

RECENT AMENDMENTS TO INCOME TAX**A: Amendments by the Finance Act, 2008**

Already given in the last class.

B: SOME IMPORTANT JUDICIAL PRONOUNCEMENTS -2008**BASIC CONCEPTS**

1. *CIT v. Willingdon Sports Club (Bom.) 302 ITR 279 (2008):* Principle of mutuality applies even where some of the members of a society are not entitled to vote.

Where a number of persons combined together and contribute to a common fund, for the financing of some venture or object and in this respect, have no dealings or relations with any outside body, then any surplus arising there from cannot be regarded as profit derived. Following this principle the Bombay High Court has held that the principle of mutuality applies even where some of the members of a society are not entitled to vote.

2. Can the amount of share application money be treated as undisclosed income if it was found that the subscribers to the share capital were not genuine?

Held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company.

3. Can there be any addition u/s. 69A on account of the valuation report of the valuation officer that the assessee has invested unexplained income?

No, the High Court observed that since the business of the assessee is construction, even if some unexplained income has been invested in construction, the effect would be nullified on account of consideration of such investment as cost of construction. It is to be noted that reference can not be made to the valuation officer for the purpose of finding out the cost.

4. Whether the share income of a partner received by a sub-partnership firm from the main partnership firm is exempt u/s. 10(2A) in the hand of the sub-partnership firm?

Yes, the High Court observed that the pre-requisite for claiming exemption u/s. 10(2A) is that a person should be a partner of a firm which is separately assessed. The diversion of income of a partner in the main partnership at source to the sub-partnership (on account of the overriding obligation created by the sub-partnership) vests an enforceable right upon the sub-partnership to claim a share in the profits accruing to, or received by, a partner. Therefore, a sub-partnership which is in receipt of the share of profit of a partner in the main partnership has to be deemed to be a partner in the main partnership and entitled to exemption u/s. 10(2A). For example, PQR & Co. is a partnership firm with partners P, Q and R. Q and R constitute a sub-partnership QR & Co. The share income of Q and R from the main the partnership PQR & Co. gets diverted at source by overriding title to the sub-partnership QR & Co., which is entitled to exemption u/s. 10(2A).

Income from House property

5. *CIT v. Premnath Motors (Raj.) P. Ltd. 297 ITR 83 (Raj.) (2008):*

Question: Can the stamp duty paid for drawing up the lease deed and registration charges be allowed as a deduction while determining the annual value of house property?

Stamp duty and registration charges are not allowable as deductions under HP.

6. *CIT vs. Neha Builders P. Ltd. (2008) 296 ITR 661:*

Question: Whether the rental income from any property in the construction business can be claimed under the head of 'Income from house property' even though the said property was included in the closing stock and expenses on maintenance were debited to the profit and loss account?

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Income derived from the property would always be termed as “Income from house property”, but if the property is used as “stock-in-trade”, then the said property would become or partake the character of stock, and any income derived from the stock, would be “Income from Business”, and not income from house property. The income was therefore assessable as business income.

Profit and Gains of Business or Profession

7. In respect of machinery installed in an earlier year, is depreciation allowable for that year on additional customs duty paid during the subsequent year?

Yes, the depreciation shall be allowed during the year in which the machinery was imported.

8. Goyal Mg Gases Ltd. (2008) 296 ITR 72 (Del)

Facts: a. The assessee claimed depreciation at the rate of 100% on containers/ cylinders mounted on trucks.
b. The AO was of the view that the assessee was entitled to depreciation @ 15% as eligible to “plant and machinery”
c. the truck chassis on which the cylinders were mounted not owned by the assessee but were taken on hire.

Decision: The High Court held that –

- a. the expression “gas cylinder” used in Income-tax Rules does not mention the size of the gas cylinder nor does it say that gas cylinders should be only for cooking purpose or for any other particulars purpose.
- b. Hence, all gas cylinders are entitled to depreciation @ 100%.
- c. The chassis on which the cylinders are carried does not belong to the petitioner. Hence it cannot be said that the cylinders are part of the truck.

9. CIT v. L.K.Trust 297 ITR 53 (Karn.) (2008):

Facts: The assessee was a private family trust, the trust deed of which provided for acquisition of stocks, shares, debentures, annuities and securities. The assessee borrowed an amount to subscribe for equity shares of a particular company, which were to be issued in future. However, there was no immediate acquisition of shares. The amount of interest paid on borrowed amount was claimed as a deduction u/s. 36 (1) (iii) but the same was disallowed by the AO.

Question: Can the interest on borrowed capital for acquisition of assets be allowed as a deduction even if the asset is not put to use?

Decision: The High Court held that the loan was borrowed for the acquisition of shares which did not take place. Shares (asset) that were applied for have not been acquired and thus could not be put to use. Hence, the interest could not be allowed as a deduction, by virtue of proviso to section 36 (1) (iii).

10. Kerala Road Lines Vs. CIT 299 ITR 343(SC) [2008]:

Facts: The assessee purchased a land with building constructed thereon. The assessee demolished such buildings and sold scrap material, the proceeds of which assessed as business income in the hands of the assessee. The assessee paid interest for delay in payment of purchase consideration of such land and buildings, which was claimed as deductible expenditure from income from sale of scrap.

Decision: Held that , since sale proceeds of the scrap materials from the demolished structure had been treated as business income, therefore interest paid for delayed payment of purchase consideration of such structure was allowable as revenue expenditure.

11. CIT v. Chinna Nachimuthu Constructions 297 ITR 70 (Karn.)(2008):

Facts: To avail a contract work, the assessee was required to give bank guarantee. To secure the bank guarantee, the assessee was required to invest certain amount in fixed deposits.

Question: Whether interest accrued on fixed deposits made to avail a bank guarantee would be treated as business income or income from other sources?

Decision: The High Court held that the interest accrued on deposit made by the assessee to avail the bank guarantee had to be treated as income from business and not income from other sources.

12. CIT v. All India Films Corporation 297 ITR 358 (Delhi) (2008): Revenue vs. Capital

Facts: The assessee surrendered the possession of two cinema halls back to the lessor. As per the arrangement, the assessee received certain amount in lieu of loss of business and by the way of compensation for handling back possession of two cinema

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halls. The AO assessed the whole amount as a revenue receipt. Commissioner (Appeals) was of the opinion that the same is a capital receipt and thus not liable to tax.

Question: Whether compensation received for partial cessation of business is a capital receipt or a revenue receipt?

Decision: On reference, the High Court held that the compensation received was not so much for the loss of premises but for the loss of business as the assessee was still exhibiting films in other cinema halls and thus there was no cessation of business. The compensation received cannot be treated as a capital receipt since no part of the profit making apparatus of the assessee was extinguished. Therefore, the Court held the receipt to be a revenue receipt.

13. CIT vs. Renu Sagar Power Co. Ltd. 298 ITR 094 (All.) (2008): Revenue vs. Capital

Facts: The assessee had two thermal power plants of generating capacity of 67.5 MW each for its captive power plant. The AO rejected the claim of the assessee amounting to Rs. 1,05,44,904 as the cost of the turbine rotor. Further, the Tribunal found that the turbine rotor was an essential part of turbo generator set. It was not an independent machinery or plant. The turbine rotor on its own independent functioning could not generate electricity. Hence, the assessee was entitled to the deduction.

14. CIT v. Kerala Solvent Extractions Ltd. 306 ITR 54 (Ker.) [2008]:

It was held that section 43B of the Act, in itself, is not a provision providing for deduction of any item of expenditure which is otherwise not allowable under any of the provisions of the Act. Section 43B deals with deductions "otherwise allowable" under the provisions of the Act; and seeks to disallow certain sums if they have not been actually paid even if the assessee follows mercantile system of accounting.

Therefore, where an item is not an 'expenditure' incurred during the previous year and is, therefore, not allowable u/s. 29 read with section 37(1) and 145 of the Act, the same cannot be allowed under section 43B on the ground that the same has been actually paid in advance of the liability being incurred.

15. Anis Ahmad & Sons vs. CIT(A) 297 ITR 441 (SC) [2008]:

Facts: The assessee carried on business as 'commission agent' and declared income of Rs.1.33 lakh. However the AO did not accept the claim of the assessee and treated it as "trader" instead of 'commission agent' and enhanced its income to Rs.4.07 lakh. It was found that the assessee used to credit sale proceeds less commission to the "principal party's A/c" and the commission to "Commission A/c". Further, on requirement of the AO, the assessee produced five out of ten principal parties who gave evidence that the assessee was a commission agent. The AO regarded the assessee as commission agent for five parties who gave evidence and, in respect of the other five, he regarded the assessee as a trader and reduce its income to Rs.2.31 lakh.

Decision: Held that the accounting entry passed by the assessee gave *prima facie* evidence that it was a commission agent. The fact that the five parties out of ten gave evidence that the assessee was a commission agent proved genuineness of the assessee. No adverse inference could be drawn based on the fact that the other five parties did not appear. Therefore, the assessee was a commission agent and his income was Rs.1.33 lakh only.

16. CIT vs. Bilahari Investment P. Ltd. 299 ITR 1(SC) [2008]:

Where the assessee a subscriber to chit funds, had computed profits accounting for chit discount on completed contract method, which method had been accepted by the department over several years, the Department can not insist on adoption of percentage of completion method for recognizing expenditure by way of chit discount, particularly when the ultimate result was revenue neutral.

17. CIT v. Willard India Ltd. (2008) 302 ITR 221(All.):

When the assessee makes a change in the method of accounting from cash system to mercantile system, it may be possible that few of the expenses, relating to earlier years, which was not claimed as deduction since the actual payment was not made. Such expense may be allowed as deduction in the year of actual payment also since the assessee has switched over to mercantile system wherein matching concept is the principle.

The Allahabad High Court has held that legitimate expenditure shall be allowed as deduction irrespective of change in the method of accounting. While pronouncing the judgment, the Court has endorsed a view that it would be unreasonable to deny the right to deduction to the assessee when the change in the method of accounting is a bonafide one. On the similar grounds, the Income-tax Department can tax any receipt, which was not taxed in the earlier years.

18. CIT vs. Enron Oil and Gas India Ltd. 305 ITR 75 (SC)[2008]:

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In case where the Government of India has entered in to a production sharing contract u/s 42 with any person or persons for exploration of mineral oil, such contract/agreement constitutes a complete code in itself for the charge of income-tax and all other provisions of the Act get modified in accordance with the provisions of that agreement.

The assessee had opened a bank account from out of which various expenses being incurred. The deposits in, and withdrawals from the bank account were in Indian rupees as well as US Dollars. Therefore, the currency gains and losses constituted an integral part of the accounting mechanism of the assessee. Accordingly, in addition to actual exchange loss suffered by the assessee, loss of Rs. 39 Crores on account of translation of all monetary balances at the exchange rate prevailing as on the last date of accounting year, were allowable as deduction in computing its total income.

19. CIT v. Oil and Natural Gas Corporation Ltd. 301 ITR 415 (Uttarakhand) (2008): Deduction u/s. 43A shall be allowed on account of actual payment and not on notional booking.

AS-11 'Effect of changes in Foreign Exchange Rates' issued by ICAI provides for restatement of current assets and liabilities as on Balance sheet date and the effect of the same shall be charged off to Profit and Loss account as gain or loss on the foreign exchange rate variation. However, this accounting treatment, by itself would not allow as deduction u/s. 43A of the Income-tax Act. The High Court has held that deduction u/s. 43A shall be allowed only if the loss is suffered on the account of actual payment and not on notional booking.

20. CIT vs. Gupta Global Exim P. Ltd. 305 ITR 132(SC) [2008]:

Facts: The assessee engaged in the business of trading in timber also used to hire his motor lorries/trucks. The assessee claimed higher depreciation @ 30% on the motor lorries/trucks so hired. However the assessing officer denied higher depreciation on the ground that the higher rate is available only on motor lorries/truck used in the business of running them on hire. Since the assessee's Business was trading in timber and motor lorries/trucks had been hired out occasionally, therefore it could not be said that the occasional hiring out of motor lorries/trucks constituted separate line of business.

Decision: Held that, for allowability of depreciation at higher rate of 30%, the use of Lorries in the transportation-business of the assessee is the test. Therefore, if the assessee was in the business of hiring out of motor Lorries in addition to his business of trading in timbers, then the depreciation would be admissible to him @30%. However if the hiring of motor lorries/trucks did not constitute separate line of business, then, it would not be eligible for the depreciation at the higher rate of 30%.
[Note: In absence of any evidence in this regard, the matter was remanded by the Supreme Court.]

21. CIT v. Dinesh Mills Ltd. (2008) 302 ITR 164(Guj.): In a case where assessee repaid the refund of excise duty along with interest as per the Courts order, such interest could not be treated as statutory liability and therefore, does not partake the character of tax, cess, duty or fee as covered u/s. 43B.

22. CIT v. Shriram Builcons Ltd. (2008) 306 ITR 328(Bom.): Any compensation paid to tenants for vacating the premises in the course of business of the assessee, who was a civil contractor and builder, pursuant to an agreement for a development of property, was held to be revenue expenditure. On the other hand, where the assessee is subject to tax under the head capital gains, the compensation so paid shall be allowed as cost of improvement.

23. CIT v. Relaxo Footwears Ltd. [2007] 293 ITR 231 (Delhi): Expenditure incurred on setting up of a new unit, which forms a part of the existing business of the assessee, is revenue expenditure. Therefore, expenditure incurred by the assessee on setting up new business of manufacturing and sale of hawai chappal, which formed part of existing business of trading in rubber footwear, was allowable as revenue expenditure; the same cannot be capitalized as being expenditure incurred prior to commencement of business.

24. Deepak Fertilizers and Petro chemicals corporation ltd v DCIT (2008) ITR (AT) 167 (Mum.): Where the assessee issues partly convertible debentures and forfeits application moneys for non payment of call moneys, such forfeited amount would be on capital account, so that there can be no inference of a revenue element therein.

25. CIT v Hewlett Packard India Pvt. Ltd. (2008) 171 Taxman 13 (Del): Where the warranty clause is a part of the sale document and it imposes a liability on the assessee to discharge its obligation for the period of warranty, the liability could be capable of being construed in define terms and, therefore, could be deducted while working out the profits and gains of business.

26. CIT v Eicher Ltd. (2008) 173 Taxman 251 (DEL): Where the assessee had entered into a non-compete agreement with 'V' who has an employee of the assessee, and 'VCPL', a company promoted by 'V' whereby the assessee had paid a sum of Rs. 4 crores to 'VCPL' so that 'VCPL' and 'V' would not carry out any business activity with regard to two-wheelers after retirement of 'V' from the assessee company it was held that payment of non-compete fee which had only eliminated

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competition in the two wheelers business for a while and had not resulted in any permanent or ephemeral benefit to the assessee would be revenue in nature.

27. CIT v Shreyans Industries Ltd. (2008) 303 ITR 393 (P&H): Expenditure on construction of drainage for disposable of effluents is a capital expenditure as the outlay resulted in a construction of enduring nature on which the assessee is entitled to depreciation.

28. Can the expenditure incurred by the assessee on shifting the factory be treated as revenue expenditure?

The Madras High Court held that the assessee did not have any option but to shift the factory due to opposition by the public against letting out the sewage water. If the very survival of the assessee-factory in the existing place itself was at stake, the question of applying the test of enduring advantage did not arise. The test of enduring benefit was not certain and conclusive test and it could not be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. Therefore, the expenditure incurred by the assessee on shifting the factory was revenue expenditure.

29. Can the amount of sales tax collected and kept as a contingency deposit be treated as a trading receipt?

The Kerala High Court observed that the amount of sales tax collected formed part of the assessee's trading receipt. The mere fact that the assessee had created a head "contingency deposit" and kept the collection as such without remitting the amount to the sales tax department would not change the nature of the receipt. The sales tax collections made by the assessee and shown under the head "Contingency deposit" had to be considered as a trading receipt and included in the total income of the assessee.

30. CIT vs. Rajam Ramaswamy and sons (2008) ITR 325 (Mad.):

Facts: The AO has disallowed the claim of the assessee for a sum of Rs. 1,30,000 paid to the partners u/s. 40(b) of the Income-tax Act and adds as the income of the firm. On appeal, the CIT (Appeals) allowed the appeal directing the AO to delete the addition, which was, on further appeal, confirmed by the ITAT.

Question: Whether the payments made to the partners by the assessee-firm for the specific services rendered by them were allowable u/s. 40 (b) of the Income-tax Act, 1961?

Verdict: The High Court held that on the facts of the case, it was found that payments made to the partners were not in their capacity as partners, but were made for the specific services rendered by them. By applying this ratio the High Court upheld the order of the Tribunal by holding that the payments made to the partner, by the assessee-firm, for the specific services rendered cannot be disallowed under section 40 (b) of the Act.

Capital Gains

31. CIT v KAY ARR Enterprises (2008) 299 ITR 348 (MAD): No transfer in family settlement: Where a family settlement / agreement is arrived at in order to avoid continuous friction and to maintain peace among the family members, the family arrangement is governed by the principles which are not applicable to dealing between strangers. So, such bona fide realignment of interest, by way of effecting family arrangements among the family members would not amount to transfer.

32. CIT v Southern Tubes (2008) 306 ITR 216 (Ker): Where the firm is dissolved and one of the partner took over the land and factory building and continued the business as a proprietorship concern. It was held that the transaction resulted in dissolution of the firm with one of the partners getting rights over the immovable property. The subsequent reconstruction of the firm did not affect the liability u/s. 45(4) of the act which was a liability of the dissolved firm to be assessed for capital gains in terms of section 45 (4) of the Act . The transaction in both the case was transfer within the meaning of section 2(47)(vi).

33. Mrs. June Perrett vs. ITO (2008) ITR 268 (Kar.):

Facts: In this case, A, owner of the residential house in Bangalore, under a will, appointed executors, who were required to obtain probate of the will and thereafter sell the residential property and divide the sale proceeds and distribute them to the three sons and a daughter of A. After the death of A, the executors filed probate proceedings and obtained the probate by paying the court fee of Rs.1,23,000 towards the letter of administration. Further, a maid-servant illegally occupied the house. In order to secure vacant possession of the property, the executors were forced to file an eviction petition in Bangalore and ultimately they succeeded in the court. After obtaining possession and clearing all the litigation pending over the house property, it was sold for a total consideration of Rs. 1,18,46,850. The assessee, being a daughter of A, while computing the capital gains, claimed certain expenditure incurred by the executors towards litigation expenses, traveling expenses incurred by them to travel from London to India and their stay at Bangalore and the fees paid to the lawyers towards litigation expenses. The AO disallowed the expenses claimed by the assessee. The assessee filed an appeal before the CIT(Appeals), which was allowed in part denying the expenses incurred towards legal and professional charges, executor's expenses in India, executors expenses in England and the

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court fee paid to obtain the letter of administration. Against the order the CIT (Appeals), an appeal was filed before the Tribunal that was rejected.

Question: Whether the expenditure incurred on obtaining probate, travel expenses of executors and expenditure on evicting illegal tenant are expenditure incurred wholly and exclusively in connection with transfer and allowable as deduction while computing the capital gains ?

Decision: The High Court held that –

a) the executors who were residing in London could not sell the property to any party without letters of administration, therefore were required to obtain probate and letters of administration and any expenses incurred by the executors in order to obtain probate and letter of administration were to be treated as expenses incurred by them in connection with the transfer of property.

b) Similarly, without paying the court fee, no letter of administration would be issued by the court. Therefore, sum paid by the executors as court fee at the time of obtaining the letter of administration had to be treated as expenditure incurred in connection with the transfer of property.

c) If the unauthorized occupant had not been evicted the value of the property would have decreased instead of increasing. Therefore, the expenditure incurred by the executors to evict the unauthorized occupant had to be treated as an amount spent towards cost of improvement of the property. The cost of evicting the unauthorized occupant was also deductible.

34. Navneet Kumar Thakkar v. ITO [2008] ITR (AT) 42 (Jodhpur): The provisions of section 50C can be applied only when the purchaser gets the purchase deed of the immovable property, acquired by him, registered with the stamp valuation authority. If the purchaser doesn't get the purchase deed registered, there will be no occasion for determination of value of immovable property by the stamp valuation authority. Hence, capital gains from such unregistered sale shall be computed taking the actual sale consideration to be the full value of consideration. The valuation rate adopted by the stamp valuation authority in respect of other similar properties cannot be the basis for determining full value of consideration for the unregistered sale.

35. CIT v. Suresh Chand Goyal [2007] 163 Taxman 54 (MP): Where the assessee plots out his owned land to secure a better price and sells such plots of land, then, such activity of plotting and selling cannot be regarded as 'adventure in the nature of trade or business', as such activity was not carried on a regular basis, but was done with a view to secure better price. The gains, so arising, would be assessable as capital gains.

36. CIT v. Amrik Singh (2008) 299 ITR 14 (P & H):

Facts: The assessee had got the land under the provisions of the Punjab Occupancy Tenants Act, 1952 through court decree. No amount was paid in lieu of the acquisition of land. The assessee contended that he was not liable to pay any capital gains for the said land as the assessee acquired the rights of ownership of the land by operation of law and not by purchase or inheritance. However, the Income tax Officer did not agree with the assessee and the amount received by the assessee from the acquisition of the said was added to the income of the assessee.

Question: Whether the assessee was liable to pay capital gain tax in respect of the capital asset acquired by him through the operation of law?

Verdict: The High Court held that the assessee became the owner of the land in respect of which he had earlier acquired only tenancy rights. Thus, the assessee had acquired the ownership rights in the land by operation of law and not by purchase or inheritance. There was no record of any payment made for the acquisition of the land in question either by the assessee or his predecessor in interest. The cost of acquisition of the land to the assessee was nil. Therefore, in such a situation if the assessee sells such asset he would not be liable to pay any capital gains tax.

37. CIT vs. Smt. Laxmidevi ratani (2008) 296 ITR 363 (MP): Whether the action taken by the assessee in giving up her right to claim the property amounts to transfer as defined in section 2(47) of the Income-tax , 1961?

Held that, the action on the part of an assessee in giving up her right to claim the property and instead accepting money compensation is a clear case of relinquishment of a right in the property resulting in transfer as defined in section 2(47).

38. Whether for claiming exemption u/s. 54F of the Act, the condition laid down in section 54F(1) and the CBDT Circular No. 667, dated 18-10-1993 that the purchase/construction is to be completed within stipulated time is mandatory?

The Madras High Court held that in order to get benefit u/s. 54F of the Act, the assessee need not complete the construction of the house and occupy it. It was enough if the assessee established the investment of the entire net consideration within the stipulated period.

charitable Trust**39. U.P. Forest Corporation v. DCIT (2008) 297 ITR 1 (SC):****Question:** Is registration of a trust or institution mandatory for claiming benefit u/s. 11(1) (a)?

Yes

40. ACIT vs. Surat City Gymkhana [2008]300 ITR 214(SC):

a) Since 'public' includes a section of public, therefore a trust for the benefit of staff of 16 institutions, which is an 'object of general public utility', can be regarded as 'charitable' in nature.

b) Once a trust is granted registration u/s. 12AA by the commissioner after application of his mind on going through the objects, the AO cannot question the same. In other words the AO has no power to say that the objects of the trust are not 'charitable in nature' and, hence, it is not entitled to exemption.

41. Shri Dhakad Samaj Dharamshala Bhavan Trust v. CIT (2008) 302 ITR 321(MP): Merely because accommodation was created in a religious place and provides to a particular community, it cannot be considered to be for religious purpose. There should be something more to suggest its nexus with the religious or charitable purpose to fulfill the requirements of Sec. 11 for claiming exemption. On this ground, the court held that trust is not entitled to registration.

Minimum alternate Tax**42. CIT vs. HCL Comnet Systems and Services Ltd.[2008] 305 ITR 409(SC): Provision for bad and doubtful debts – Not to be added in computing book profits**

As per explanation 1 to section 115JB, provision made for liabilities, other than ascertained liabilities, are required to be added in computing the amount of book profits. Therefore, only provisions for un-ascertained liabilities are required to be added in computing book profits.

Provision for bad and doubtful debts is made to cover up the probable diminution in the value of the assets being debt receivable/debtors. It can not be said to be provision made for a liability, being debts payable by the assessee, because even if a debt is not recoverable no liability could be fastened upon the assessee. Therefore provision for bad and doubtful debts is not covered by the explanation 1 to section 115JB and is, thus, not required to be added back in computing book profits of the company.

43. Malayala Manorama Co. Ltd. Vs. CIT [2008] 300 ITR 251(SC): Depreciation rates given in Schedule XIV to Companies Act, 1956 – Not mandatory

If a company consistently charges higher depreciation in its books of account at the rate prescribed by the Income Tax Rules instead of depreciation at the rates prescribed in Schedule XIV to the Companies Act, 1956, the AO can't rework the net profit in accordance with the company law rates. This is so because the depreciation provided under the Company Law as per Schedule XIV was minimum but there was no bar to claim higher depreciation while preparation of books of account.

44. Gulf Oil Corpn. vs. CIT (2008) 111 ITD 124 (Hyd.): None of the clause given in the Explanation to section 115JB provide for the increase or decrease of the book profit by extraordinary items. Accordingly, no adjustment shall be made for the extraordinary items debited or credited in the profit and loss account or P& L appropriation A/c.

Set off and carry forward of losses**45. CIT vs. Joseph Valakuzhy [2008] 302 ITR 190(SC): Section 80 applies to carry-forward of 'losses' only**

As per Rule 9A of Income-Tax Rules, 1962, if a feature film is released for 180 days or more during the previous year, the whole of the cost of production thereof is allowable in that previous year. However if such film is released for less than 180 during the previous year, the cost of production is allowable only to the extent amount realized from commercial exhibition during that previous year and balance, if any, is allowed in next previous year.

Question: Whether timely filling of return, as required by Section 80 of the Act, is necessary for carry-forward of unabsorbed part of the cost of production to the next year?

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Held that, Sec.80 of the Act applies only to the carry-forward of 'losses'. The said Sec. does not apply to carry forward and set off of amortized business expenditure. Therefore in order to carry-forward and set-off amortise business expenditure, the return need not be filed as required by the Sec.80

Tax deducted/collected at source**46. Is a company liable to deduct tax at source in respect of payment of salary by its foreign collaborator to its Managing Director?**

The Delhi High Court observed that the assessee was liable to deduct tax at source only on the payment made by it to its Managing Director and it cannot be burdened with the liability of deduct tax at source on any other payment, either by way of salary or otherwise, received by the Managing Director from some other source. Therefore, the Court held that the assessee was not liable to deduct tax at source on salary received by its Managing director from the American collaborator.

47. Whether the assessee was liable to deduct tax at source on milk and milk products sold by it through "concessionaires" appointed by it?

The Delhi High Court held that the milk booths were owned by the assessee with a right to enter the booth and take charge thereof at any time without assigning any reason or intimation to the concessionaries, the unsold milk was taken back and the cash collected daily was handed over to the assessee. The concessionaries only rendered service to the assessee of selling milk to customers and the ownership of the goods did not pass from the assessee to the concessionaries inasmuch as there was no sale of the milk or milk products to the concessionaries. The transaction between the assessee and the concessionaries was principal to agent and not principal to principal. Therefore, the assessee was liable to deduct tax on payments to the concessionaries.

Fringe Benefits Tax**48. R&B Falcon(A) Pty. Ltd. vs. CIT [2008] 301 ITR 309(SC): Since question has already come on this case law in November 2008 Final examination, we are not giving this case law.****Assessment procedure****49. Can the self-assessment tax paid u/s. 140A be taken into account while determining the interest on refund payable to the assessee u/s. 244 (1A) ?**

The Madras High Court held that while determining interest u/s. 244(1A), the self-assessment tax paid u/s. 140A should also be taken into consideration as the tax paid by way of self-assessment u/s. 140A would get adjusted against the assessed tax and partake the character of tax paid in pursuance of the assessment order.

50. Can the AO pass an order u/s. 142(2A) directing the assessee to get new books of account prepared by the special auditor?

The Rajasthan High Court observed that u/s. 142(2A), no authority has been conferred on the AO for directing the assessee to prepare fresh books by referring the matter to an auditor under special audit. Audit is for the purpose of satisfying one about the authenticity and credibility of accounts prepared by the assessee but not for preparing new books of account as per the direction of the AO.

51. A debatable issue can never be a subject matter for consideration while passing an order u/s. 143(1)(a).**52. Whether lower profits in particular year can be considered as sufficient reason to invoke best judgment assessment u/s. 144?**

No, without pointing out any error in the profit and loss account and the audit report, the powers of best judgment could not be invoked.

53. Whether the AO has jurisdiction to issue notice u/s. 148 to reopen the same assessment order on the same grounds for which the notice u/s. 263 has been issued?

The High Court held that the AO had found that there were errors in the computation of allowances. The reassessment proceedings were valid. Further, it was also held that notice u/s. 263 had been issued, and those proceedings were stayed, but the proceedings initiated after the issuance of notice u/s. 148 were not stayed. Therefore, the AO was at liberty to proceed with the proceedings and make final assessment. The court directed that since the reassessment order had already been passed, the notice u/s. 263 was to stand discharged subject to the outcome of the reassessment proceedings.

54. Can the AO reopen an assessment after the expiry of four years from the end of the relevant assessment year?

The High Court held that where the assessment is completed u/s. 143(3) of the Income-tax Act, the reopening of the assessment u/s. 148 beyond the period four years at the end of the relevant assessment year can be sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. Reassessment proceedings after the expiry of 4 years were not possible where there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts and also all the material facts are available at the time of making original assessment.

55. Indian Farmers Fertilizer Co-op. Ltd. (2008) 171 Taxman 379 (Del):

Where the reasons recorded for reopening of assessment after expiry of 4 years from the end of relevant assessment year, do not contain an allegation that the assessee had failed to disclose or truly all material facts necessary for assessment, the notice u/s. 148 is not valid.

56. Deepak Agro foods Vs. State of Rajasthan [2008] 228 ELT 510(SC)

An assessment made without inherent jurisdiction (e.g. *an assessment made after expiry of time limit specified in this behalf*) is null and void and does not exist in the eyes of law. The defect of jurisdiction can't be cured even by consent of parties.

However, an assessment made in wrong exercise of jurisdiction or an assessment not made in accordance with procedure laid down by law or that not made as per principles of natural justice, can, at best, be regarded as 'illegal or irregular order'. The same can't be regarded as 'null and void'. The defect in 'illegal order' is capable of being cured and can be so cured, generally, by way of remand.

57. K.P. Mohammed Salim Vs. CIT [2008] 300 ITR 302 (SC): Section 127 applies to assessment of search cases:**Held that :**

(a) In case of assessment of search cases, 153A provides that save as otherwise provided in Section 153A to 153C, all other provisions of the Act shall apply to the assessment made u/s 153A. Therefore Section 127 relating to transfer of cases shall have application to assessment of search cases.

(b) It can't be said that since Section 127 uses the word 'case', therefore, the search cases dealing with several assessment years doesn't fall under Section 127. The word 'any' in Section 127 should be interpreted to mean 'all'. Accordingly, the search cases can be transferred u/s 127.

Appeals and revisions**58. Whether the rectification order u/s. 254 can be passed beyond four years?**

The SC in the case of *Sree Ayyanar Spinning & Weaving Mills Ltd. vs. CIT (2008) 301 ITR 434*, held that the Tribunal can rectify order passed by it within 4 years from the date of the order. However, if application for rectification is made within 4 years, and the Tribunal takes his own time to dispose of the application, it is not correct to state that the application cannot be entertained by the Tribunal beyond 4 years.

Excellent

59. ACIT vs. Saurashtra Kutch stock exchange Ltd (2008) 305 ITR 227 (SC): Non-consideration of judgments of superior courts-Mistake apparent from record

If the appellate tribunal fails to consider any judgment of jurisdictional High Court or Supreme Court while passing an order, then, it may rectify such order in accordance with such judgment even if such judgment was not brought to the notice of the tribunal

60. CIT v. D and H Secheron Electrodes Ltd. [2008] 301 ITR 20 (MP): Consequential order cannot be challenged without first challenging the order in consequence of which the same has been passed.

Facts: The question regarding allowability of a certain expenses was decided against the assessee by the Appellate Tribunal and the matter was remanded for fresh assessment in accordance with law. The assessee didn't file any appeal against the order of the appellate Tribunal but challenged the consequential remand order passed by the AO.

Verdict: Held that, since the assessee didn't go in appeal against the order of the Appellate tribunal, the said matter had attained finality. The AO, in remand proceedings, merely implemented the decision on the Appellate Tribunal, which had become final. Therefore, the same couldn't be challenged, as the same would amount to review/re-agitation of the concluded issues, which is impermissible.

61. C K Gangadharan vs. CIT (2008) 304 ITR 61(SC)

If the revenue has accepted an order/judgment in one Case by not filing an appeal against the same, it would not be allowed to file an appeal in another case when the same issue is involved, as the revenue cannot pick and choose. Further this is to ensure certainty in law. However this fact alone does not operate as bar for the revenue to prefer an appeal in another case involving same/similar issue.

- (a) Where there is just cause in doing so (e.g. where appeal was not preferred earlier in view of small amount involved or where earlier case was revenue-neutral); or
- (b) Where it is in public interest to do so; or
- (c) For a pronouncement by higher court when divergent views are expressed by the tribunals or the High Courts.

Therefore, in the cases mentioned above, the Revenue already has the right to file appeal even though in the earlier cases involving similar issues, no appeal was filled. **The newly introduced Section 268A deals with only one category of circumstances i.e. where appeal was not filled earlier on account of involvement of petty sum.**

62. CIT v. Sohana Woollen Mills [2008] 296 ITR 238 (P & H)

Audit opinion cannot be the basis for initiation of revision proceedings u/s. 263, because mere audit objection, without any further material, cannot lead to an inference that order of the Assessing Officer was erroneous and prejudicial to interests of Revenue.

Penalty & prosecution

63. CIT v. Pioneer Breeding Farms [2007] 295 ITR 78 (Mad.): The difference between the value of stock declared to the bank in the stock statement submitted for availing advances and the value of stock shown in the accounts books of the assessee can be treated as undisclosed income of the assessee only if there is adequate material to support such addition. Merely because the assessee has declared higher stock to avail higher advance, the difference cannot be treated as undisclosed income.

64. Sudarshan Silks and Sarees vs. CIT [2008] 300 ITR 205(SC): No concealment penalty when facts don't establish concealment of income

Facts: A search was conducted at the premises of the assessee and, apart from cash and jewellery, certain documents evidencing concealment of income were found. There were two sets of books of accounts; and only 50% of the sales/purchases were accounted for in the regular set of books. In order to avoid difficulties and litigation, the assessee offered additional income before the AO and filled revised returns on being morally assured by the departmental authorities that no penalty would be imposed.

Thereafter penalty action was initiated against the assessee and maximum penalty was imposed upon him. The Tribunal held that taking in to account the co-operative attitude of the assessee; the moral assurance by the department; and also the fact that evidences found couldn't fully establish concealment by the assessee no penalty was imposable on the assessee.

Despite no challenge by the Department that findings of fact arrived at by the Appellate Tribunal were unreasonable, the High Court reversed the judgment of the Tribunal.

Verdict: The Supreme Court, held that –

- (a) The Tribunal is the final fact-findings authority. Its decision on facts can be gone in to by the High Court only if a question is referred on whether the finding of the Tribunal was preserve i.e. such finding could not have been reasonably arrived at on the material placed before the tribunal. In the absence of such a question before the High Court, the High Court is bound to accept the findings of the fact arrived at by the Tribunal and then proceed to determine the question of law referred to it.
- (b) In view of the facts, the Tribunal had rightly arrived at the conclusion that no penalty was imposable on the assessee. Therefore the High Court was wrong in reversing the judgment of the Tribunal.

65. UOI vs. Dharmendra Textiles Processors [2008] 306 ITR 277 (SC): 'Willful concealment' is not necessary for imposition of penalty u/s 271(1)(c)

Section 271(1)(c) vs. 276C: There is conceptual difference between sec. 271(1)(c) and sec. 276C of the Act. Section 271(1) along with explanation thereto indicates an element of strict liability of penalty of the assessee for concealment or for giving inaccurate particulars while filling the return. Section 271(1)(c) has been enacted to provide for a remedy for loss of revenue. The penalty u/s 271 (1)(c) is a civil liability. *Mens rea* i.e. wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution u/s 276 of the Act.

66. Can the assessee be absolved of the penal consequences u/s. 271(1)(c) if he voluntarily files a revised return (before the order of assessment is made) after discovering an omission or wrong statement in the original return?

Yes, Penalty cannot be imposed u/s. 271(1)(c) if the assessee, after discovering an omission or mistake in the original return, voluntarily files a revised return declaring additional income before the AO. However, if revised return is filed after such mistake or omission was noticed by the AO, concealment penalty can be imposed u/s. 271 (1) (c).

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67. Whether the tribunal was right in deleting the penalty imposed u/s. 271(1)(c) on the ground that the assessee suffered a loss in the relevant assessment year?

The tribunal after going through the records observed that the disallowance of interest u/s. 43B of the Act does not amount to concealment of income and when there is no tax payable, penalty could not be levied. Therefore, there is no illegality or infirmity in the order of the Tribunal in deleting the penalty.

68. Whether the penalty imposed u/s. 271B by the AO for violation of the provisions of section 44AB was justified?

The High Court held that the assessee society was registered under the Haryana Co-operative Societies Act and the accounts of the co-operative society shall be audited in such manner as the Registrar may specify from time to time. The assessee society had given the explanation for not furnishing the required audit report within the stipulated time that the Registrar did not appoint the auditor by that time. The Tribunal found that the explanation was satisfactory and once the explanation was satisfactory the benefit of section 273B was available to the assessee.

ADVANCE RULING

69. Is an assessee entitled to relief under the DTAA in respect of salary income received in India for services rendered in Norway for a period of more than 182 days, if such income was not subjected to tax in Norway?

Since he has not paid tax in Norway the question of claiming relief in India under DTAA does not arise. Therefore, the salary income of the applicant had been rightly taxed in India and he was not eligible to get any relief under the DTAA.

Wealth Tax

70. Thermax Ltd. Vs. CWT (2008) 110 ITD 591(Pune): The assessee had arranged for motor cars for its employees by devising a finance scheme under which the employees would pay a certain percentage of cost and the balance would be paid by the company. The loan amount would be recovered from the employee's salary till the loan amount was fully paid and the vehicle would remain in the name of the company. It was held that the motor cars in the name of the assessee-company were its assets u/s. 2(ea) of the Act and the amount of monthly installments collected would be "debt owed" by the company and would be eligible for deduction.

71. Commissioner of Wealth-tax vs. Mohan Das (2007) 295 ITR 580 (All.):

Facts: The assessee owned a property which was let out to bank for commercial purpose. The Wealth-tax assessment orders for the AY 1982-83 to 1985-86 were framed determining the value of the building by applying the land and building method. The AO reopened the assessment u/s. 17 of the WT Act, on the ground that the property ought to have been valued by applying the rent capitalization method. The Dy. Commissioner (Appeals) partly allowed the appeal filed by the assessee holding that it would be reasonable if the value of the property was determined by taking the average of the rent capitalization method and the land and building method.

Decision: The High Court held that u/s. 7 of the Act the value of any asset has to be estimated on the basis of the price which is the opinion of the AO it would fetch if sold in the open market on the valuation date. The building in question had been let out for commercial purpose. No specific mode of valuation of assets used for commercial purpose has been prescribed under the Act. It has to be the value which it would fetch if sold in the open market on the valuation date. The AO while passing the original assessment had applied the land and building method for determining the value of the property which was one of the well accepted and well recognized modes of valuation. Merely because by applying another mode of valuation, the value would be little higher, that would not clothe the Wealth-tax Officer with jurisdiction to proceed u/s. 17 of the Act, specifically when no specific mode of valuation of assets used for commercial purpose had been prescribed by section 7 of the Act and rules framed thereunder. Hence, the reassessment had been rightly annulled by the Tribunal.

72. For Motor Car the market Value should be based on its written down value and not on the basis of insured value.

C: CIRCULARS - 2008

Already given in the last class.

D: NOTIFICATIONS - 2008

1. Notification No. 2/2008, Dated 08-01-2008: The CBDT has substituted the existing Rule 18C with new Rule 18C, which lays down the following eligibility criteria for industrial Parks to claim benefit under section 80-IA (4) (iii) –

- (1) The undertaking should begin to develop, develop and operate or maintain and operate an industrial park any time during the period from 1-4-2006 to 31-3-2009.
- (2) The undertaking and the industrial park should be notified by the Central Government under the Industrial Park scheme, 2008.
- (3) The undertaking should continue to fulfill the conditions envisaged in the Industrial Park Scheme, 2008.

2. Notification No. 6/2008, Dated 14-01-2008: Section 10(15) (vii) exempts interest on bonds issued by a local authority or by a State Pooled Finance Entity and notified by the Central Government in then Official Gazette. Accordingly, the Central Government has specified the “Tax-free Pooled Finance Development Bonds” under Pooled Finance Development Fund Scheme of Government of India, interest from which would be exempt under section 10(15)(vii).

3. Notification No. 7/2008, Dated 15-01-2008: As per section 10(39), any specified income arising from any notified international sporting event held in India, to the person or persons notified by the Central Government in the Official Gazette, is exempt from tax. Accordingly, in exercise of the powers conferred by section 10(39), the Central Government has notified the following:

- (a) the Commonwealth Games Federation, London, United Kingdom as per the person,
 - (b) the Commonwealth Games 2010 to be held in India, as the international sporting event,
 - (c) the income arising to Commonwealth Games Federation from Commonwealth Games 2010 on account of Host Fee, received or receivable from the Organising Committee Commonwealth Games 2010 Delhi, India amounting to 7.3 million GBP, as the specified income,
- for the purposes of exemption under section 10(39).

4. Notification No. 11/2008, Dated 18-01-2008: The Finance act, 2007 has amended the provisions of the Income-tax Act to provide that employers will be liable to pay fringe benefit tax on the value of ESOPs granted to employees as and when the specified security or sweat equity share were allotted or transferred to the employees. The value of ESOPs for the purpose of levy of FBT would be the fair market value of the specified security or sweat equity share on the date of vesting of the options as reduced by the amount actually paid, or received from, the employee.

Explanation (i) to clause (ba) of sub-section (1) of section 115WC of the Income-tax Act defines fair market value to mean the value determined in accordance with the method as may be prescribed by the Board. A new rule 40D has been inserted in the Income-tax Rules w.e.f. A.Y 2008-09 for the purposes of valuation of specified security not being an equity sharer in the company.

As per new Rule 40D, for the purpose of section 115WC(1)(ba), the fair market value of any security, not being an equity share in a company, on the date on which the option vests with the employee, shall be such value as determined by a merchant banker on the specified date.

5. Notification No. 20-/2008, Dated 05-02-2008: The CBDT has inserted new Rule 14B, which lays down the guidelines for the purpose of determining expenses for audit under section 142 (2A).

The said notification is applicable when the audit under section 142 (2A) is directed by an Assessing Officer on or after 1st June, 2007. The expenses of, and incidental to, audit (including the remuneration of the accountant, qualified assistants, semi-qualified and other assistants who may be engaged by such Accountant) should not be less than Rs. 3750/- and not more than Rs. 7500 for every hour of the period as specified in terms of the number of hours required for completing the report.

6. Notification No. 23/2008, dated 06-2-2008: Section 2(48) defining zero coupon bonds requires that such bonds should be notified by the Central Government. Accordingly, the Central government has, vide this Notification specified the 10 year zero coupon bonds of National Housing Bank (NHB), to be issued on or before 31-3-2009, as zero coupon bonds for the purposes of section 2(48).

7. Notification No. 34/2008, Dated 13-3-2008: The CBDT has inserted a new Rule 125 which has made electronic payment of taxes (including interest and penalty) by corporate assesseees and assessee subject to tax audit mandatory on or after 1st April 2008. Electronic payment of taxes means payment of taxes by way of internet banking facility or credit or debit cards.

8. Notification No. 45/2008, Dated 24-3-2008: This is Rule 8D [Section 14A – Expenditure in relation to exempted income]-already covered in study modules.

9. Notification No. S.O. 2085(E) dated 21/8/2008: For the purposes of Section 194J the following persons shall also be regarded as “Professionals” :

(1) Sports Persons (2) Umpires and Referees (3) Coaches and Trainers (4) Team Physicians and Physiotherapists (5) Event Managers (6) Commentators (7) Anchors and (8) Sports Columnists.

RECENT AMENDMENTS TO INDIRECT TAXES

A: Amendments by the Finance Act, 2008

CHANGES UNDER EXCISE

a) Amendments in the Central Excise Act, 1944

1. “Excisable goods” [Sec 2(d)]: As per section 2(d), “excisable goods” means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. An explanation has been inserted in this clause to expand the scope of the term “excisable goods” which clarifies that **“goods” includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.**

2. Provisions introduced for excise duty on the basis of capacity of production in respect of notified goods [Sec. 3A] w.e.f 10-5-2008

(1) Where the central government is of the opinion that it is necessary to safeguard the interest of revenue,
 (a) having regard to the nature of the process of manufacture or production of excisable goods of any specified description,
 (b) the extent of evasion of duty in regard to such goods or such other factors as may be relevant, specify such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2) The Central Government may, by rules,-

(a) provide the manner of determination of the annual capacity of production of factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor; and

(ii) Provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

(3) The duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the official gazette, specify, and collected in such manner as may be prescribed:

Provided that where a factory producing notified goods did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacture of such goods fulfils such conditions as may be prescribed.

(4) The provisions of this section shall not apply to goods produced or manufactured, by a 100% EOU and brought to any other place in India.

(5) The duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the CETA read with any notification for the time being in force. [1st Explanation to section 3A]

(6) The expression “100% EOU” shall have the meaning assigned to it in sec. 3 [2nd Expln. to S.3A]

3. The provisions applicable for refund of duty extended to refund of interest [Sec. 11B]

Section 11B of the Central Excise Act provides for the refund of duty of excise. Now it has been amended to extend the refund of ‘duty of excise’ to ‘refund of duty excise and interest, if any, paid on such duty by substituting the word -

- a) “duty of excise and interest, if any, paid on such duty” for the words “duty of excise” and
- b) “duty and interest, if any, paid on such duty” for the words “duty”.

KS: The Tax-Age**4. Scope of section 11D expanded [Sec. 11D(1A)]**

The scope of section 11D which provides for the deposit of duty of excise collected from the buyer, has been expanded by inserting sub-section (1A) which provides that *every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or as chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the Credit of the Central government.*

Further, section 11DD(1) has also been consequently amended so as to make the assessee liable for payment of interest on excess duty collected from any person or where a person has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty.

5. Matter to be referred to the jurisdictional Chief Commissioner where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order of Commissioner (Appeal) [Sec. 35B(2)]

Section 35B(2) deals with the right of the Committee of Commissioners of Central Excise to authorise any Central Excise officer to appeal to the Appellate Tribunal against the order passed by the Commissioner (Appeals).

A proviso has been inserted by the Finance Act, 2008 in sub-section (2) to cover case where the committee of commissioners differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner. The jurisdictional chief commissioner shall, after considering the facts of the order, if is the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct the proper officer to appeal to the Appellate Tribunal against such order.

“Jurisdictional Chief Commissioner” means the Chief Commissioner having jurisdiction over the adjudicating authority in the matter. [W.E.F 10-5-2008]

6. Matter to be referred to the Board where the Committee of Chief Commissioners of Central Excise differs in its opinion on the legality or propriety of the order passed in appeal by the Commissioner [Section 35E]

Section 35E(1) deals with the power of Committee of Chief Commissioners of Central Excise to call for and examine the record of any proceeding to satisfying itself as to the legality or propriety of any decision or order passed by Commissioner of Central Excise and direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such point arising out of the decision or order as may be specified by the Committee of chief Commissioners.

A proviso has been inserted by the Finance Act, 2008 in sub-section (1) to cover a case where the Committee of Chief Commissioners differs in its opinion as to the legality or propriety of the decision or order of the Commissioner, it shall state the point or points on which it differs and make a reference to the Board. The Board, after considering the facts of the decision or order passed by Commissioner, is of the opinion that the decision or order passed by the Commissioner is not legal or proper, may, by order, direct such commissioner or any other commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.

Sub-section (3) of section 35E has also been amended to provide that order passed under section 35E of the Act shall be made within a period of 3 months from the date of communication of the decision or order of the adjudicating authority.

7. Interest on delayed refund of amount deposited under the proviso to Sec. 35 F [Sec. 35 FF]

A new section 35FF has been inserted to provide for payment of interest on pre-deposit made by an appellant who succeeds in appeal, if the amount of pre-deposit is not refunded within 3 months from the date of communication of the order of the appellate authority to the adjudicating authority.

Section 35FF provides that where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal, u/s 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within 3 months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB(i.e. 6%) after the expiry of 3 months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

b) Amendments in the Central Excise Tariff Act, 1985

8. Lamination or lacquering to amount to manufacture: Note 16 of Chapter 39 to the CETA, 1985 has been amended to specify that the process of lamination or of lacquering shall also amount to manufacture in addition to the process of metallization.

CHANGES UNDER CUSTOMS**Amendments in the Customs Act, 1962**

9. Scope of section 28B expanded [sec. 28B(1A)]: Similar to section 11D(1A) of Central Excise – Refer point 4 above.

10. Power to summon persons to give evidence and produce documents [Sec.108]

Section 108(1) has been amended so as to make the gazetted officer of customs more powerful. Now, it is not necessary for the gazetted officer to be empowered by the Central Government for summoning persons to give evidence and produce documents i.e., gazetted can, on his own motion, summon persons to give evidence and produce documents.

11. Maximum penalty prescribed u/s. 117 increased from Rs. 10,000 to Rs. 1,00,000[Section 117]

Any person contravenes any provisions of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding Rs. 1,00,000.

12. Matter to be referred to the jurisdictional Chief Commissioner where the Committee of Commissioners of Customs differs in its opinion regarding the appeal against the order of Commissioner (Appeal) [Sec. 129A(2)]

Similar to section 35B(2) of Central Excise – Refer Point No. 5 above.

13. Matter to be referred to the Board where the Committee of Chief Commissioners of Central Excise differs in its opinion on the legality or propriety of the order passed in appeal by the Commissioner [Section 129D(1)]

Similar to section 35E(1) of Central Excise – Refer Point No. 6 above.

14. Interest on delayed refund of amount deposited under the proviso to Sec. 129E [Sec. 129EE]

Similar to section 35FF of Central Excise – Refer Point No. 7 above.

15. Import or export of the goods in the customs area to be regulated in the prescribed manner [Section 141]

A new sub-section (2) has been inserted to regulate the imported or exported goods in customs area. It provides that the imported or export goods may be received, stored delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

16. Maximum penalty for contravention of rule or regulation increased to Rs. 50,000 [Sec. 158(2)(ii)]

Clause (ii) of section 158(2) has been substituted by new clause (ii) to increase the maximum penalty to Rs. 50,000/- for contravention of any rule or regulation. The new clause (ii) of section 158(2) provides that any person who contravenes any provision of a rule and regulation or abets such contravention or who fails to comply with any provision of a rule or regulation with which it was his duty to comply, shall be liable to penalty which may extend to Rs. 50,000.

CHANGES UNDER SERVICE TAX

17. Section 67: The definition of “gross amount charged” given in explanation (c) to section 67 has been modified. The amended definition of “gross amount charged” reads as follows.

'Gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service any associate enterprise.

18. Section 71: Scheme for submission of returns through Service Tax preparers: The Board is empowered to frame a scheme providing that specified class of person may furnish their service tax returns through an authorised Service Tax Return Preparer. Such scheme may provide for various provisions applicable to the Service Tax Return Preparer (including educational qualification, duties, etc.)

“Service Tax Return Preparer” means any individual, who has been authorised to act as a Service Tax Return Preparer under aforesaid Scheme.

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A Service Tax Return Preparer shall assist the specified person or class of person to prepare and furnish the return in such manner as may be specified in the Scheme framed under this section.

19. Section 72: Best judgment assessment: If any person, liable to pay service tax,

- (a) fails to furnish the return under section 70;
- (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

20. Section 77 & 78: PENAL PROVISIONS: The existing section 77 has been substituted by a new section 77 and section 78 has been amended which reads as follows -

Sec.	Reasons of penalty	Quantum of penalty
77	(1) Failure to take registration as per provisions of section 69 or rules made under this Chapter	Penalty which may extend to – (a) Rs. 200 for every day during which such failure continues starting with the first day after the due date, till the date of actual compliance, or, (b) Rs. 5000, whichever is higher
	(2) Failure to keep, maintain or retain books of account and other documents as required by this law.	Penalty which may extend to Rs. 5000.
	(3) Failure to - (i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or (ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or (iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry.	Penalty which may extend to – (a) Rs. 200 per day during which such failure continues starting with the first day after the due date, till the date of actual compliance, or (b) Rs. 5000, whichever is higher.
	(4) Failure to pay tax electronically through internet banking, though required to pay tax electronically.	Penalty which may extend to Rs. 5000.
	(5) Issuing invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or failure to account for an invoice in his books of account	Penalty which may extend to Rs. 5000.
	(6) Contravention of any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided	Penalty which may extend to Rs. 5000.
78	Suppressing value of taxable Service	100% Subject to maximum of 200% of service tax sought to be evaded by suppressing taxable service.

21. Section 83: Section 83 enlists the sections of the Central Excise Act, 1944 that are applicable to service tax. The Finance Act, 2008 has added section 35FF of the Central Excise Act, 1944 in the said list thereby making it applicable to the service tax matters. Section 35FF contains the provisions relating to interest on delayed refund of amount deposited under the proviso to section 35F.

22. Section 95: Section 95 inter alia empowers Central Government to issue orders for removing difficulties, which may arise in respect of implementing or assessing the value of any taxable service introduced by any of the Finance Acts.

Section 95 has been amended to provide that if any difficulty arises in respect of implementing, classifying or assessing the value of any taxable services incorporated by the Finance Act, 2008, the Central Government may, by order published in the Official Gazette, not inconsistent with the provisions of Chapter V of the Finance Act, 1994, remove the difficulty. However, no such order shall be made after the expiry of a period of 1 year from 10.05.2008.

23. Changes relating to Taxable services are already covered in service tax Mat.

B: SOME IMPORTANT JUDICIAL PRONOUNCEMENTS -2008**EXCISE****Basic Concepts****1. Cipla Ltd. vs. CCEx. (2008) 225 ELT 403 (SC): Mere transfer to another captive unit of the assessee does not establish marketability of the product.**

Assessee used to clear BMS (Benzyl Methyl Salicylate), an intermediate product, from its factory at Bangalore to its another unit at Patalganga for manufacture of medicines, being the final product. Simply because a product is mentioned in Chemical Weekly Drug Directory as an intermediate product does not mean that the product is marketable. Mere transfer of BMS by the appellant from its factory to another unit does not show that product was either marketed or was marketable. Hence, BMS was not dutiable.

2. White Machines v. CCEx. [2008] 224 ELT 347 (SC):

Question: Is excise duty leviable on intermediate product when finding on marketability is absent?

The final products manufactured by the assessee were exempt from excise duty. However, during the production process being carried on by the assessee, an intermediate product used to emerge. The Department contended that though final product was exempt; the intermediate product was liable to excise duty.

Held that, even though final product is exempt from excise duty, the intermediate product will be liable to excise duty only if the same is marketable in the condition in which the Department seeks to levy duty thereon.

3. BOC(I) Ltd. v. CCEx. [2008] E.L.T 323 (S.C.)

a. Assessee procured Helium gas from other manufacturers and sold under own brand name by affixing labels.

b. Assessee does not undertake packing or re-packing from bulk packs to retail packs.

c. **Whether labeling or relabeling without repacking from bulk to retail amounts to “deemed manufacture”?**

d. Supreme Court agreed with the decision taken on similar fact in the case of Johnson & Johnson Ltd. that mere packing for marketing or mere labelling or relabelling without repacking from bulk packs to retail packs not renders product marketable directly to consumer and not amount to manufacture.

4. Prachi Industries v. CCEX. [2008] 225 E.L.T 16 (S.C.):

Question-

- Whether swaging constitutes manufacture in terms of Section 2(f) of the Act?

Verdict:

- Rotary swaging machine with machine with different dies imparts a change of lasting character to the plane pipe or tube by use of dies. Thus, after undergoing swaging process a work piece of different shape and user emerges.
- Distinguishable identity is acquired of a lasting character imparted to a plane MS pipe/tube by use of dies and presses.

Therefore, the process of swaging amount to manufacture under section 2 (f) of the Central Excise Act, 1944.

5. UOI vs. Banswara Syntex Ltd. 2008 (221) ELT 360 (Raj.):

Question: Can waste material of building construction be taken as non-dutiable, when no-credit has been availed on either inputs or capital goods?

Verdict: The High Court held that MS Scrap arising as waste material of building construction, wherein credit of duty neither as inputs nor capital goods had been availed would be non-dutiable as it did not arise from manufacturing process.

6. CCEx. vs. Sunco Rubbers Ltd. 2008 (228) ELT 27 (Mad.)

Facts: The assessee, a job worker, received raw materials required for the manufacture of strips tyres from the primary manufacturers (viz. raw material suppliers) for further processing and after undertaking the processing returned them to the suppliers. Thereafter, the suppliers carried on the process of deflashing, testing and inspection of those goods. The Department opined that since the goods processed at the premises of the job worker were fully manufactured goods, the job worker should pay excise duty on such goods before clearing them from its premises.

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Question: When does the manufacturing activity get completed- either at the time of clearance of goods from the premises of job-worker or at the time of their clearance from the premises of the manufacturer?

Verdict: High Court ruled that having regard to the activities like deflashing, testing, inspection etc. being undertaken by the primary manufacturers, it was evident that the goods were made ready for marketing only after the same were subjected to the above mentioned processes at the hands of the raw material suppliers. Hence, the manufacturing process was completed only after these processes were carried out at the premises of the suppliers. The job worker collected only job charges for the various processes undertaken by him on the goods. Moreover, as per section 2 (f) (i), any activity which is incidental or ancillary to the manufacture of the final product would be considered as a manufacturing activity. Therefore, the goods cleared from the premises of the job worker, could not be regarded as fully manufactured goods, and as such, the activity undertaken by the assessee could not be regarded as a manufacturing process.

7. SKB Dryfruits Marketing CO. PVT. LTD v. C.C.Ex., New Delhi [2008] 224 E.L.T. 339 (SC)

Question- Whether the activity of packing of processing dry fruits, peanut, wheat Dalia, rice etc. in to different pouches bearing brand name amounts to manufacture?

Summary-

- The applicant carried out the activities of processing dry fruits, peanut and also clearance of wheat dalia, rice flips, roasted and spiced channa and channa dal, cleared in different pouches bearing brand name, which were packed cartons.
- The issue under consideration was that whether these processes would amount to manufacture.

The Supreme Court held that the activities carried on by the assessee amounted to 'manufacture' and that the products in question were classifiable under chapter 20 of the Central Excise Tariff Act, 1985.

8. CCEX. vs. Gurdaspur Distillery (2008) 224 ELT 337 (SC):

Question – Does an article become excisable by mere mention in Excise Tariff?

Verdict – Held that an article did not become liable to excise duty merely because of its specification in schedule to CETA unless it was salable and known to market. Since, the Department failed to prove the marketability of the goods in question, it was held that the methane gas produced by the respondent was not marketable and hence, was not liable to duty.

9. CCEX. vs. Laljee Godho & Co. 2007 (216) ELT 514 (SC):

Question- Whether process of converting raw asfoetida into compounded asfoetida amounts to manufacture?

Decision: Held that the impugned process did not result in any chemical change. The product remained the same at the starting and terminal points of the process. Thus, the Apex Court upheld the Tribunal's decision that since the essential character of the impugned goods remained constant, there was no manufacture.

10. Board of Trustees v. CCEX. [2007] 216 ELT 513 (SC)

Assessee-port-trust prepared cement concrete Armour blocks for use in installation of breakwaters in harbour for keeping water calm. Held that process of preparation of cement concrete Armour block amounted to manufacture. However, since such blocks were harbour or location specific, they could not be used in any other harbour were not marketable.

Classification of Excisable Goods

11. Phil Corporation Ltd. v. CCUS. & C.EX. [2008] 223 E.L.T 9 (S.C)

Facts-

- Assessee manufactures processed cashew nuts, peanuts, almonds etc. by dry roasting, oil roasting, salting, seasoning and packed in different containers and cleared under assessee's brand name. The assessee did not register with the Central Excise Authorities and cleared these goods without payment of excise duty.
- The Department demanding duty under chapter 20 (2001.10) on the goods cleared without payment of Excise duty and proposed penalty action.
- Assessee denied the demand of the department and submitted that its products were classifiable under chapter 8 (0801.00) of the Central Excise Tariff Act, 1985 and chargeable to NIL rate of duty and hence there was no requirement to register with the Central Excise Authority.

Summary-

- **Excisability-** HSN (Harmonised System of Nomenclature) contains a list of possible goods that are traded (including animals, human hair etc.) and as such the mention of an item has got nothing to do whether it is manufactured and taxable or not
- **Classification of goods** – HSN is a safe guide for deciding issue of classification.
- **Processed dry fruits- Manufacture- Deemed manufacture-** Processed cashew nuts, peanuts, almonds etc. manufactured by dry roasting, oil roasting, salting, seasoning and packed in different containers and cleared under assessee's brand name – Classifiable under chapter 20 of Central Excise Tariff and not under Chapter 8 in view of HSN explanatory notes to Chapter 20.

12. Insulation Electrical (P) LTD. v. CCEX. [2008] 224 E.L.T. 512 (S.C)

Classification Rail assembly, front seat adjuster/assembly slider and rear back lock assembly whether classifiable under Sub-heading 9401.00 of Central Excise Tariff as parts of seats or under sub-heading 8708.00 as motor vehicle parts.

Summary-

- Impugned goods not classifiable under sub-heading 9401.00 merely because of supply through seat manufactures.
- Heading 9401 covers all types of seats and not only seats of car.
- Seat being complete without rail assembly or other impugned goods, such goods are not essential parts of it.
- Heading 9401 covers only parts of seats and not accessories thereof.
- Heading 8708 covers both 'parts' and 'accessories'.
- Impugned items are only adjuncts affixed on floor of motor vehicles to improve efficiency and convenience and are not parts of seats.
- Impugned goods can be termed as accessories to motor vehicle for better convenience of passengers/drivers travelling in car and classifiable under Heading 8708.

Distinction between parts and accessories- A 'part' is an essential component of the whole without which the whole cannot function. Whereas 'Accessory' is supplementary or subordinate in nature and need not be essential for actual functioning of the product.

13. CCEX. V. Calcutta Springs Ltd. [2008] 229 ELT 161 (SC)

When goods are classifiable under two headings the assessee should be given benefit.

14. Godrej Industries Ltd. v. CCEX. [2008] 228 ELT 321 (SC)

'Hair dye', which is used to colour hair, cannot be regarded as 'hair lotion', which is used to soothing, cleansing or antiseptic action while washing out one's hair.

15. Ponds India Ltd. vs. Comr. of Trade Tax (2008) 227 ELT 497 (SC)

Facts: The assessee was a manufacture of petroleum jelly. For the purpose of classification, whether it should be classified as a drug or a cosmetic, the assessee referred to Wikipedia, on the basis of Wiki definition the assessee contended that it should be classified as a cosmetic.

Question: Can Internet sources like Wikipedia be relied upon, for classification/ interpretation of tax statute?

Verdict: The SC held that Wikipedia, dictionary, etc, was not an authentic source, although the same might be looked at for the purpose of gathering information. Where an express statutory definition of a word existed, a Wiki definition could not be preferred. It could not normally be used for the purpose of interpreting a taxing statute or classification of a product vis-à-vis an entry in statute.

Valuation of Excisable Goods**16. Kraftech products v. CCEX. [2008] 224 E.L.T. 504 (S.C.)****Facts**

- The assessee used to pack hair dye in sachets each containing 3 gms. 3 such pouches were sold in one packet. The net weight of each sachet, as also net weight of the packet and the maximum rate were duly printed on sachets as well as on the packet. The assessee contended that since the total weight of each packet does not exceeds 10 gms., hence there is no requirement to declare RSP thereon and the same is assessable under section 4 of the Act.
- Further, in another case, the assessee cleared-
 - (i) packages each containing 72 pieces of lip smoothers (each such piece containing 4.3 ml.) ; and
 - (ii) cartons each containing 500 sachets of shampoo (each such sachet containing shampoo less than 10 ml.),
 and contended that since the total weight of each piece/sachet did not exceed 10gms./10 ml., hence there is no requirement to declare RSP thereon and the same is assessable u/s 4 of the Act.
- The department contended that the packet of hair dye was not being sold by weight or measure and further the 'packet' thereof contained further packets i.e. the sachets. Hence, the same was not covered by exemption from declaration of RSP. Further, since the packages of lip smoothers and cartons of shampoo weighted more than 10ml/10gms., in aggregate, hence the same was not covered by exemption from declaration of RSP. Therefore, RSP was to be declared on all of the said goods and they were assessable u/s 4A of the Act.

Question

- Whether the packets of hair dye, lip smoothers and shampoo were assessable u/s 4A of the Act?

Decision

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- There is no requirement to declare RSP on any package containing a commodity if the net weight or measure of the commodity is 10 gms. Or 10 ml. or less, if it is sold by weight or measure.
- In case of hair dye the assessee had not only declared weight of 3 gms. on each sachet but had also declared the aggregate weight of 9 gms. on each packet of 3 sachets. Therefore, the packet was intended to be sold by the weight or measure. Further, the expression 'any package containing a commodity' appearing in SWM Rules does not mean that the outermost package should contain the commodity. The 'packet' in this case, contained sachets of hair dye, therefore, the 'packet' was a package containing a commodity, namely, hair dye. Accordingly, there was no requirement to declare RSP on the packet and the same assessable u/s 4 of the Act.

In case of Lip smoothers & shampoo, in view of the quantity contained in the packages of lip smoothers and cartons of shampoo, the said packages/cartons could not be considered as a package intended for retail sale. No person could, ordinarily be expected to purchase 72 pieces of lip smoothers or 500 sachets of shampoo. Further, the weight of the individual piece/sachet did not exceed 10gms./10ml. Accordingly, there was no requirement to declare RSP on the packet/carton and the same were assessable u/s 4 of the Act, not u/s 4A of the Act.

17. Bharti Telecom. Ltd. v. CCE [2008] 226 E.L.T. 3 (S.C)

For determining assessable value for the purpose of excise duty relationship is not important but what is to be seen that whether it influenced the value or not.

- 1) Assessee sold goods to DOT & MTNL about 75% of its product and remaining of its product in the open market through its joint venture (JV) company.
- 2) Department sought that goods were sold at a far lesser price to the joint venture company as related person having mutuality of interest and the assessable value is the price at which the JV company sold the goods in the open market and not the sale price at which the assessee sold to JV company.
- 3) Assessee sold the goods to its JV Company at or about the same price at which it sold the goods to other buyer.
4. **Held that,** Since the product is being sold to JV Company at or about the same price at which it was sold to DOT & MTNL, the relationship did not influence the price and, therefore, the transaction value between the assessee and its Joint venture regarded as assessable value.

18. CCE vs. Mysore Kirloskar Ltd. [2008] 226 ELT 161 (SC):

In case of agreement to supply drawings, patterns, etc. along with machines, the charge for drawings, patterns, etc. is addable to assessable value of machines only if the price of the machinery is understated on that account.

Facts: The assessee, a manufacturer of engineering machines, entered into an agreement with ITC for manufacturing machines for ITC. As per agreement, the price of machines was to be stipulated by ITC in orders to be placed upon the assessee.

The agreement provided that the machines would be manufactured as per the specifications, prototype drawings and patterns prepared by the assessee and approved by ITC. It was also provided that such drawings, pattern, jigs, fixtures and tools prepared by the assessee would be the property of the ITC, for which ITC paid Rs. 43 lakhs.

The assessee manufactured machines in accordance with the agreement and cleared the same on payment of excise duty on the selling price of the machines. The sum of Rs. 43 lakhs was booked as "Other income" by the assessee.

The Department contended that since the agreement was for preparation of drawings, patterns, etc. as well as for manufacture of machines, therefore, the sum of Rs. 43 lakhs was also liable to duty. Hence, extended period of limitation was invoked to levy excised duty.

Question: Whether the sum of Rs. 43 lakhs was liable to excise duty?

Verdict: The agreement was not merely for the preparation of design and drawings, but a total contract for design, drawing, manufacture of prototype, supply of the machines, etc. The contract could not have been read in isolation in parts, that is, supply designs, drawings etc. and supply of machinery.

No doubt, the charges for drawings, designs, etc. are to be added to the assessable value of machines manufactured, based on use of such drawings, designs, jigs, fixtures, tooling etc. However, it was to be proved that the charges had a nexus with the negotiated price of the machines.

In absence of any evidence establishing whether the prices of drawings, tooling etc. were part and parcel of the agreement for supply of machine, the transaction value could not be rejected. Therefore, in view of vague allegations without evidences, the extended period of limitation was also not irrevocable. Accordingly, the sum of Rs. 43 lakhs couldn't be made liable to excise duty.

KS: The Tax-Age**19. CCEx. V. India Thermit Corp. Ltd. [2008] 226 ELT 164 (SC):**

(a) Re-agitation of same issue, not allowed: The first show-case notice relating to 1995 was dropped on adjudication. Later, second show-cause notice on the same issue for 1993 to 1996 was issued.

Held that, since the Department has accepted the earlier adjudications on the same issue for part of the period, it cannot be permitted to re-agitate the same point for a part of the remaining period. There cannot be second proceedings raising the demand for the same period.

(b) Related parties – Transaction value acceptable if price not influenced by relation: The assessee-company (ITCL) had a subsidiary company, M/s. Asiatic Thermics Ltd. (ATL), which used to sell dry moulds to the assessee in an unpacked condition and also to Railways in a packed condition. It was found that the price charged to railways after deducting the cost of packing was the same as charged to ITCL. The Department sought to reject transaction value between the assessee and ATL on the ground that they were related persons.

Held that, even if ATL and assessee are assumed to be related persons [*the court didn't hold so*], it had influenced the price. There was no under-valuation. ATL had been selling the product to the assessee and India Railways at or about the same price. Hence, transaction value between ATL and the assessee was acceptable.

20. CCEX. vs. Damnet Chemicals Pvt. Ltd. [2007] 216 ELT 3 (SC)

Held that, Merely because –

- a) The registered offices of the bulk distributor and that of the assessee are located in same premises,
- b) the manufacturing unit of assessee is situated in industrial gala owned by such bulk distributor, and
- c) 40% trade discount is offered to such bulk distributor,

the assessee and the bulk distributor cannot be regarded as 'related person', more so when there was no evidence that the assessee received something further from the bulk distributor other than the price charged, or, profits made by such bulk distributor were flown into the assessee-company.

Cenvat Credit

21. UOI v. Guljag Industries Ltd. [2008] 224 ELT 32 (Raj.): Asbestos sheets used for connecting equipments for passing of gas / steam are 'accessories' to the plant, as their use is essential and adjunct to the main plant. Such 'accessories' necessary for smooth running of the plant qualify as 'capital goods' even if such sheets are not covered under tariff chapters listed in definition of 'capital goods'.

22. CCE&C v. MDS Switchgear Ltd. [2008] 229 ELT 485 (SC): Even if the supplier of inputs has paid duty in excess of that payable thereon, the assessee is eligible to avail CENVAT credit of the total sum. The credit cannot be denied in the hands of the assessee without, in the first instance, disturbing the assessment of the supplier of inputs.

Facts: The 'Sinnar Unit' of the company (hereinafter referred to as 'supplier') used to clear intermediate products to the 'Jalgaon Unit' of the company (hereinafter referred as 'assessee') for manufacture of 'circuit breakers' by assessee. The supplier used to value the said intermediate products at cost *plus* notional profit provided for in Valuation Rules and rounded off such value to the nearest rupee (say, Rs. 56.68 to Rs.60). The duty was accordingly discharged on such rounded off value (Rs. 60)

The Department contended that the supplier had included CENVAT Credit element in the cost and had also rounded off the value to a higher sum, which has resulted in excess payment of duty by the supplier. This excess payment, which had been availed of as CENVAT credit by the assessee, was not available as CENVAT credit to the assessee.

The Department also contended that since the value of finished product was lower than the value of semi-finished product, such value being Rs. 45 to 52, therefore, it could not be inferred that the supplier had paid excess duty to transfer excess CENVAT credit to assessee.

Question: Could the CENVAT credit availed of by the assessee be denied?

Verdict: The CENVAT credit rules entitle the recipient manufacturer to avail of the benefit of the duty paid by the supplier manufacturer. A quantum of duty already determined by the jurisdictional officers of the supplier unit cannot be contested or challenged by the officers in charge of the recipient unit without any change in the assessment of the supplier unit.

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If the Department was of the opinion that the supplier had inflated the value of intermediate goods so as to pass on excess credit, the same should have been done by challenging the assessment of the supplier unit. On the contrary, if the Department was of the opinion that the value of the final product was depressed, then they could have charged the assessee with under-invoicing of their product. But, no such action was taken.

Having approved the assessable value and payment of duty by supplier, the Department couldn't deny the consequential availment of CENVAT credit by the assessee. Therefore, The CENVAT credit availed of by the assessee could not be denied.

23. CCEx. vs. Gujrat State Fertilizers & Chemicals Ltd. [2008] 229 ELT 9 (SC): Inputs used to produce steam / electricity, which is used in manufacture of exempted fertilizers, are entitled to CENVAT Credit because the inputs used for generation of steam / electricity used for 'any other purpose' are also "inputs".

Rule 6 of the CENVAT Credit Rules, 2004 applies to "exempted goods" i.e. excisable goods subject to NIL rate of duty or wholly exempt from duty. However, since electricity is a non-excisable item, therefore, inputs used for generation of electricity cannot be denied credit under Rule 6.

24. UOI v. Marmagao Steel Ltd. [2008] 229 ELT 481 (SC): In case of imported goods directly transferred by an importer from the port of the import to the factory of the assessee, the relevant document evidencing payment of duty for the purposes of Rule 9 of CENVAT Credit Rules, in such case, would be bill of entry.

Since the assessee had produced bill of entry relating to imported scrap and had taken CENVAT credit of additional duty of customs paid thereon on the strength of such bill of entry, therefore, the CENVAT credit so taken could not be denied.

25. CCEx. v. CESTAT [2008] 230 ELT 209 (Mad.): In case the factory of the assessee is shifted to any other place, then, the assessee is entitled to the transfer of whole of the CENVAT credit lying unutilised in his account on transfer of inputs/capital goods to the new place.

The quantum of CENVAT credit cannot, in any case, be restricted to the CENVAT credit attributable to the inputs/capital goods so transferred.

26. Innovative Tech Pack Ltd. v. CCEx. [2008] 224 ELT 340 (SC)

Facts-

- An exemption from excise duty was available on the condition that the manufacturer shall not avail CENVAT credit in respect of the exempted products or any other products manufactured in the same factory.
- The assessee opted for such exemption in respect of his first factory; while he did not avail of such exemption in respect of his another factory and availed CENVAT credit in respect of same products manufactured in the another factory.
- The Department contended that since the assessee had opted for exemption, therefore, the exemption was to apply to all factories of the assessee and it could not avail of any CENVAT Credit.

Decision-

Held that, the said condition specifically provided that the manufacturer could not avail of Cenvat Credit in respect of all products manufactured in the same factory; such condition was not intended to apply to all factories of manufacturer. Therefore, the manufacturer had the option to not avail exemption in respect of another factory and avail CENVAT Credit in respect of products manufactured therein.

27. UOI v. Slovak India Trading Co. Pvt. Ltd. [2008] 223 ELT A170 (SC)

If the assessee opts out of the Cenvat Scheme or its unit is closed, then, the assessee is eligible for refund of utilized Cenvat credit, which is to be made in cash. There is no expression prohibition in Rules 5 or 5A of Cenvat Credit Rules in that regard.

Note: if the assessee opts out of Cenvat Credit scheme on account of any exemption, then, as per Rule 11(3) or 11(4), the unutilized credit is to lapse. Therefore, in that case no such refund can be claimed.

Central Excise Rules, 2002

Rule 21: Remission of duty

28. CCEx v. Balarampur Chini Mills Ltd. [2008] 223 ELT 34 (All.):

Loss of sugar due to spontaneous combustion is loss due to natural causes. Therefore, remission of duty is available in respect thereof. Such remission cannot be denied on the ground that the assessee should have taken preventive measure to avoid the loss, because question of preventive measure is applicable only in case of loss due to accident; not in case of loss due to natural causes.

KS: The Tax-Age**Rule 25: Confiscation and penalty****29. CCEx v. Rama Wood Craft P. Ltd. [2008] 225 ELT 348 (Tri. -LB)**

Penalty under Rule 25 of the Central Excise Rules, 2002 cannot exceed higher of –

- (1) the duty of excisable goods in respect of which any of the contravention has been committed, or
- (2) Rs. 2000.

Therefore, the penalty, as aforesaid, is the maximum penalty imposable. Accordingly, if the duty exceeds Rs. 2000, the maximum penalty shall be the amount of duty; and if the duty is less than Rs. 2000, the maximum penalty shall be Rs. 2000. The Central Excise Officer has the option to impose a penalty lower than the maximum.

Further, Rule 25 is subject to the provisions of section 11AC of the Act; that is, in cases pertaining to fraud, collusion, wilful misstatement, etc., with an intent to evade payment of duty, penalty shall be imposable u/s. 11AC, and not under Rule 25.

GENERAL PROCEDURES**30. BDH Industries Ltd. v. CCEx. [2008] 229 ELT 364 Tri. (LB):**

The assessee, by mistake, debited an amount in excess of the duty payable by him in his PLA/CENVAT Account. The assessee, thereafter, requested the Department to allow him to take the credit of such excess payment in his PLA/CENVAT A/C. The Department denied assessee's request and asked it to file claim for refund u/s. 11B.

Held that, there is no provision under the Central Excise Act and rules allowing *suo motu* taking of credit or refund without proper sanction by the Central Excise Officer. Any correction in PLA/CENVAT A/c. requires Department sanction. Therefore, any excess payment by mistake or on account of clerical/arithmetical error has to be claimed by way of refund application filed u/s. 11B.

31. Ratan Melting and Wire Industries (2008) 231 ELT 22 (SC): The landmark judgments provided by five judge constitution Bench are mentioned below-

→ **CBEC circulars are binding on Departmental authorities and not on assessee, appellate authorities or court:** According to section 37B, the Departmental authorities are bound to observe and follow the orders or instructions or directions issued by the CBEC in exercise of the powers conferred by the Act. Hence, the orders passed by Departmental authorities cannot be contrary to such circulars. However, the CBEC circulars are not binding upon the assessee, Appellate Tribunal or the courts.

→ **Circular contrary to the statutory provisions has no existence in law:** The Board has no power to issue instructions or orders contrary to the provisions of the Act. It can only issue such direction as is necessary for the purpose of and in furtherance of the provisions of the Act. A circular having contrary to the statutory provisions is void. Any circular issued, without any jurisdiction in this regard with the Board, can, at best, be regarded as administrative direction, which cannot take away statutory powers of a Central Excise Officer under the Act. Such directions can, at the highest, be followed by Central Excise Officers, as a matter of propriety; however, if an Officer still adjudicates contrary to such circulars, it would be not to be a ground to set aside the adjudication.

→ **Revenue can file appeal regardless of the interpretation placed by Circular:** In case of a circular favorable to the assessee, the assessee would not file an appeal, as the view is in his favour; and it has to be the revenue authorities who have to question that. If the Revenue cannot file questioning a circular placing interpretation in favour of the assessee, then, there will be no scope for filing an appeal. In other words there would be no scope for adjudication by the High Court or the Supreme Court, which would be against the concept of supremacy of law laid down by the Constitution. It is for the courts/judiciary to interpret the law and not the Board/ Department. Therefore, the revenue can file appeal regardless of the view expressed in a CBEC circular.

→ **The Judgment of the Courts is binding on over all authorities:** When the SC or a HC declares the law on the question arising for its consideration, then, in view of the express mandate of the constitutions, the law so laid down is binding on all courts/tribunals, bodies and authorities falling within its jurisdiction. The circulars of the Board cannot prevail over the law laid down by the SC/HC.

Thus, if a judgment of the SC/HC is available on a subject, then, regardless of any circular, all courts/tribunal/other authorities are bound to follow the judgment of the SC/HC while disposing of the case before them.

PROVISIONS RELATING TO SSI**32. Nirlex Spares Pvt. Ltd. v. CCEx. [2008] 222 ELT 3 (SC)**

SSI exemption cannot be denied merely because the assessee has used a specific shape/ design on the pack of its goods, which is same as the design/shape appearing on the visiting cards of executives of another company, since a mere design/shape used on visiting cards cannot amount to 'brand/trade name' of another company.

33.CCEx v. Superior Products [2008] 230 ELT 3 (SC): Where the two unit have separate legal identity with separate capital, premises, machinery and labour; the fact that they are managed by same person or that their products are same cannot mean that they are dummy units and their clearances should be clubbed for the purposes of SSI-exemption.

Facts: The assessee, a partnership firm engaged in manufactures of pet bottles, had two partners Mrs. R and Mrs. T. M/s. Superior pet pvt. Ltd. was also engaged in manufacture of pet bottles and the major share holders and directors of the company were Mrs. R and Mrs. T (Mrs. R had 18% and other major part with Mrs. T). Both assessee firm and company were being managed by Mrs. R.

The firm and company had separate capital investment, separate machinery, separate labour workforce, separate premises & separate operations. Both of them were claiming SSI- exemption.

Department contended that since both the company and the firm were being managed by Mrs. R, hence, the actual manufacturer was Mrs. R. The creation of corporate veil was only with a view to avoid excise duty. Therefore, clearance of firm and company were liable to be clubbed and since the aggregate exceeds SSI-eligible limit, hence, no exemption was available to them.

Verdict: In case of professionally managed business, the management remains entirely separated from ownership. Therefore, the ownership, not the management, is a criteria.

APPEALS AND REVISIONS**34. Punjab Fibres Ltd. v. CCUS & C.EX. [2008] 223 E.L.T 337 (S.C.)**

- **Condonation of delay-** No provision for condonation of delay exist in Section 35H of Central Excise Act, 1944. In other words, the legislative intent is clear that the parliament never intended that delay in filling the reference application under section 35H could be condoned.
- **Power of High Court to condone delay-** High court has no power to condone delay in filling reference.

35. Sree Ayyanar Spinning & Weaving Mills Ltd. v. CIT [2008] 229 ELT 164 (SC)

Application made within 6 months can be disposed of even after 6 months: When an application for rectification of order was made by the assessee to the Appellate Tribunal within 6 months from the date of the original order, then, the Tribunal cannot reject the same after the expiry of 6 months on the ground that the time-limit of rectification of 6 months has expired. Since it was the Tribunal, which took its own time to dispose of the application, the assessee should not suffer.

Therefore, in case of application for rectification made within 6 months, the Tribunal has the power to dispose of the same even after expiry of said 6 months.

36. ACIT v. Sarashtra Kutch Stock Exchange Ltd. [2008] 230 ELT 385 (SC)

Non-consideration of Supreme / High Court judgment – Mistake apparent from record: Non-consideration of the decision of a judicial High Court or that of the Supreme Court results into a 'mistake apparent from record'. Since the judicial decisions act retrospectively i.e. they declare the law what has been at all material times, therefore, even if such decision is rendered subsequent to the passing of original order, the same would constitute 'mistake apparent from record'.

Therefore, if the Appellate Tribunal fails to consider any judgment of jurisdictional High Court or the Supreme Court while passing an order, then, it may rectify such order in accordance with such judgment even if such judgment was not brought to the notice of the Tribunal.

37. Monotosh Saha v. Special Director, Directorate of Enforcement [2008] 229 ELT 492 (SC)

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Requirements for stay / Dispensation of Pre-deposit: Petitions seeking stay of demand should not be disposed of in a routine manner; the same should be disposed of only after taking into consideration the factual scenario involved. Mere establishment of a *prima facie* case wouldn't entitle stay of demand.

The two conditions governing dispensation of pre-deposit are –

- (i) it must be shown that the pre-deposit would cause 'undue' hardship to assessee i.e. the requirement of pre-deposit is excessive / disproportionate than what the circumstances warrant (an example thereof may be genuine 'economic crisis'); and
- (ii) the stay should be granted subject to imposition of conditions to safeguard the interest of revenue i.e. conditions like furnishing of security, guarantees, etc., may be insisted upon depending on the facts and circumstances of each case.

Penalty; Interest and Demand
38. CCEx. v. Lajya Dyeing & Bleaching Works [2008] 224 ELT 345 (SC)
Facts-

- The assessee, a job worker, was engaged in processing man-made fabrics received from principal supplier. The assessee undertook to discharge all duty liabilities.
- The assessee received man-made fabrics on declaration from the principal supplier that the said man-made fabrics had polyester content not exceeding 70%; processed the same and cleared the processed fabrics claiming partial exemption available to man-made fabrics having polyester content not exceeding 70%.
- On chemical examination by the Department, it was found that polyester content in man-made fabrics supplied to the assessee was more than 70% and it was not entitled to partial exemption. Therefore, the Department invoked extended period of limitation against the assessee contending misdeclaration by the assessee.

Decision-

- **Held that,** there was no requirement for the assessee-processor to verify the correctness of declaration furnished by the principal suppliers. Further, there was no allegation that the assessee was a party to such misdeclaration by the principal supplier. Therefore, extended period of limitation could not be invoked against the assessee.

39. CCEx. v. Dugar Tetenal India Ltd. [2008] 224 ELT 180 (SC)

Where, in order to avail SSI exemption, the assessee had wrongly declared that brand name used on goods cleared by it was owned by it, it was evident that the assessee had willfully misstated/ suppressed the facts with an intent to evade payment of duty. Hence, extended period of limitation was invocable in that case.

40. Geo Tech Foundation & Construction v. CCEX. [2008] 224 E.L.T 177 (S.C.)
Facts-

- Assessee manufactures PSC girders and cleared it without payment of duty.
- The Authority issued a show cause notice after the statutory period of 6 months.
- The Stand of the assessee before the CESTAT was that the show cause notice was issued beyond the statutory period of 6 months.
- Earlier notice was withdrawn and second shows cause notice issued on 8-5-1996.

Summary-

- **Extended period-** When First show cause notice was issued; extended period of limitation was not resorted to. A notice should ordinarily be issued within a period of 6 months (as the law then stood) i.e. within the prescribed period of limitation but only in exceptional cases, the said period could be extended to one year or five years, as the case may be. When in original notice, such an allegation had not been made; the same could not have been made subsequently as facts alleged to have been suppressed by the assessee were known to Department. Hence, Extended period of limitation not available under section 11A of the Act.

41. CCEx. v. Rucha Engineering Pvt. Ltd.[2008] 223 ELT 161 (Bom.)

In case of retrospective increase in rate of duty, the assessee pays differential duty liability arising out of such increase immediately after receipt of knowledge of such increase, then, interest on differential duty cannot be demanded from the retrospective date of such increase.

42. CC v. MMK Jewellers [2008] 225 ELT 3 (SC)

During stock-checking conducted at the premises of the assessee, it was found that the had not maintained proper records for accounting of imported gold and wastage claimed by the assessee was excessive. A show-cause notice was issued after expiry of 2 years therefrom in order to recover differential customs duty.

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Held that, when all the facts were within the knowledge of the Department during the course of stock-checking, the Department couldn't invoke extended period of limitation alleging suppression of facts by the assessee. Therefore, the issue of show-cause after expiry of about 2 years was barred by limitation.

Held further that, customs section 114A is a mirror image of proviso to customs section 28(1). Therefore, where extended period of limitation is itself not invocable, no penalty can be imposed under the said section 114A.

43. UOI v. Dharamendra Textiles Processors [2008] 231 ELT 3 (SC)

Proviso to Section 11A & Section 11AC: Proviso to section 11A relating to extended period of limitation and section 11AC relating to imposition of penalty are identically worded. It is for the Revenue to establish that the extended period of limitation is invocable. Once it is established that the extended period of limitation is invocable, the levy of penalty u/s. 11AC is automatic.

Mens rea not an essential ingredient for imposition of penalty: Penalty u/s. 11AC is a civil liability enacted to provide for revenue loss. Once it is established that the assessee had resorted to fraud, collusion, etc. with an intent to evade payment of duty, the presence of *mens rea* viz. guilty and offensive mind on the part of the assessee need not be proved. The imposition of penalty becomes automatic.

Penalty and its quantum, both, fixed and mandatory: Since section 11AC uses the expression 'shall be liable to pay', therefore, once the conditions set out in section 11AC are fulfilled, the imposition of penalty follows and is mandatory in nature. The quantum of such penalty is also fixed as being equal to duty. There is no discretion with the Central Excise Officer not to impose penalty or to impose a lesser penalty than the amount equal to duty.

44. UOI v. Shreeji Colour Chem Industries [2008] 230 ELT 199 (SC)

While the Interest on refund provided by law is to be granted to the assessee even without a written demand by the assessee in this respect, however, equitable interest i.e. interest claimed on equitable grounds in absence of statutory provisions, can be granted only on written demand being made in this behalf.

45. Deepak Agro Foods v. State of Rajasthan [2008] 228 ELT 510 (SC)

Difference between void assessment and illegal /irregular assessment: An assessment made without inherent jurisdiction (*e.g., assessment made after expiry of time-limit specified in this behalf*) is null and void and doesn't exist in the eyes of law. The defect of jurisdiction cannot be cured even by consent of the parties.

However, an assessment made in wrong exercise of jurisdiction or an assessment not made in accordance with procedure laid down by law or that not made as per principles of natural justice, can, at best, be regarded as 'illegal or irregular order'. The same cannot be regarded as 'null and void'. The defect in 'illegal order' is capable of being cured and can be so cured, generally, by way of remand.

46. Vinod Kumar Agarwal v. UOI [2008] 223 ELT 19 (Bom.)

The Chief Commissioner has the absolute power u/s. 137(3) of Customs Act (9A of the Excise Act) to compound any offence subject, of course, to the specific provisions of the Act and the compounding rules. The power of the Board to issue circulars u/s. 151A of Customs Act (37B of Excise Act) is limited to the matters pertaining to levy of duty or classification of goods. The Board has no power to issue circulars restricting the powers of Chief Commissioner in relation to compounding of offences.

Therefore, **Circular No. 54 / 2005** providing that compounding application from –

- (a) a person who has earlier exercised compounding option in respect of goods valuing more than Rs. 1 crore; or
- (b) a person who has been convicted after date of publication of compounding rules,

should be rejected, is *ultra vires* section 137(3) and is void to that extent.

47. J.P.Tobacco Products Pvt. Ltd. v. ACCEX. [2008] 229 ELT 325 (SC)

Prosecution cannot be continued / initiated when demand and penalty set aside -

The Appellate Tribunal set aside the demand and penalty raised against the assessee, which order became final on the Revenue not filing any appeal against the same.

Since the demand and penalty had been finally set aside, therefore, there remained no basis for contribution of prosecution on the charge of evasion of duty by the assessee. Accordingly, the prosecution was to be dropped.

The same view was held in *CCEX. V. Parsin Chemicals Ltd. [2008] 230 ELT 4 (SC)*. Where the Tribunal order setting aside demand and penalty has been upheld by the Supreme Court, the quashing of the prosecution is automatic.

CUSTOMS**Introduction****48. Aban Loyd Chilies Offshore Ltd. v. UOI [2008] 227 ELT 24(SC): Deemed territory of India:**

It was held in this judgment that though section 2(27) defines “India” to include territorial waters of India, however, -

- since the Customs Act, 1962 and Customs Tariff Act, 1975 have been extended to “designated areas” and other areas of the Continental Shelf and the Exclusive Economic Zone of India,
- therefore, by virtue of deeming fiction of the Maritime Zones Act, the said areas form part of the territory of India for the purposes of the Customs Act, 1962 and the Customs Tariff Act, 1975.

Implication of the aforesaid deeming fiction and judgment on scope of levy of customs duty: The implication of the aforesaid deeming fiction and judgment is that since territorial waters of India or the ‘designated areas’ of the Continental Shelf or Exclusive Economic Zone are ‘India’, hence, -

- (a) any goods produced or manufactured within such areas and brought to the mainland of India shall not be regarded as ‘imported goods’ and will not be liable to customs duty;
- (b) any goods brought from any foreign country into such areas will be treated as ‘import’ and, hence, liable to customs duty; and
- (c) any goods supplied from the mainland to such areas shall not be treated as ‘export’ and consequently, no export benefits shall be available in respect of them;

Provisions in respect of mineral oils (including petroleum or natural gas): Mineral oils produced in any place in Continental Shelf and Exclusive Economic Zone of India when brought to the mainland will not be liable to customs duty as ‘imports’. Similarly, goods supplied from the mainland to such place in connection with prospecting or production of mineral oils shall not be treated as ‘export’. Further, any goods brought other country to such place in connection with prospecting or production of mineral oils shall be treated as ‘import’ and would be charged to duty accordingly.

49. CCEx. & Cus. Vs. Suresh Synthetics (2007) 216 ELT 662 (SC)

Question: Whether show cause notice issued for demanding customs duty in respect of clearances made by a 100% EOU in DTA is defective in law?

Verdict: The SC stated that in respect of clearances made by a 100% EOU in DTA, the duty to be paid by the 100% EOU was the duty of excise and not customs duty. The Apex Court pointed out that even the investigations made before the issuance of the show cause notice were made under the Central Excise act, 1944. Thus, the Supreme Court held that the show cause notice was defective in law and accordingly the demand was not maintainable.

Valuation**50. Initiating Explosives Systems (I) Ltd. (2008) 224 ELT 343 (SC):**

Facts: The assessee (importer) imported certain goods @ US \$ 15 p.u from a foreign supplier, who was holding 30% equity in Assessee Company. On account of increase in orders placed by the assessee, the import price was redybgd to US \$ 14.10 p.u.

Thereafter, the assessee entered into an agreement with the foreign supplier to import 100% of its annual requirements from such foreign supplier only and, accordingly, the price was reduced to US \$ 10 p/u.

On import being made at US \$ 10 p.u., the Department rejected the transaction value contending that the price was influenced by relationship and valued the imports at transaction value of earlier imports i.e at US \$ 14.10 p.u under Rule 4.

Decision-

- Merely because the foreign supplier held 30% equity in the assessee-company, the same would not mean that the assessee and foreign supplier are ‘related’;
- Rule 4 provides for assessment on the basis of identical goods imported by some another importer. The imports earlier made by the importer cannot be termed as ‘identical goods’ or ‘contemporaneous imports’ and therefore, no assessment can be made on the basis of the same;
- The fact that the assessee had made bulk imports could be a reason for reduction of import price. In absence of any evidence from the Department to prove under valuation, the price declared by the assessee was acceptable.

51. WEP Peripherals Ltd. vs. CC (2008) 224 ELT 30 (SC)

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In case price of imported goods is lowered on account of bulk orders, this fact should be taken into consideration and the value of imported goods should be computed accordingly. Further, royalty payment for technical assistance, which is not relatable to import goods in any manner, cannot be included in value of imported goods.

52. CC v. J.D. Orgochem Ltd. [2008] 226 ELT 9 (SC)**Facts:**

- The assessee imported certain goods at US\$ 13.2 per Kg. The same were earlier imported by the assessee at US\$ 18.7 per Kg.
- Since the assessee was the only importer of such goods, the customs authorities, treating the earlier imports as contemporaneous imports, enhanced the value of the imported goods to US\$ 18.7 per Kg.
- The assessee submitted that due to lesser demand in the international market, the prices were declining. The evidences showing that the prices were further declining were also submitted.
- The Department contended that since the assessee had failed to prove the downward trend in international prices, therefore, the assessee's arguments were not acceptable.

Decision:

- The burden to prove that transaction value is not 'genuine' is on the Department. The Department must produce evidences of contemporaneous imports to reject invoice / transaction value.
- The contemporaneous imports have to be the imports made by other persons. The imports made earlier by the importer cannot be regarded as contemporaneous imports.
- The assessee's submission that international prices have declined was to be considered.
- Since the Department failed to produce contemporaneous evidence to reject transaction value, hence, the transaction value of US\$ 13.2 per Kg. was acceptable.

53. Bussa Overseas Properties Ltd. Vs. CCus (2007) 216 ELT 659 (SC)

Facts: It was claimed by the Department that the assessee had undervalued goods imported by him. It was submitted that a part of the consideration was paid to the foreign supplier subsequently in cash and cheque and no duty was paid on it. The Department relied on some unsigned Xerox copies of documents in support of its case.

Question: Can unsigned Xerox copies of documents be relied upon for claiming under valuation of imported goods?

Verdict: The SC examined the documents placed on record and was in agreement with the finding of fact recorded by the Tribunal that there was no evidence of under valuation particularly when the Department was relying on unsigned Xerox copies of the documents in support of its case. The Apex Court added that even the contents of those documents did not support the case of department.

Types of Customs duty

54. Super Cassettes Industries Ltd. v CC [2008] 225 ELT 401 (SC): Goods sent abroad for repairs when re-imported into India are liable to customs duty as if they had been imported for first time in India.

Decision:

- As per Section 20 read with the definition of "import" as given u/s. 2(23) of the Customs Act, imported goods would include re-imported goods as well and therefore the goods sent / exported out of India and re-imported would also be liable to payment of duty in the same manner in which it would have been liable if imported for the first time in India.
- For levy of additional customs duty, it is not material as to after what process an article is imported or re-imported into India. The only test is whether the imported article is one which has been manufactured or produced. In the case, the product re-imported is magnetic head which is a manufactured product. Hence, the same is liable to additional duty of customs u/s. 3 of CTA, 1975.

In this connection, the Central Government has granted concessions under section 20 Chapter- 7. The importer is liable to pay basic customs duty as well as additional customs duty only on the 'Fair cost repairs + Insurance and freight, both ways'.

55. Lohia Sweet Products Vs. CC(2008) 224 ELT 349 (SC)**Facts –**

- There was an exemption notification exempting 'copper waste and scrap used within the factory of production for manufacture of handicrafts' from excise duty. The assessee imported copper waste and scrap for use within factory of production for manufacture of handicrafts and claimed exemption from additional duty of customs leviable u/s 3 (1) of Custom Tariff Act, 1975.
- The department denied the said exemption to assessee contending that the exemption notification was not applicable to imports, as it was intended to exempt copper waste and scrap generated within the factory of production of manufacture.

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- It was nowhere required in the notification that only the copper waste and scrap generated in the factory of production would be exempt. The mere fact that the assessee had imported copper waste and scrap would not make any difference. Therefore, the copper waste and scrap imported by the assessee and used in the accordance with the exemption was not liable to additional duty u/s 3(1) of CTA, 1975.

Stores

56. Aban Lloyd Chilies Offshore Ltd. v. UOI [2008] 227 ELT 24 (SC): Oil rigs located in Continental Shelf /Exclusive Economic Zone of India are not 'foreign going vessels' and hence, imported stores consumed thereon will not be eligible for exemption u/s. 87.

Decision:

- **Oil rigs continental shelf/EEZ, not foreign going vessels:** The goods imported by the assessee for consumption on board on 'oil rigs' were 'stores', as they were for use on oil rigs, which are vessels. However, the oil rigs proceeding to or carrying out operations in, continental shelf/ exclusive economic zones of India, which are deemed to be a part of Indian territory, would not be a foreign going vessels, as the oil rigs proceed from the territory of India to an area which also deemed to be a part of the territory of India.
- **Imported stores consumed on 'oil rigs' liable to import duty:** Since the oil rigs were located in within the territory, which is deemed to be a part of India, therefore, the stores consumed on such oil rigs were consumed in 'India' to which the Customs Act has been extended. Therefore, the supply of imported spares or goods or equipments to the rigs by a ship will attract import duty.

Consumption of 'oil rigs' not entitled to benefit of section 87: Neither the 'oil rigs' nor the ship employed for transshipment of the goods to the oil rigs were 'foreign going vessel'. Therefore, the stores transhipped to the oil rigs and consumed thereon were not entitled to exemption u/s. 87.

Search and seizure

57. Kuresh Laila Vs. CC (2005) 189 ELT 45 Tri. (Chennai)

The goods imported by post parcel and declared as 'memory modules' by the foreign supplier were actually found to be RAMs. The Department alleging misdeclaration by the importer, confiscated the goods u/s 111 and imposed penalty u/s 112.

Held that the description and value of goods, on the label, declared by the foreign supplier cannot be regarded as misdeclaration by the importer. Hence, the allegation of misdeclaration was wrong and thus, the goods were not liable to confiscation or penalty.

58. CC v. Suresh Jhunjunwala [2006] 203 ELT 353 (SC)

In case any export goods are overvalued for claiming higher DEBP, the same will come under the ambit of prohibited goods, since section 113(d) not only covers prohibition under the Customs Act but also under other laws.

Warehousing

59. Biecco Lawrie Ltd. vs. CC (2008) 223 ELT 3 (SC):

Facts -

- Kerosene Oil imported by importer was stored in a warehouse. An ex-bond bill of entry for home consumption was filed and duty was paid as per rate prevalent as on the date of presentation of such bill of entry (i.e. @ 10%) in accordance with provisions of section 15(1)(b); and the order for clearance for home consumption was passed.
- On account of highly combustible nature of Kerosene Oil, the importer made an application u/s. 49 to permit the storage of such Kerosene Oil in the same storage tank in the same warehouse until actual clearance for sale / use, which application was allowed.
- When the goods were actually removed from the warehouse for sale/use, the rate of duty got increased to 32%. The department demanded the differential duty.

Question -

- Whether the demand made by the Department valid in law?

Decision -

- The Kerosene Oil imported and warehoused by the importer had been cleared for home consumption on paying full duty payable as per section 15(1)(b).
- Once clearance for home consumption had been made and appropriate duty had been paid, nothing more remained to be paid by the importer. Further, the assessee had applied for storage of the Kerosene Oil in the same storage tank of the same

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warehouse u/s. 49, which specifically declares that provisions relating to warehousing do not apply to goods stored as per section 49.

- Therefore, the demand made by the Department was not valid in law.

60. Jk Cement Works v. CCEx. (2008) 223 ELT 138 (Raj.): Title to goods can be relinquished even after expiry of warehousing period if goods still lying in warehouse and order for clearance of such goods for home consumption not made.

Importation, Exportation and Transportation of Goods

61. CC v. Indian Rayon & Industries Ltd. [2008] 229 ELT 3 (SC)

When the assessee avails of conditional exemption under a particular notification, then, it cannot, thereafter, contend that the condition in such notification need not be fulfilled, be it on the ground that the benefit under another notification is available to him or otherwise.

Therefore, when the goods re-imported into India for repairs without payment of customs duty u/s. 20 are not exported within 6 months from the date of their re-importation, then, the exemption granted to the assessee can be withdrawn.

Miscellaneous

62. Pro Musicals v. JCCus. (Prev.) 2008 (227) ELT 182 (Mad.)

Question: What is the difference between detention and seizure?

SC clarified that the detention of goods is actually taking the custody of the goods and keeping it under restraint from being taken by the parties; but, the party is entitled to produce sufficient documentary evidence, and if he shows proof, he can take it. At that juncture, no question of seizure would arise. Once the property is detained by the department, unless and until the adjudication proceedings are over, and an order is passed for the return of the property, the officials cannot return the goods. Thus, the detaining of goods is for the purpose of enquiry, and if not sufficient proof coming forward, question of seizure of the property would arise.

Supreme Court referred to case of **Gian Chand and others v. State of Punjab** wherein it was stated that the seizure meant to take possession of the property contrary to the wishes of the owner of the goods in pursuance of a demand under legal right. Seizure involved not merely the custody of the goods but also a deprivation of possession of goods whereas in case of detention, the custody of goods was taken; but it would not involve a deprivation of possession of goods.

Service tax

63	Whether value of materials supplied free of charge by service recipient is includible in gross amount?	No, held that any material which is supplied free of charge by service recipient would not be includible in gross amount charged.
64	Whether value of spares and parts is includible to arrive at service tax liability in case of an Annual Maintenance Contract?	No, it was held that while computing the service tax liability in case of AMC, value of spares and parts would not be included in the gross amount charged and service tax was payable only on commission received in terms of AMC.
65	Whether parking charges includible in taxable value for 'mandap keeper service'?	Yes, because parking was provided as a part of 'mandap keeper service' and could not be used by any other person who had not booked mandap.
66	Is the activity of collecting human blood samples and separating serum from it covered within the ambit of business auxiliary service?	No, it was held that the drawing of test samples form part of testing and analysis service and it was not a separate service covered under business auxiliary service.
67	Whether 'retainer fee' is liable to service tax?	No, Since the basic requirement i.e., the transaction between a 'service provider' and a 'service recipient' must be on principal- to-principal basis, in this case was not satisfied the demand of service tax was liable to be vacated.
68	Whether the activity of powder coating on furniture supplied by the customer is covered under the scope of business auxiliary service?	No, the activity of powder coating was a process of manufacture in terms of section 2(f) the Central Excise Act, 1944. Therefore said activity did not fall within the definition of business auxiliary service.
69	Whether sale of lottery tickets is liable to service tax under the category of business auxiliary service?	No, lottery tickets were actionable claims and not goods within the meaning of Sale of Goods Act. Therefore, the petitioner could not be said to be rendering any service in relation to the promotion of their client's goods, or marketing of their client's goods, or sale of their client's goods.
70	Is the promotion of any service which is not taxable liable to service tax?	Held, that in respect of 'business auxiliary service', promotion of any service would be covered and it was not necessary that the service which was being promoted should be a taxable service only. The promotion of any service, whether taxable or non-taxable, would be taxable as a 'business auxiliary service'.
71	Whether loading and unloading in a mine is covered under 'cargo handling service'?	No, held that the activities under taken by the respondents were primarily in the nature of mining activities comprising of excavation, transportation and feeding of iron ores to the crusher plant and even though these activities might incidentally involve some loading and unloading, the same could not be covered under the category of 'cargo handling service' because the iron ore which was being carried could not be commercially called 'cargo'.
72	Does Management Consultant service cover marketing know-how?	No, know-how for marketing the products could not be considered to be in relation to the working system of the organization. It could never be considered as falling within the definition of 'Management Consultant'.
73	Is service tax leviable on hire purchase finance?	No, SC held that service tax was not leviable on hire purchase finance.
74	Whether clearances of two units, where there is no clear demarcation between the activities of two firms, should be clubbed?	Yes, if the activities show that in the actual running of the units there was no distinction and demarcation, the corporate veil needed to be lifted. In such as case, clearances were to be clubbed.
75	Can outdoor catering services provided to the employees within the factory premises be regarded as input service?	Yes, the canteen facility, although not specifically stated in the list of the activities mentioned in the definition, yet it was an activity relating to the business of the appellants and hence could be regarded as 'input service' within the ambit of rule 2(I) of the Cenvat Credit Rules, 2004.

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C: NOTIFICATIONS - 2008

The various notifications contains amendment relating to CENVAT Credit Rules, 2004 and Central Excise Rules, 2002. These are already upda