Agencies (2007) 6 STR 142 (Tri. - Bang.)

The Tribunal held that the appellant are not handling the cargo of the import. They were handling the cargo of the export goods. The definition of Cargo Handling Services excludes the handling of export goods. Therefore, it cannot be brought under the category of cargo handling services.

13. Whether a non-commercial organisation providing training to the officers of Government of India were covered under the category of commercial coaching services?

Administrative Staff College of India v. CCEx., Hyderabad (2007) 6 STR 319 (Tri. – Bang.)

The appellant is a society registered under the Society Act. They are providing training to the officers of Government of India as well as the State Government before entering into Central/State Government services. It is a non-profit organisation which receives fee from the candidates of non-governmental organisations. The appellant contended that they are not commercial organisation and hence they do not come under the heading commercial coaching services.

The Tribunal held that the Government of India has recognized their activity as non-commercial one. The appellant are rendering training to the candidates who are selected by the Central Government and the State Government. Although the appellants have provided certain training to some private candidates also, it cannot be said that they are a profit-oriented organisation. They have also produced Balance Sheet to show that they do not have funds to pre-deposit the amount. Therefore, the stay application is allowed by granting waiver of pre-deposit of the amount.

14. Whether the Government office which has hired a single taxi for their officer can be considered as a tour operator?

CCEx. , Mangalore v. Sunil S. Kotian (2007) 6 STR 379 (Tri. - Bang.)

The respondent was engaged in the business of hiring out his vehicle registered as a taxi. He was not conducting tour operation. Therefore, the Commissioner (Appeals) noted that the services provided by the respondent do not fall within the ambit of tour operator and it can be brought under the category of rent-a-cab service. It has been noticed that M/s. BSNL has taken the taxi for use of their employees. The Government of India has issued a circular directing the Government offices to engage taxi. Now in most of the Government offices, they are required to engage taxi for their officers. The Commissioner has noticed that the vehicle was not used for pre-determined tours and it was restricted for the use for a day by M/s. BSNL. He has also referred to the clarifications issued by the RTA, Udupi, in his order to hold that such use of taxi by Government office cannot be brought under the category of tour operator.

The Tribunal held that the Government officers who were not provided with car although they are eligible to it in terms of the service contract are being asked to engage taxi. Such engagement of taxi cannot be said to come within the category of 'tour operator'. If the argument of the revenue is accepted then all taxis plying including auto rickshaws have to be considered as 'tour operator.

15. Whether promotion of sales abroad and marketing in India can be brought within ambit of clearing & forwarding agent?

Acer India Pvt. Ltd. v. Commissioner of Service Tax, Bangalore (2007) 6 STR 380 (Tri. - Bang.)

The appellants are carrying on the marketing and promotional activities. The revenue conducted audit of their balance sheets, which revealed that the assessee had extended coordination and promotional activities relating to sale of computers and for those services they had received certain commission from their overseas vendors. The revenue has proceeded to cover them under the ambit of clearing and forwarding agents as defined under the Finance Act, 1944. The appellant contended that they were not carrying on the activity of clearing and forwarding agent. Their business was only promotion of sale of computers to overseas buyers.

The Tribunal held that the appellant are not carrying on any activity of clearing and forwarding agent in terms of the definition appearing in Finance Act, 1994. They were only promoting sales of computers through overseas buyers. The Larger Bench in his judgment in the case of *Larsen & Tourbo Ltd.* v. *CCE, Chennai* (2006) 3 STR 321 (Tri. - LB) has clearly held that promoting sales in India cannot be brought within the ambit of clearing and forwarding agent services. When this is the case, the promotion of sales abroad and marketing in India also cannot be brought within the ambit of clearing and forwarding agent services.

16. Whether the appellant, who were letting out their hall for organizing social / cultural functions were liable to pay Service Tax under the category of Mandap Keeper?

Ada Rangamandira Trust v. CCEx. , Bangalore-III (2007) 6 STR 381 (Tri.- Bang.)

The Hon'ble Supreme Court, in the *Tamil Nadu Kalyana Mandapam Association v. UOI (2006) 3 STR 260 (SC),* has held that taxable services could include mere providing of premises on a temporary basis for organizing any official, social or business functions. The appellant contended that they are letting out the premises for cultural purposes like dance, drama, music etc. and these activities would not come within the ambit of social functions.

The Circular dated 29-4-2002 had clarified that programmes of dance, drama, music etc. are social functions and letting out of a hall for holding these programmes is liable to service tax under the category of Mandap Keeper.

17. Can the wall painting under a labour contract as such equated with advertising?

Pawan Sharma v. CCEx. , Jaipur (2007) 7 STR 21 (Tri. – Del.)

The appellant is providing manpower for the painting of advertisement materials. This is brought out by the contract as well as bills also. The appellant contended that the wall painting under a labour contract couldn't be equated with advertising. *Prima facie*, appellant's contention merits acceptance.

18. Whether an ambulance for carrying patients to hospitals covered under the definition of Rent-a-cab operator scheme?

Bachan Singh Salooja v. CC, Jaipur (2007) 7 STR 28 (Tri. – Del.)

The applicant is providing the service of Rent-a-Cab operator. The contention of the applicant is that the vehicle is ambulance for carrying patients to the hospitals and ambulance is not covered under the definition of Rent-a-Cab Operator-Scheme. Therefore, the applicant has a strong case in his favour. Therefore, the pre-deposit of whole of the amount of Service Tax and penalties are waived.

19. Whether the hire purchase and hire purchase financing are synonymous and covered under the category of banking and other financial services?

Bajaj Auto Finance Ltd. v. CCEx., Pune (2007) 5 STR 139 (Tri. – Mum.)

The applicant contended that they are not carrying on the business of hire purchase but that of hire-purchase financing and therefore not liable to service tax. The contention of the revenue is that the two expressions are synonymous for the reason that in both cases, the hirer enters into agreement with the person who provides financial services to the hirer and in lieu of such services, hirer pays certain amount as finance charges/hire-purchase charges.

The Tribunal held that *prima facie* the nature of the transaction between the applicants and their customers is a hire-purchase finance transaction. The hire purchase and hire purchase financing are not synonymous. The Apex Court in the case of *Sundaram Finance Ltd. v. State of Kerala 17 STC 480* had held that in a hire purchase agreement an owner hires goods to another party called the hirer and agrees that the hirer shall have an option to purchase the goods when he has paid a certain sum, or when the hirerental payment has reached the hire-purchase price stipulated in the agreement. In the case of hire-purchase finance, goods are purchased by the customer who in consideration of executing a hire-purchase agreement and allied documents, remains in possession of the goods, subject to the liability to pay the amount paid by the financier on his behalf to the owner or dealer of the goods, and the financier obtains a hire-purchase agreement which gives a licence to seize the goods in the event of failure by the customer to abide by the conditions of the hire-purchase agreement.

20. Whether an activity amounts to manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 is subject to service tax under the head Business Auxiliary Service?

CMS (I) Operations & Maintenance Co. P. Ltd. v. CCE, Pondicherry (2007) 7 STR 369 (Tri. – Ch.)

In terms of sub-section 19 of section 65 of the Finance Act, 1944, any activity involving manufacture of any goods within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 is not subject to tax under the head Business Auxiliary Service. The Hon'ble High Court of Orissa in *Orient Paper & Industries Ltd. v. Orissa State Electricity Board* (1989) 42 ELT 52, had upheld imposition of Central Excise duty on electricity, electricity being manufactured goods as defined in the Central Excise Act 1944. Hence, it is a settled position that the electricity is a goods manufactured in the sense envisaged in clause (f) of Section 2 of the Central Excise Act, 1944. Therefore, the services involved are not liable to tax as Business Auxiliary Service.

21. Whether certification services to clients provided as accredited agency were covered under the category of consulting engineer services?

CCEx., Bangalore v. Sai Global Ltd. (2007) 7 STR 395 (Tri. - Bang.)

The assessee has rendered taxable services falling under the category of consulting engineer. The Commissioner has noted that the party is accredited agent for a National Accreditation Board and they are authorized to certify their clients as to whether they fulfil the quality management systems requirements. This certificate is necessary for a unit to obtain certification under ISO: 9001.

The Tribunal held that the activity of the appellant in certifying their clients as ISO: 9001 units would not come within the definition of consulting engineer. The appellant visited units that need a certification and management system and examined to find out as to whether they fulfill the requirement for the said certification. As per the board's Circular No. 1/1/2002-ST dated 26-2-2002 there was no engineering service rendered by them.

22. Whether unloading of LPG from ship and transfer by pipeline to LPG tanks would fall under the category of unloading of goods and storage and warehousing activities?

Finolex Industries Ltd. v. CCEx. , Pune (2007) 7 STR 408 (Tri. – Mum.)

As per the definition storage and warehousing includes storage and warehousing services for goods including liquids and gases but does not include any service provided for storage of agricultural produce or any service provided by a cold storage. From the definition of storage and warehousing service it could be noticed that the storage and warehousing services would include storing and warehousing of the goods including liquids and gases. The Central Board of Excise and Customs in its circular dated 1-8-2002 clarified that if the storage owner rents out the storage premises it does not get covered as service provider of storage and warehousing.

In this case, the appellant is the owner of the two LPG tanks and had rented out the premises. The appellant had not accepted the security of the goods, stacking of the goods or loading or unloading of the goods in the storage area. The unloading of LPG from the ship and transfer by pipeline to LPG tanks cannot fall under the category of unloading of the goods in the storage area considering the fact that the characteristic of the product is of volatile nature and hazardous one. The unloading activity of the LPG gas from the ship takes place at the port and appellant is paying service tax under the category of port services. Hence, only unloading and transferring of the LPG gas from the ship to tanks, cannot get attracted under the services of storage and warehousing.

23. Whether taking over of management of a mill covered under management consultancy?

Basti Sugar Mills Co. Ltd. v. CCEx. , Allahabad (2007) 7 STR 431 (Tri. - Del.)

The appellant is engaged in the manufacture of sugar in its sugar mills. Under an agreement, it took over the management of the sugar mill at Maizapur. The Central Excise Authorities treated the above agreement as a Management Consultancy agreement and demanded the service tax. The appeal challenges that demand as well as the penalty imposed for failure to pay the said tax.

The definition of management consultant makes it clear that consultant is advisory services and not the actual performance of the management function. In the present case, the appellant was in-charge of the operation of the factory and thus was performing the management function.

In a similar case in *Rolls Royce Industries Power (I) Ltd. v. Commissioner (2006) 3 STR 292 (Tri.)* the tribunal had held that where the agreement conferred operational autonomy and responsibility on the contracted party, the relationship is not of consultancy. There is no management consultancy in the present case.

3

SERVICE TAX PROCEDURES

1. **Whether the Modvat credit taken by the assessee on photocopy of bill of entry certified by bankers and notary public was permissible?**

   Vardhman Acrylics Ltd. v. CCEx. & Cus. , Surat- II (2006) 4 STR 489 (Tri. – Mum.)

   The appellant had imported capital goods like PVC pipe fittings, Gaskets, etc. They had misplaced triplicate copy of the Bill of Entry under which goods were imported. They lodged police complaint and simultaneously addressed letters to customs authorities. The appellant took credit on the strength of photocopy of the bill of entry duly certified by the bankers and notary public. The department had contented that the appellant had wrongly availed the credit on the strength of ineligible duty paying documents.

   The Tribunal had made a finding that the appellant have produced a certificate issued from the proper officer apart from photocopy of bill of entry which has been notarised photocopy of bill of entry, original for duplicate copy of the bill of entry which has been obtained from the bank. Hence, the photocopy authenticated invoices and xerox triplicate copy of bill of entry and attested copy of bill of entry are permissible for availment of Cenvat credit.

2. **Whether the inputs used in photography should be mentioned in invoices/bills issued to customers?**

   Ajantha Digital Color Lab and Studio v. CCEx. , Calicut (2006) 4 STR 575 (Tri. – Bang.)

   The revenue submitted that the inputs used in the photography should be mentioned in the invoices/bills issued to the customers. The appellant contended that this is not in the trade practice to show all the inputs used in the activity of photography in the invoices/bills issued to the customers.

   The Tribunal relied upon the decision in the case of *M/s. Adlabs* v. *CCE, Bangalore* (2006) 2 STR 121 (Tri.) in which it was held that the inputs are not required to be shown separately in the invoices / bills issued to the customers.

3. **Can an advance ruling be sought in relation to a service which has already been commenced?**

In Re: IJM (India) Infrastructure Limited (2007) 5 STR 314 (AAR)

Section 96A(a) of the Finance Act, 1994 provides that the liability to pay service tax can be determined by way of an advance ruling by the authority in relation to a *service proposed to be provided* by the applicant. In the instant case, the construction work has already commenced on the date of the application and is in progress, it ceases to be a service proposed to be provided and therefore the service will not be within the meaning of the advance ruling.

The same view has been taken in the case of *M/s. McDonald's India Pvt. Ltd., Mumbai (2006) 3 STR 245 (AAR)* and of *Pfizer Ltd. (2006) 4 STR 84 (AAR).*

4. **Whether the Commissioner was right in imposing enhanced penalty even assessee had make payment well in time before issue of show cause notice?**

Aarti Advertising v. CCEx. & Cus. , Nasik (2007) 6 STR 122 (Tri. – Mum.)

The assessee was engaged in providing services of advertising services. The assessee had failed to pay service tax and to file return in time in Form ST-3. The Assistant Commissioner had issued two show cause notices for the contravened the provisions of Sections 68 & 70 of the Act for not paying the service tax and filing the returns in time and raised demand for the service tax along with interest and imposed penalty under Section 76. It appears that the assessee has already been paid the service tax along with interest even before issuing the show cause notice by the adjudicating authority. Later on Commissioner (revision) has enhanced the penalty amount. The assessee having been aggrieved by the impugned order came before Tribunal.

The Tribunal held that the assessee had *bona fide* made the payment well in time before issuing the show cause notice and after confirming the penalty amount. As against the order of adjudicating authority, enhanced penalty by the revisionary authority is not justifiable. Therefore, the imposition of enhancing penalty is not warranted in this particular case. It is suppress from legal infirmity.

5. **Whether the assessee can claim Cenvat credit on the courier services and internet services utilized by him?**

Universal Cables Ltd. v. CCEx. , Bhopal (2007) 5 STR 142 (Tri. - Del.)

The demand of duty has arisen out of the denial of Cenvat credit to the applicant on the courier services and internet services utilized by him for despatching of his final products and the internet services used in the office. The internet services are used by the applicant for doing research of final products manufactured in his factory and courier service is for the despatch of the final products. The definition of input service would indicate that availment of Cenvat credit on the courier services, for despatch of final products may be correct. Accordingly, the pre-deposit of Service Tax and penalty is waived.

6. **Whether assessee was liable to pay amount collected in respect of non taxable services representing service tax, in terms of Section 11D of the Central Excise Act, 1944.**

CCEx. , Pune v. Jayashree Suraksha Rankshak Shakari Sanstha Maryadit (2007) 7 STR 147 (Tri. – Mum.)

The appellant are providing the taxable services under the heading Security Agency and Manpower Recruitment Agency. In addition, they also rendering services of cleaning & gardening that are not taxable services.

Section 11D is attracted only in the case of the person who is liable to pay duty and only when amounts have been collected as representing duty. The Tribunal held that the services of cleaning and gardening are not liable for service tax. In respect of these services it cannot be held that these appellants are liable to pay any duty. It is also admitted fact that in most of the cases, the invoices raised by the appellant to the service receivers do not indicate any amount as representing duty of service tax. Therefore, it is not proper to hold that they have collected amounts as representing service tax, from the service receivers. The wordings of Section 11D are clear and the same cannot be applied unless both the conditions mentioned therein are satisfied.