

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2008 and Notifications/Circulars issued up to 31.10.2008 which are relevant for June 2009 examinations.

PAPER – 8 : INDIRECT TAXES

Answer to question nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) Briefly explain the following with reference to the provisions of the Central Excise Act, 1944 as amended by the Finance Act, 2008:
- (i) Deposit of excise duty collected from the buyer.
 - (ii) Payment of interest on pre-deposit made by an appellant under section 35FF.
- (2×2=4 Marks)
- (b) Explain the provisions of section 3A of the Central Excise Act, 1944 regarding duty payable on the basis of capacity of production in respect of notified goods. (5 Marks)
- (c) X Ltd. of Kanpur was receiving goods in semi-finished condition from its sister concern based at Mumbai. After carrying out some operations, it cleared the goods at lower value than the landing cost of semi-finished goods received from the supplier. After verification of company's records, Revenue Department alleged that the value of the intermediate goods had been inflated by the supplier to pass on excess CENVAT credit and hence, Department wanted to disallow the excess credit so availed as per the provisions of rule 14 of the CENVAT Credit Rules, 2004. Explain, whether the contention of the Department is correct, giving reference to decided case law, if any. (5 Marks)
- (d) Discuss the validity or otherwise of the following statements giving reasons to support your answer:
- (i) Erroneous claim made by the assessee earlier precludes him from subsequently making a claim for correct classification.
 - (ii) Omission to give correct information can be construed as 'suppression of facts' for the purpose of the proviso to section 11A of the Central Excise Act, 1944.
- (2×3=6 Marks)

Answer

- (a) (i) The scope of section 11D was expanded by inserting sub-section (1A) which provides as follows:-

FINAL EXAMINATION : JUNE, 2009

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 are 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.

- (ii) New 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 (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three 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 after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.
- (b) Central Government, having regard to the nature of the process of manufacture/production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, can issue notification specifying that duty on such notified products will be levied and collected on the basis of production capacity of the factory. In this connection, new section 3A has been introduced under the Central Excise Act, 1944 by Finance Act, 2008 giving the provisions for ascertaining the production capacity, with effect from 10-5-2008. It provides as follows:-
- (i) Capacity will be determined by an officer not below the rank of Assistant Commissioner. Factors relevant to determine production capacity will be specified by rules framed by Central Government.
- (ii) The annual capacity fixed will be deemed to be annual production of such goods by the factory. If factory is not working for part of the year, annual production will be calculated on proportionate basis of the annual capacity of production. If factors determining production capacity are changed during the year, annual capacity will be re-determined on a proportionate basis having regard to such alteration or modification.
- (iii) The rate of duty payable based on production capacity will be notified by Central Government in rules. If factory does not work for a continuous period of 15 days or more in a month, duty calculated will be proportionately reduced, subject to prescribed conditions.

PAPER – 8 : INDIRECT TAXES

- (iv) Provision of payment of duty on the basis of production capacity does not apply to goods produced or manufactured, by a 100% Export Oriented Undertaking (EOU) and brought to any other place in India.
 - (v) Even if duty on goods notified u/s 3A is payable as per rates notified if similar goods are imported, CVD will be payable at the rate specified in Central Excise Tariff read with any exemption notification.
- (c) In CCE v. MDS Switchgear Ltd. 2008 (229) ELT 485, the Hon'ble Supreme Court held that CENVAT credit availed by the assessee was justified in this case.

CESTAT's view which was up-held by the Apex Court was that if the Department was of the opinion that the value of the final product was depressed, then they should have charged Kanpur unit with under- invoicing of their product, which had not been done in this case. Valuation as given by the Mumbai unit was duly approved by the Department and the payment of duty was also accepted. The CENVAT Credit Rules, 2004 entitled the recipient unit to avail the benefit of the duty paid by the supplier unit. A quantum of duty already determined by the jurisdictional officers of supplier unit could not be contested by the officers in charge of recipient unit.

- (d) (i) The statement is not valid. The question as to whether erroneous claim made by the assessee earlier precludes him from subsequently making a claim for correct classification was negatively answered by Rajasthan High Court in the case of Guljag Industries Ltd. v. Union of India 2008 (224) ELT 38. In this case, the appellant-the manufacturer wrongly classified the storage tank, motor rails and platforms manufactured by him under chapter heading 73.09 by taking it to be the storage of general use. Later on, he claimed the classification under chapter heading 84.19 on the ground that storage tank concerned, was actively used for manufacturing activity of the plant and was an integral part of the manufacturing process, therefore ought to be classified under chapter heading 84.19. Adjudicating Authority contended that classification once opted by the manufacturer could not be allowed to be altered subsequently. The High Court approved the contention of appellant that earlier claim to a particular classification by the manufacturer did not stop the assessee from claiming the correct classification under a different head by pointing out that the classification earlier claimed was erroneous.
- (ii) The statement is not valid. The question as to whether omission to give correct information can be construed as 'suppression of facts' for the purpose of the proviso to section 11A of the Central Excise Act, 1944 was negatively answered by Supreme Court while deciding the case of Continental Foundation Joint Venture v. CCEx. 2007 (216) ELT 177. The Supreme Court observed that the expression "suppression" used in proviso to section 11A of the Central Excise Act, 1944 should be construed strictly. Suppression means failure to disclose full information with intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. The Apex Court held that mere omission to give correct information is

FINAL EXAMINATION : JUNE, 2009

not suppression of facts unless it was deliberate to stop the payment of duty. The Apex Court further explained that an incorrect statement cannot be equated with a wilful misstatement. There cannot be a non wilful suppression or misstatement of a fact. Misstatement of fact must be wilful.

Question 2

- (a) Assessee purchased duty paid M.S. tubes from its manufacturers and cut into requisite length and were put into the swaging machine for undertaking swaging process whereby dies fitted in the machine imparted 'folds' to flat surface of M.S. tube/pipe. Department's view is that 'swaging process' amounts to manufacture whereas assessee denies. Discuss whether the Department's contention is correct by referring to section 2(f) of the Central Excise Act, 1944. You can take the help of decided case law, if any. (5 Marks)
- (b) Briefly explain the provisions relating to re-entry of the goods cleared for export under bond but not actually exported, in the factory of manufacturer as per notification issued under rule 19 of the Central Excise Rules, 2002. (4 Marks)
- (c) Raj & Co. furnishes the following expenditure incurred by them and wants you to find the assessable value for the purpose of paying excise duty on captive consumption. Determine the cost of production in terms of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and as per CAS-4 (Cost Accounting Standard):
- | | | |
|--------|---|--------|
| (i) | Direct material cost per unit inclusive of excise duty at 10% | Rs.880 |
| (ii) | Direct wages | Rs.250 |
| (iii) | Other direct expenses | Rs.100 |
| (iv) | Indirect materials | Rs.75 |
| (v) | Factory overheads | Rs.200 |
| (vi) | Administrative overhead (25% relating to production capacity) | Rs.100 |
| (vii) | Selling and distribution expenses | Rs.150 |
| (viii) | Quality control | Rs.25 |
| (ix) | Sale of scrap realized | Rs.20 |
| (x) | Actual profit margin | 15% |

(6 Marks)

Answer

- (a) This problem is based on the case law Prachi Industries v. CCEx., Chandigarh 2008 (225) ELT 16 (SC).

In this case, Department took the plea that swaging process amounted to manufacture and duty was payable on the goods manufactured by the appellant. However, the demand by the Department was not accepted. Consequently, the appeal was filed before the Supreme Court.

PAPER – 8 : INDIRECT TAXES

The Apex Court held that by reading section 2(f) of the Central Excise Act, 1944, it was clear that manufacture includes "any process incidental or ancillary to the completion of a manufactured product". In other words, incidental process must be an integral part of manufacture resulting into a new finished product which must be of a different physical shape, size and use. Moreover, the said process must impart a change of a lasting character to the original product or raw material. Supreme Court observed that swaging was the process which imparted a change of a lasting character to the plane MS pipe or tube by use of dies which existed in the machine. After the process of swaging, the identity of the plane MS pipe or the tube underwent a change in terms of form, shape or use. Hence, Supreme Court held that swaging amounted to manufacture and thus, excise duty was payable by the assessee.

- (b) The excisable goods cleared for export under bond or undertaking but not actually exported for any genuine reasons may be returned to the same factory provided:
- (i) such goods are returned to the factory within 6 months with original documents like invoice and ARE-1.
 - (ii) the assessee shall give intimation of re-entry of each consignment in Form D-3 within twenty four hours of such re-entry;
 - (iii) such goods are to be stored separately at least for forty eight hours from the time intimation is furnished to the Range Office or shorter period if verification is done by the Superintendent of Central Excise or through Inspector in charge of factory, about the identity of such goods with reference to the invoice, ARE-1 and daily stock account in respect of 5% of intimations, within another 24 hours of receipt of intimation.
 - (iv) the assessee shall record details of such goods in daily stock account and taken in the stock in the factory.
- (c) Computation of assessable value as per rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and CAS-4:-

S. No.	Particulars	Total cost Rs.
1	Material cost consumed–net of excise duty (Note-1)	800
2	Direct wages	250
3	Direct expenses	100
4	Works overheads (75 +200) (Note-2)	275
5	Quality control cost	25
6	Administration overheads (relating to production capacity)	<u>25</u>
7	Total (1 to 6)	1,475

FINAL EXAMINATION : JUNE, 2009

8	Less: Credit for recoveries/scrap/by products/ miscellaneous income	<u>20</u>
9	Cost of production (8-9)	1,455
10	Add: 10% as per rule 8 (Note-3)	<u>145</u>
11	Assessable value	<u>1,600</u>

Note:

1. Material Consumed: Rs. 880-Rs. 80 (excise duty) =Rs. 800
2. Indirect materials and factory overheads have been included in works overheads.
3. Actual profit margin earned is not relevant for excise valuation as per rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

Question 3

- (a) Is there any discretion under section 11AC of the Central Excise Act, 1944 to impose penalty less than the amount equal to duty evaded? Briefly explain based on case law, if any. (3 Marks)
- (b) Explain eligibility of CENVAT credit in each of the following occurrences during the month of January, 2008 for an assessee:
- (i) Assessee received a consignment of inputs on which excise duty paid was Rs.12,000. The invoice is dated 10th January, 2008. The transporters delivered the goods on 1st February, 2008.
 - (ii) Inputs on which CENVAT credit availed earlier Rs.5,000, were sent to production centre and on its way, the inputs were completely damaged due to careless handling. Inputs have become unfit for use.
 - (iii) CENVAT credit of Rs.20,000 was taken on certain inputs. Due to long storage they have become unfit and were sold as scrap for Rs.5,000 and excise duty is 14.42%. (3×2=6 Marks)
- (c) S & Co., a small scale unit, had cleared goods of the value of Rs.750 lakhs during the financial year 2007-08. Records show that the following clearances were included in the total turnover of Rs.750 lakhs :

	Rs. in lakhs
(i) Total exports during the year	200
(ii) Job work in terms of Notification No. 214/86	50
(iii) Job works in terms of Notification No. 83/94-CE	50
(iv) Clearance of excisable goods without payment of duty to a 100% E.O.U.	20
(v) Goods manufactured in rural area with others' brand	100

PAPER – 8 : INDIRECT TAXES

Find out whether the unit is eligible to avail concession for the year 2008-09, under Notification No. 8/2003 dated 1st March, 2003, giving reasons for your answer. 30% of total exports were to Nepal. (5 Marks)

Answer

- (a) The Supreme Court in case of Union of India v. Dharmendra Textile Processors 2008 (231) ELT 3 (SC) has held that there is no discretion to impose lower penalty under section 11AC of the Central Excise Act, 1944. In notes to clause, while introducing section 11AC, it has been mentioned that levy of penalty under the said section is a mandatory penalty.

Earlier, similar view was taken by Bombay High Court, in case of C.C.E. & C., Aurangabad v. Godavari Manar Sahakari Sakhar Karkhana Ltd. 2008 (228) ELT 172, wherein it pronounced that under section 11AC, there was no discretion vested with the authority to impose any penalty different than the one prescribed by the said provision. It was evident that legislature had not fixed any upper or lower limit, but prescribed only one quantum for penalty which was equal to the duty intentionally evaded.

Hence, there is no discretion under section 11AC of the Central Excise Act, 1944 to impose penalty less than the amount equal to duty evaded. The Court observed that the reason for such stiff and stringent provision was that since the penalty under section 11AC was a sort of penal provision, the said provision ought to be harsh and stringent.

- (b) (i) The assessee is eligible for CENVAT credit in the month of February, 2008 and not in the month of January, 2008 because the inputs have been received only in the month of February. Rule 4(1) of CENVAT Credit Rules, 2004 provides that the CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. As the inputs in the problem have been received in February, 2008, CENVAT credit can be taken only in the month of February, 2008.
- (ii) In this case, the inputs were issued from the stores to the production department but got damaged due to careless handling on its way to production centre. It is a clear indication that the inputs are removed from the stores which is to be construed as if they were removed for use 'in or in relation to manufacture'. Hence, there is no need to reverse the CENVAT credit already availed.
- (iii) In this case, since the inputs were subsequently sold as scrap, the assessee will have to reverse CENVAT credit of Rs. 20,000 already taken on inputs. Since, credit on inputs is available only for inputs used in or in relation to manufacture of final products, if the inputs are lost or destroyed in the store room, credit of duty paid on such inputs will not be available, as it cannot be said that they are used 'in or in relation to manufacture'.
- (c) In order to claim the benefit of exemption under Notification No. 8/2003 – C.E. in the financial year 2008-09, the total turnover of the unit should not exceed Rs.400 lakh in the

FINAL EXAMINATION : JUNE, 2009

preceding financial year 2007-08. For the purpose of computing the turnover of Rs. 400 lakh:-

- (i) Export turnover has to be excluded. However, export to Nepal and Bhutan cannot be excluded as these are treated as "clearance for home consumption". Therefore, clearances worth Rs.140 lakh will be excluded while clearances worth Rs.60 lakh exported to Nepal shall remain included.
- (ii) Job work under Notification No. 214/86-CE and under Notification No. 85/94-CE shall not to be included. Consequently, clearances worth Rs. 100 lakh are to be excluded.
- (iii) Clearance of excisable goods without payment of duty to EOU has to be excluded as it is considered as "deemed export". Therefore, clearances worth Rs. 20 lakh have to be deducted.
- (iv) Goods manufactured in rural area with other's brand name, the turnover which is cleared without payment of duty shall be included. Therefore, the clearances worth Rs. 100 lakh shall not be excluded.

Therefore, for the year 2008-09, the turnover of S & Co. for claiming the SSI exemption will be:-

= Rs. 750 lakh – (140 + 20 + 100) lakh = Rs. 490 lakh. Hence, S & Co. will not be entitled to exemption under Notification No. 8/2003 dated 01.03.2003 in 2008-09.

Question 4

- (a) Discuss with reference to the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, the following:
 - (i) Goods sold only through inter-connected undertaking
 - (ii) Valuation in case of job worker. (2×3=6 Marks)
- (b) As per section 11B(2) of the Central Excise Act, 1944, refund shall be granted to the applicant only in specified cases otherwise shall be credited to Consumer Welfare Fund. You are required to explain briefly such cases. (5 Marks)
- (c) Rule 9(2) of the Central Excise Rules, 2002 provides for exemption from registration to specified categories of persons. Explain briefly those categories. (4 Marks)

Answer

- (a) (i) Goods sold through inter-connected undertaking
If goods are sold only through inter-connected undertaking, the value shall be determined as per rule 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as follows:-
 - (i) When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of goods shall

PAPER – 8 : INDIRECT TAXES

be the “transaction value” if:-

- (a) the buyer is not a holding or subsidiary of assessee, or
- (b) buyer and seller are relatives, or
- (c) buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor, or
- (d) buyer and seller are so associated that they have interest, directly or indirectly, in the business of each other.

(ii) In any other case, price will be “normal transaction value” of buyer to unrelated person (as per rule 9 of the said rules).

(ii) Valuation in case of job work

Where the goods are manufactured by a job worker on behalf of a person, provisions of rule 10A (a new rule inserted from 1-4-2007) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 shall apply. Rule 10A provides that the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods to an unrelated buyer.

(b) Refund shall be granted by the Assistant Commissioner, on being satisfied that excise duty and interest, if any, paid on such duty is refundable, to the applicant only in the following cases:

- (i) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (ii) unspent advance deposits lying in the applicant's account current maintained with the Commissioner of Central Excise;
- (iii) refund of credit of duty paid on excisable goods used as inputs in accordance with rules made, or any notification issued, under the Act;
- (iv) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
- (v) duty of excise and interest, if any, paid on such duty borne by the buyer if he has not passed on the incidence of such duty to any other person;
- (vi) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by Notification in the Official Gazette, specify.

In other cases, the Assistant Commissioner shall make an order for credit of amount refundable to the "Consumer Welfare Fund".

(c) Central Board of Excise and Customs, as per the power given under section 9(2) of the Central Excise Act, 1944, vide Notification No.36/2001-CE. (NT) dated 26.06.2001, has exempted the following specified categories of persons from obtaining registration:

FINAL EXAMINATION : JUNE, 2009

- (i) Persons who manufacture the excisable goods, which are chargeable to nil rate of duty or are fully exempt from duty by a notification subject to the declaration to be made in a specified form.
- (ii) Small scale units having the slab exemption based on value of clearances under a notification. However, they have to give the declaration when their clearances touch Rs. 90 lakh.
- (iii) In respect of final products falling under chapter 61 or 62, the job-worker need not get registered if the principal manufacturer undertakes to discharge the duty liability.
- (iv) Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to certain prescribed conditions.
- (v) The person who carries on whole sale trade or deals in excisable goods except first and second stage dealer, as defined in the CENVAT Credit Rules, 2004.
- (vi) A hundred percent Export Oriented Undertaking or a unit in EPZ or a unit in SEZ licensed or appointed; as the case may be under the Customs Act, 1962.
- (vii) Persons who use excisable goods for any purpose other than the processing or manufacture of goods availing benefit of concessional duty exemption notification.
- (viii) Person who gets his goods manufactured on his account from any other person subject to the conditions that the said person authorizes the person actually manufacturing or fabricating the said goods, to comply with all procedural formalities under the Central Excise Act, 1944 and the rules made there under and to furnish information in order to enable the determination of value of the said goods.

Note: Any four points may be mentioned.

Question 5

- (a) State the categories of cases that cannot be settled as per section 32E of the Central Excise Act, 1944. (5 Marks)
- (b) Write a brief note on the following with reference to the Central Excise Act, 1944:
 - (i) Tampering or altering MRP after removal
 - (ii) Remission of duty on lost/or destroyed goods. (2×3=6 Marks)
- (c) Under what circumstances, the appellant shall be entitled to produce before the Commissioner of Central Excise (Appeals) additional evidence as per rule 5 of the Central Excise Appeal Rules, 2002? (4 Marks)

Answer

- (a) As per section 32E(1) of the Central Excise Act, 1944, an application for settlement is not entertained by the Settlement Commission under the Central Excise Act, in the following circumstances:

PAPER – 8 : INDIRECT TAXES

- (i) The applicant has not filed a return showing production, clearance and central excise duty paid in the prescribed manner.
- (ii) The applicant has not received a show cause notice for recovery of duty issued by the Central Excise Officer.
- (iii) The additional amount of duty accepted by the applicant does not exceed Rs. 3 lakh.
- (iv) An application/case is pending with the Tribunal or Court.
- (v) Any excisable goods or books of account/documents are seized and 180 days have not yet expired.
- (vi) Application pertains to interpretation of classification of excisable goods.
- (vii) The applicant, while filing the application, has not deposited the additional amount of excise duty accepted by him along with interest due under section 11AB.

Note: Any four points may be mentioned.

- (b) (i) Tampering or altering MRP after removal ;

Rule 5 of the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 provides that where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods. However, where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods.

- (ii) Remission of duty on lost/destroyed goods.

“Remission” means waiver or cancellation of excise duty legally payable. Rule 21 of the Central Excise Rules, 2002 provides that where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing.

- (c) As per Rule 5 of the Central Excise (Appeal) Rules, 2001, only under following circumstances the appellant shall be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceeding before adjudicating authority:

- (i) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or
- (ii) where the appellant was prevented by sufficient cause from producing the evidence which was called upon to produce by the adjudicating authority; or

FINAL EXAMINATION : JUNE, 2009

- (iii) where the applicant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; or
- (iv) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

PART B

Question 6

- (a) As per section 15 of the Customs Act, 1962, briefly discuss the date for determining the rate of duty and tariff valuation of imported goods. (3 Marks)
- (b) Referring to section 25 of the Customs Act, 1962, discuss the following:
 - (i) General exemption
 - (ii) Special exemption (2×2=4 Marks)
- (c) The assessee imported capital goods and deposited them in the warehouse. The said goods were not removed from the warehouse within the period permitted under section 61(1)(a) i.e. five years. Subsequently, the assessee filed an application for relinquishment of title of such warehoused goods. The Department contended that since the assessee did not file an application for extension of warehousing period before the expiration of five years' period fixed under section 61(1)(a), after expiration of the said period, the goods could no longer be termed as 'warehoused goods'. Therefore, the assessee lost its title to the same and consequently, it lost its right to relinquish its title thereto. It was further claimed that the relinquishment of title to the said goods ought to have been made by the assessee before the expiration of the warehousing period and not thereafter and therefore the goods were 'deemed to have been improperly removed from the warehouse'. Consequently, the assessee became liable to pay duty, penalty and interest with respect to the said goods as provided under section 72(1)(b) of the Customs Act, 1962. (5 Marks)

Discuss, whether the contention of the Department is correct, by referring to case law, if any.

- (d) K imported some old machinery from London claiming that the machinery was fully exempted from customs duty under a notification. Assistant Commissioner of Customs, the authority in original, differed and held that the machinery so imported was covered under a different heading and attracted customs duty. Therefore, K had to furnish bank guarantee for duty payable for release of machine.

Subsequently, the Assistant Commissioner of Customs ordered to encash the bank guarantee to realize the duty. This order was issued to K and immediately thereafter, the Customs Department invoked bank guarantee by sending request to bank for making payment to them. K contended that order of the Assistant Commissioner was appealable and the period of filing appeal was yet to expire. Hence the action of the Department

PAPER – 8 : INDIRECT TAXES

- was not correct. You are required to comment whether the action of customs Department is correct in law based on decided case law, if any. (5 Marks)
- (e) Whether the right of warehouse-keeper to recover the warehousing charges from the sale proceeds of the goods kept therein is superior to the right of the Revenue to recover custom duty? Answer briefly, by referring to section 150(2)(b) of the Customs Act, 1962. (3 Marks)

Answer

- (a) Section 15 of the Customs Act 1962 provides that the rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force-
- (a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section.;
 - (b) in the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;
 - (c) in the case of any other goods, on the date of payment of duty
- (b) (i) Special Exemption : As per section 25 of the Customs Act, 1962:
- If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty, any goods on which duty is leviable only under circumstances of an exceptional nature to be stated in such order. Further, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.
- (ii) General Exemption: As per section 25 of the Customs Act, 1962:
- If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon.
- (c) The facts of the given case are similar to the facts of the case of CCus v i2 Technologies Software (P) Ltd. 2007 (217) ELT 176 (Kar.)
- The High Court, while dismissing the Department's appeal observed that the owner of the goods (importer) though loses control over the goods when he deposits them in the warehouse, but he does not lose his title or ownership to such goods so long as they remain in the warehouse either during the continuance of the warehousing period or even after its expiration. Therefore, the High Court rejected the Department's contention that on the expiration of the warehousing period or on the expiration of extended warehousing period, the owner of the goods loses his title in respect of such goods and consequently, also loses his right to relinquish his title to such warehoused goods.

FINAL EXAMINATION : JUNE, 2009

The High Court elaborated that on a plain reading of the provisions of section 23(2), 47, 68 and the proviso to section 68 of the Customs Act, 1962, it is clear that the owner of warehoused goods has the right to relinquish his title to goods 'at any time before an order for clearance of goods for home consumption has been made in respect thereto'. There is no prohibition on relinquishing the title to such goods after the expiration of the warehousing period or after the expiration of the extended period. The High Court pointed out that the provisions of section 23(2) and proviso to section 68 make it clear that upon relinquishment of his title to any imported goods, including the warehoused goods, the owner of such goods shall not be liable to pay duty thereon and when the owner is not liable to pay duty, the question of paying any interest on the duty and penalty would not arise.

Therefore, in the instant case, the Department's contention is not correct.

- (d) Bombay High Court, in the case of *Ocean Driving Centre Ltd. v. Union of India* 2005 (180) E.L.T 313, had an opportunity to address the similar situation. In that case, the petitioner contended that he had a statutory right of appeal before the Appellate Authority and also he had a right to move an application to get the pre-deposit waived in terms of section 129E of the Customs Act, 1962. He further submitted that he had an arguable case on classification. The debatable question had resulted in release of goods subject to furnishing bank guarantee at the stage of provisional assessment. Had it not been a debatable issue, he would not have been allowed to claim release of goods on furnishing the bank guarantee, which was furnished to secure the dues of Department. The same was valid and should have been kept alive till the dispute was finally resolved. According to them, the order of assessment was not final and conclusive.

The High Court observed that it was not in dispute that the appeal period was yet to expire and that the order was an appealable order as per the Departmental circular no. 396/29/98-C.E dated 2nd June, 1998, the Department was expected not to resort to coercive action so long as the appeal period was not over. Hence, the Departmental action was contrary to their own policy. According to the High Court, it was not proper on the part of Department to encash the bank guarantee before the expiry of statutory period provided for filing appeal.

Thus, the stand taken by the Department was not tenable in law.

- (e) In the case of *Associated Container Terminals Ltd. v. Union of India* 2008 (226) E.L.T 169, Delhi High Court held that as per the words used in section 150(2)(b), the right of warehouse keeper to recover the warehousing charges from the sale proceeds appeared to be superior to the right of the Revenue to recover customs duty. The Court noted the following words used in section 150(2)(b):

“-----and other charges ,if any, payable in respect of goods sold ,to the carrier, if notice of such charges has been given to the person having custody of the goods”.

PAPER – 8 : INDIRECT TAXES

High Court observed that these words make it clear that it does not pertain to custom duty and refers to the payment of warehousing charges. So, it takes precedence over recovery of custom duty which is relatable to section 150(2)(e) of the Customs Act, 1962.

Question 7

(a) Compute the assessable value and customs duty payable from the following information:

- (i) F.O.B. value of machine 8,000 UK Pounds
- (ii) Freight paid (air) 2,500 UK Pounds
- (iii) Design and development charges paid in UK 500 UK Pounds
- (iv) Commission payable to local agent @ 2% of F.O.B., in Indian Rupees
- (v) Date of bill of entry 24.10.2007 (Rate BCD 20%; Exchange rate as notified by CBEC Rs.68 per UK Pound)
- (vi) Date of entry inward 20.10.2007 (Rate of BCD 18%; Exchange rate as notified by CBEC Rs.70 per cent UK Pound)
- (vii) C.V.D. is payable @ 16% plus education cess as applicable
- (viii) Special C.V.D. – as applicable
- (ix) Insurance charges have been actually paid but details are not available.

(6 Marks)

(b) What is 'redemption fine' in lieu of confiscation? What is the limit for imposing redemption fine under section 125(1) of the Customs Act, 1962? (4 Marks)

(c) Briefly explain the provisions of section 28BA of the Customs Act, 1962 regarding provisional attachment of property pending adjudication. (5 Marks)

Answer

7 (a) Computation of assessable value and duty thereon:

FOB value	8,000 UK pounds
Add: Design and development charges	500 UK pounds
Add: Freight (air) (Note-3)	1,600 UK pounds
Add: Insurance 1.125% of FOB (Note-4)	<u>90 UK pounds</u>
Total	<u>10,190</u>
Total in Rupees @ Rs. 68 per pound (Note-1)	Rs. 6,92,920
Add: Local agency commission	

FINAL EXAMINATION : JUNE, 2009

(2% of 8000 UK pounds)= 160 UK pounds × Rs. 68	Rs. <u>10,880</u>
C.I.F value	Rs. 7,03,800
Add: Landing charges @1%of CIF value	Rs. <u>7,038</u>
Assessable value	Rs. 7,10,838
Add: Basic custom duty @ 20% (Note-2)	Rs. <u>1,42,167.60</u>
Total	Rs. 8,53,005.60
Add: CVD @16.48%	Rs. 1,40,575.32
Add: Education cess (3% of custom duty) = 3% of (Rs. 1,42,167.60+ Rs. 1,40,575.32)=Rs. 2,82,742.92	Rs. <u>8,482.28</u>
Total for Special CVD	Rs. 10,02,063.20
Special CVD @4%	Rs. 40,082.53

Total duty payable: Rs. 1,42,167.60

Rs. 1,40,575.32

Rs. 8,482.28

Rs. 40,082.53

Rs. 3,31,307.73

or Rs. 3,31,308

Notes:

1. Exchange rate =Rs. 68 per UK pound (date of presentation of bill of entry)
2. Section 15 of the Customs Act, 1962 provides that rate of duty shall be :-
the rate in force on the date of presentation of bill of entry
or
the rate in force on the date of entry inward
whichever is later.
3. The air freight should not exceed 20% of FOB value.
4. Where the insurance charges are not ascertainable, such cost shall be 1.125% of FOB value of the goods.

(b) Redemption fine in lieu of confiscation:

Section 125 (1) of the Custom Act, 1962 provides that whenever confiscation of goods is ordered, the adjudicating officer may give option to the owner of the goods to pay fine in lieu of confiscation, if the importation or exportation of goods are prohibited under the Act or any other law for the time being in force.

PAPER – 8 : INDIRECT TAXES

However, if importation or exportation of goods was not prohibited, the option to pay redemption fine shall be given to owner of the goods. This is called 'redemption fine'. After payment of redemption fine, the goods are returned to the owner of goods. Section 125(2) of the Customs Act makes it clear that where any fine in lieu of confiscation of goods is imposed, the owner of goods or the person from whom the goods were seized, is liable to pay duty and charges in respect of such goods, in addition to the fine.

Limit for imposing the redemption fine

As per proviso to section 125(1) of the Customs Act, 1962, redemption fine up to market price of goods less duty chargeable thereon can be imposed. In addition, duty and other charges in respect of such goods are also payable.

- (c) Section 28BA of the Customs Act, 1962 provides for provisional attachment of property pending adjudication as under:
- (1) During the pendency of any proceeding under section 28 or 28B, the proper officer may provisionally attach any property belonging to the person to whom notice is served under section 28(1) or 28(B)(2), as the case may be, in accordance with the rules made under section 142 in this respect.
 - (2) When proper officer is of the opinion that the attachment is necessary for the purpose of protecting revenue interest, only then he can do so but before that the permission in writing from the Commissioner of Customs must be obtained.
 - (3) Such an attachment can be done for a period of six months from the date of order of Commissioner of Customs permitting for such an attachment.
 - (4) The period may be extended by Chief Commissioner of Customs for a further period or periods as he may deem fit. The reasons of such an extension shall be recorded in writing. The total period of extension in any case shall not exceed two years.
 - (5) If an application for settlement of a case is made to the Settlement Commission, period from the date of making the application to the date of an order passed by the Commission under section 127C(1) shall be excluded from the extended period mentioned in point (4) above.

Question 8

- (a) If any duty demanded or drawback paid is recoverable from a person, what is the procedure envisaged under section 142 of the Customs Act, 1962? (5 Marks)
- (b) Briefly discuss the provisions in relation to interest on drawback as per section 75A of the Customs Act, 1962. (3 Marks)
- (c) What is the time-limit provided for issuance of show-cause notice in section 28 of the Customs Act, 1962? (4 Marks)
- (d) What are the orders of Commissioner (Appeals) not appealable to Appellate Tribunal as per section 129A of the Customs Act, 1962? (3 Marks)

FINAL EXAMINATION : JUNE, 2009

Answer

- (a) Section 142 of the Customs Act provides following procedure for recovery of duty demanded or drawback paid:
- a. Deducting from any amount payable by any Customs Officer to such person.
 - b. Detaining and selling goods belonging to such person, which are under control of customs authorities;
 - c. Issuing a certificate to District Collector in whose district any property of the person is situated or where he carries on business.
 - d. Distraining and detaining any property belonging to the person and selling the same.
 - e. Recovering from successor by attaching goods, materials, machinery, plant etc. transferred to successor in trade or business.
 - f. Enforcing a bond executed under the Act.

- (b) Payment of interest on delayed payment of drawback

As per section 75A, where any drawback payable to a claimant under section 74 or 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, there shall be paid to the claimant, in addition to the amount of drawback, interest at the rate fixed under section 27A from the date after the expiry of the said period of one month till the date of payment of such drawback.

Further, if any drawback has been paid erroneously to claimant or it becomes otherwise recoverable, the claimant shall within a period of 2 months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AB of the Customs Act, 1962.

- (c) As per section 28, the time limit for issuance of show cause notice is as under:

- (i) In the case of import made by an individual for his personal use or by the Government or by any educational, research or charitable institution or hospital- within one year from the relevant date;
- (ii) In any other case -within six months from the relevant date.

Where any duty has not been levied or has been short levied or interest has not been charged or has been partly paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the time period shall be extended to five years.

Where the service of the notice is stayed by an order of Court, the period of such stay shall be excluded in computing the aforesaid period of six months or one year or five years as the case may be.

PAPER – 8 : INDIRECT TAXES

- (d) No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall have no jurisdiction to decide any appeal in respect of any order passed by the Commissioner of Appeals under section 129A, if such order relates to:
- (i) any goods imported or exported as baggage;
 - (ii) any goods loaded in conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination, if goods unloaded at such destination are short of the quantity required to be unloaded at that destination.
 - (iii) payment of drawback as provided in Chapter X and the rules made there under.

PART C

Question 9

- (a) State with reason whether service tax liability arises in the following cases:
- (i) Services provided by 'angadia' in undertaking delivery of documents or goods received from a customer to another person for a consideration.
 - (ii) Commission received by distributors for distribution of mutual fund units.
 - (iii) Consultancy services in the field of computer software engineering by consulting engineer. (3×2=6 Marks)
- (b) (i) What is the exemption provided to practicing Chartered Accountants under Notification No.25/2006 ST dated 13.7.2006 ? (2 Marks)
- (ii) Define the term 'gross amount charged' as per explanation (c) to section 67 of Finance Act, 1994, as amended, with reference to associated enterprises. (3 Marks)
- (iii) M, an assessee fails to pay service tax of Rs.15 lakhs payable by 5th January. He pays the amount on 16th January. What is the penalty payable by M? (4 Marks)

Answer

- (a) (i) Yes, the services provided by 'Angadia' will be covered under courier agency services. The Circular No. 96/7/2007 ST dated 23.08.2007 clarifies that angadias are covered within the definition of 'courier agency' [section 65(33) of the Finance Act, 1994 as amended]. Therefore, such services provided by angadia is liable to service tax under courier agency service.
- (ii) Yes, the services provided by distributors for distribution of mutual funds units are liable to service tax under business auxiliary service. The Circular No. 96/7/2007 ST dated 23.08.2007 clarifies that distributors receive commission from mutual fund for providing services relating to purchase and sale of mutual fund units. Services provided by such distributors are in the nature of commission agent and are, thus, liable to service tax under business auxiliary service [section 65(105)(zzb)].
- (iii) Yes, as per the Finance Act, 1994 as amended by Finance Act, 2008, "consulting services in the field of computer software engineering" have been included within

FINAL EXAMINATION : JUNE, 2009

the scope of taxable services provided by a 'consulting engineer'. Hence, the consultancy services provided in the field of computer software engineering by consulting engineer shall be liable to service tax.

- (b) (i) As per Notification No.25/2006 ST dated 13.07.2006, the taxable service provided or to be provided by a practising Chartered Accountant in his professional capacity to a client, relating to representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, is exempt from the whole of service tax leviable thereon.

- (ii) With effective from 10.05.2008, the definition of gross amount charged has been amended; now it reads as under:

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 is with any associated enterprise.

Here, associated enterprise has the meaning assigned to it in section 92A of the Income tax Act, 1961.

- (iii) Penalty payable is:

- (a) 2% of the amount of default per month

In this case, delay is of 11 days. Therefore,

$$\text{Amount} = 2\% \text{ of } (15,00,000 \times 11/31) = \text{Rs} 10,645$$

or

- (b) Penalty @Rs. 200 per day of default

$$= \text{Rs.} 200 \text{ per day} \times 11 = \text{Rs } 2,200$$

whichever is higher

Thus, penalty payable is Rs 10,645.