LEGENDZ *Professional Academy for* CA

INDIRECT TAXES – AMENDMENTS APPLICABLE FOR NOVEMBER 2009 EXAMS

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Amendments applicable for Nov 2009

BASIC CONCEPTS

1. ***Indian Cine Agencies v. CIT 2009 (SC)***
   Conversion of Jumbo rolls of photographic films into small flats and rolls in the desired sizes amount to manufacture

2. ***Fedders Lloyd Corporation v. CCE 2008 (SC)***
   Assessee had two branches, one in Delhi and another in Mumbai. Delhi branch manufactured condensing units which were cleared to Mumbai branch on payment of appropriate duty. Mumbai branch procured cooling units manufactured locally and combined the same with such condensing units. After conducting quality control tests and affixing the brand name, the Mumbai branch cleared the complete units along with pipe kits, electrical cord, remote control etc. The department contended that the process being carried out by Mumbai branch amounted to manufacture.
   Held that, neither the condensing units nor the cooling unit by itself, was a complete air conditioner. It was only when these two are put together, the complete unit of air conditioner fit for use came into existence. The air conditioner, so cleared by the Mumbai branch, was a commercially new article. Hence, the process amounted to manufacture.

3. ***CCEx., Chandigarh Vs Gurdaspur Distillery 2008 (SC)***
   During the manufacture of de-natured Ethyl alcohol, methane gas was being produced which was consumed captively by the assessee as a fuel in distillery. Revenue appealed that duty should be levied on the methane gas thereby produced. However, the assessee took the stand that since methane gas was not marketable as such, it was not dutiable.
   SC upholding the Tribunal's decision held that an article did not become liable to excise duty merely because of its specification in Schedule to Tariff, unless it was sealable 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 respondent was not marketable and hence, was not liable to duty.

4. ***White Machines v. CCE, Delhi 2008 (SC)***
   The assessee manufactured C.I. castings which were captively consumed for producing C.I. Chilled Rolls. These Chilled Rolls were exempted from payment of excise duty. Revenue alleged that C.I. castings which were intermediary product were marketable. Therefore, excise duty would be payable on them as the final product was exempt from duty. Delhi High Court observed that if the intermediary product (C.I. castings) was marketable, then the excise duty would be payable because the final product i.e. C.I. Chilled Rolls was exempted from the payment of excise duty. However, the Tribunal failed to record any finding regarding marketability of the said intermediary product i.e. C.I. castings. Hence, it was held that in the absence of any

findings recorded by the Tribunal regarding the marketability, duty could not be levied on the goods in question.

5. ***CCEx., Mumbai v. BOC (I) Ltd. 2008 (S.C.)***
The assessee, BOC, procured Helium from other manufacturers, affixed the labels and sold it under its own brand name. Revenue alleged that activity of affixing labels of their own name amounted to manufacture as per Note 10 of Chapter 28 of schedule to Central Excise Tariff.

In the case of CCE, Mumbai v. Johnson & Johnson Ltd 2005, SC held that mere packing for marketing or mere labeling or relabeling in the absence of any activity of repacking from bulk packs to retail packs would not render the product marketable directly to the consumer and not amounted to manufacture. SC observed that the respondent only labeled or relabeled the product and did not pack or repack from bulk packs to retail packs in the present case. Therefore, it held that the impugned activity did not amount to manufacture.

However, the chapter/section notes to the First Schedule have been amended to replace the word "and" with "or". Consequently mere labeling or relabeling, or packing or repacking, shall amount to manufacture.

6. ***Prachi Industries vs. CCE, Chandigarh 2008 (SC)***
SC held that swaging amounted to manufacture and thus, excise duty was payable by the assessee.

7. ***Board of Trustees v. Collector of Central Excise 2007 (SC)***

The assessee, Vishakhapatnam Port Trust, used Cement Concrete Armour Units for installation of break waters in the outer harbour for keeping the water calm. Concrete Armour Blocks were essentially in prismoid form, of certain specification and were made to order. These blocks were harbour or location specific. It was contended by the Department that the impugned units were excisable goods chargeable to excise duty. The Supreme Court observed that there was no evidence to show that such blocks could be used in any other harbour. The Department did not produce any evidence to show that impugned units were bought and sold in market as a commodity.

If the goods were not capable of being sold, then the test of marketability was not fulfilled. Thus, the Apex Court rejected the claim of the Department.

8. ***CCE, Mumbai-IV v. Hutchison Max Telecom P. Ltd. 2008 (Bom.)***
The respondent was engaged in providing mobile telecommunication services based on

GSM. The question that arose in this case was whether, the transmission apparatus installed at site room was goods and secondly if even so, whether they were marketable.

Bombay HC proceeded on the Tribunal's finding that what had been assembled and installed was a new commodity having a distinct name from the components from which it had been assembled. Now, considering the question of marketability of this new commodity, HC observed that, whenever the site had to be relocated, all the equipments like BTS/BSC, microwave equipment, batteries, control panels, air-conditioners, UPS, tower antennae were required to be dismantled into individual components, then they were to be moved from the existing site and reassembled at new site.

Also, the goods could not be re-erected as in the previous place as the requirement of each place was different. Hence, the court inferred that the tests of marketability and mobility were not satisfied.

As per order dated 15-1-2002 by CBEC, if items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled then the items would not be considered as movable and will, therefore, not be excisable goods. So, in the present case, the new product would not be considered as movable, and, hence not excisable. Therefore, it was held that though a new product came into existence yet, as it was not movable, saleable and marketable, it would not be subject to excise duty.

Classification of excisable goods

1. ***CCEx v. Dabur India Ltd. (2009)***
   When the classification list has been approved by the department i.e. the classification sought to be made by the assessee was within the knowledge of the Department, the Department cannot, subsequently, allege fraud / suppression of facts etc by the assessee.

   Therefore, though the demand contrary to approved classification list can be made by the department within statutory time limit of 1 year provided u/s 11A, however, the department cannot invoke extended period of limitation of 5 years to make such demand.

2. ***CCEx v. Ishaan Research Lab (P) Ltd. (2008)***
   Bio-products containing ayurvedic ingredients and produced under drug licence are classifiable as 'medicines', not 'cosmetics' even though they may incidentally enhance beauty/appearances of the users

3. ***CCus. & CEx. v. Phil Corporation Ltd. 2008 (SC)***

The respondent processed cashew nuts, peanuts, almonds etc. by dry roasting, oil roasting, salting, seasoning, packed them in different containers and cleared the same under its brand name. The respondent did not register with the Central Excise Authorities and cleared these goods without payment of excise duty on the ground that such goods were agricultural product classifiable under "Chapter 8- Edible Fruit and Nuts; Peel of Citrus Fruit or Melons" of the Central Excise Tariff and chargeable to nil rate of duty.

However, the Department claimed that such goods were classifiable under "Chapter 20 – Preparation of Vegetables, Fruit, Nuts or Other Parts of Plants" of the Central Excise Tariff on the ground that Notes to Chapter 20 of HSN provide that Chapter 20 includes "almonds, ground nuts, areca (or betel) nuts and other nuts, dryroasted, oil roasted or fat-roasted, whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives".

The Supreme Court observed that the CETA was broadly based on HSN. HSN contained a list of all the possible goods that were traded (including animals, human hair etc.) and as such the mention of an item had got nothing to do whether it was manufactured and taxable or not.

The Supreme Court reiterated that the HSN was a safe guide for the purpose of deciding issues of classification. In the present case, the HSN explanatory Notes to Chapter 20 categorically stated that the products in question were so included in Chapter 20. The HSN explanatory Notes to Chapter 20 also categorically stated that its products were excluded from Chapter 8 as they fell in Chapter 20.

Thus, the Apex Court held that processed cashew nuts, peanuts, almonds etc. manufactured by dry roasting, oil roasting, salting, and seasoning and packed in different containers and cleared under respondent's brand name would be classifiable under Chapter 20 of CETA.

4. ***CCEx., Delhi v. Insulation Electrical (P) Ltd. 2008 (SC)***

The assessee was engaged in the manufacture of Rail Assembly front seat (Omni), Adjuster Assembly slider seat, YF-2, Rear Back Lock Assembly and 1000 CC Rear Lock Assembly.

The assessee was classifying it under Chapter Heading no. - 8708.00 - Parts and Accessories of Motor Vehicles - attracting 15% rate of duty. The Department, after physically examining above mentioned goods, contended that goods manufactured by the assessee were integral parts of seats and hence were classifiable under Chapter heading no. – 9401.00 – Seats - attracting 18% rate of duty.

SC held that the aforesaid products merely improved the efficiency and convenience of the seat and did not form an integral part of the seat. Further, the seat was complete and fully functional without rail arrangement. Hence, SC concluded that the products manufactured by the assessee were accessories to and did not form a part of the seat car. Hence, Department's appeal was dismissed.

5. ***Ponds India Ltd. v. Comr. of Trade Tax, Lucknow 2008 (S.C.)***

The SC Court decided that Wikipedia, like all other external aids to construction, like dictionaries 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.

6. ***CCEx. v. Frick India Ltd. 2007 (SC)***

The assessee manufactured and cleared on payment of duty complete compressors, safety valves and filters under Heading 84.14, Heading 84.81 and Heading 84.21 respectively of the CE Tariff. The assessee also supplied bought-out items like V belt, motor, pulley, belt guard, gauge etc. to their buyers, as a package.

The Department contended that as per Rule 2(a) of the GIR, safety valves and filters should be classified along with the compressors as they were essential parts of the compressors.

The Supreme Court observed that Rule 2(a) of the GIR for Classification could not be applied in this case as:

(i) The compressors manufactured by assessee were removed as 'stand-alone' item and not in an unassembled or disassembled condition; and

(ii) Section and Chapter notes in Tariff and the Interpretative Rules did not provide guidelines for valuation of excisable goods because they decided the classification as *valuation is different from classification.*

Thus, the Apex Court upheld the Tribunal's decision holding that parts/accessories could not be classified as 'compressors' under Heading 84.14.

Valuation of excisable goods

1. ***Triveni Engg. & Inds v. CCEx. 2009 (SC)***

Increase in price after removal, which was not even thought of at the time of removal – Not includible:

The assessee cleared sugar manufactured by it at prices fixed by the Government and paid excise duty on such price. Subsequently, on appeal by the trade, the Supreme Court directed increase in the price with retrospective effect. The Government paid the difference between original price and increased price. The Department issued an SCN seeking to levy duty on such difference contending that such difference amounted to a consideration / additional – consideration for sale.

Held that, -

(i) The price for assessment would be the price at which the goods were cleared, and not the price subsequently determined. Any alteration / revision in price subsequent to clearance of the goods cannot affect computation of duty especially when there was no escalation clause in the purchase order. Duty cannot be sought to be levied if and when any sum is received from the buyer.

(ii) The amount so received could also not be regarded as additional consideration for sale. When the goods were sold, the price was the sole consideration for sale and no additional consideration was envisaged.

2. ***CCEx. V. Accurate Meters Ltd. 2009 (SC)***
The transportation and insurance charges are not includible in the value of the excisable goods when the sale is complete at the factory gate and goods are delivered to the buyer at the place of removal itself (viz. factory gate), hence, Rule 5 of Valuation Rules is not applicable.

3. ***CCEx. V. PepsiCo India Holdings (P) Ltd 2009 (SC)***
Even if the sale price of related person is taken for the purposes of assessment, the trade discount actually allowed by the related person shall be deductible. Amounts charged for services provided cannot be included in the assessable value of the excisable goods

- The assessee manufactured a ‘syrup’ containing soft-drink concentrate and sugar and sold the same to their marketing subsidiary M/s. Pepsi Cola India Marketing Company. A part of the syrup was sold by the assessee to others also. The marketing company would sell the same to retailers.
- The marketing company used to lease out dispensing machines to retailers. The dispensing machine was used for dilution and carbonation of the syrup for sale of soft-drink to consumers.
- The assessee paid central excise duty on its transaction value i.e. sale price to marketing subsidiary.
- Department held that since the assessee and the marketing subsidiary were related person, therefore, the assessable value shall be the sale price of the marketing subsidiary, that too without deducting discounts allowed by marketing subsidiary to its buyers. Further, the lease rental paid by the retailers to the marketing subsidiary towards dispensing machine was also held includible in assessable value.

When trade discount has been indicated in the invoices at the time of sale and there is no flow back / return of trade discount to the assessee-seller or its related person, the assessable value shall be computed after deducting such trade discount. Even if the valuation was sought to be made based on the sale price of the related person, the deduction of discount couldn’t be denied.

Sale of syrup and leasing of dispensing machine are separate activities with separate consideration. Even the definition of ‘transaction value’ doesn’t permit the inclusion of consideration for different activity in the assessable value of excisable goods. Therefore, the lease charges cannot be included in the assessable value of the syrup.

4. ***CCEx. v. Central Arecanut & Cocoa Marketing & Processing Co-op Ltd. (2008)***
The assessee, a job worker, used to manufacture ‘Eclairs’ brand chocolate, which was cleared in packs/jars containing about 100 pieces of ‘Eclairs’. Choclates were notified u/s 4A. Assessee discharged duty under Transaction value while the department demanded duty u/s 4A.

Held that, as per SWM Rules, a package containing more than 10 or more than 10 retail packages is defined as 'wholesale package' and there is no need to declare RSP on a wholesale package. Further, the packs containing chocolate were not intended for retail sale to consumers. Therefore, there was no need to declare RSP on the packs. Accordingly the packs/jars were assessable u/s 4 at transaction value

5. ***CCEx. v. Damnet Chemicals Pvt. Ltd. 2007 (SC)***

The registered offices of the assessee and one of the bulk buyers of the assessee were located in the same premises. Further, the factory of the assessee was located in the industrial area owned by the bulk buyer of the assessee, for which the assessee used to pay a suitable rent. The assessee gave 40% discount to the said bulk buyer. The Department questioned this discount on the ground that the two parties were related persons.

The Supreme Court observed that since there was no evidence of any mutuality of interest between the two parties, they would not be deemed to be related persons just because their registered offices were situated in same premises and manufacturing unit of the assessee was situated in industrial area owned by the buyer. There was no evidence that the assessee received anything extra from the bulk buyer other than the price charged. Also, there was no evidence that profit made by the bulk buyer had flown into the assessee company. Thus, the Apex Court held that there was nothing wrong in giving 40% discount to the bulk buyer.

6. ***Whirlpool of India Ltd. v. Union of India 2007 (SC)***

The assessee manufactured refrigerators which are notified under Sec. 4A. However, the appellant contended that refrigerator was not a packaged commodity and hence should not find place in the notification.

The Supreme Court observed that the refrigerator was a pre-packed commodity. The Apex Court elaborated that even if the package of refrigerator was required to be opened for testing, the refrigerator would still continue to be a pre-packed commodity and its sale would be a retail sale under SWM (Packaged Commodities) Rules, 1977.

The Supreme Court observed that MRP would have to be printed on package and the plea that MRP would be different depending on the area of sale would not absolve the manufacturer from displaying the MRP.

The Supreme Court held that the said notification issued under section 4A could not be faulted merely because appellant felt that refrigerator was not a packaged commodity. The Apex Court made it clear that once the notification issued under section 4A of the Central Excise Act, 1944 included the refrigerator, the appellant could not get out of the scope of notification without challenging the notification.

7. ***CCEx., Chandigarh v. Bharti Telecom Ltd. 2008 (SC)***

The assessee, Bharti telecom Ltd. (BTL), sold 75% of its product - electronic push button telephones - to Department of Telecommunications (DOT) and MTNL and remaining 25% in the open market through Siemens Telecom Limited (STL). STL was a joint venture company of BTL and STL. According to Revenue, BTL and STL

were related persons having mutuality of interest. And BTL sold its product to STL at a far less price than the price at which STL sold it in the whole sale market. So, the Revenue's contention was that assessable value in this case was the price at which STL sold the product in open market while as per assessee, assessable value was the price at which BTL sold the product to STL.
The Apex Court observed that BTL sold the goods to STL at or about the same price at which it sold the goods to DOT and MTNL. Therefore, it had not influenced the price at which the goods were sold by BTL to STL. Under the circumstances, transaction value should be taken to be the assessable value.

8. ***Commr. of C. EX., New Delhi v. India Thermit Corpoartion Ltd. 2008 (SC)***
In this case, the assessee, Asiatic Thermics Ltd. (ATL) was engaged in the manufacture of dry moulds and thermit welding equipments and was solely dependent on its Holding Company, India Thermit Corporation Ltd. (ITCL) for supply orders and all the goods manufactured by ATL had to be sold to ITCL for further marketing by them. It was held that even if ATL and ITCL were taken to be the related persons there was no material evidence that transaction between them had not been at arm length. The dry moulds manufactured by ATL were supplied to ITCL at or about the same price as to the third party. Thus, there was no under-valuation.

CENVAT Credit

1. ***Cenvat Credit in respect of goods procured from EOU***

If a manufacturer in India procures goods from EOU, he is entitled to avail Cenvat credit of duty paid by EOU while clearing the goods.

As per rule 3(7)(a), Cenvat credit in respect of inputs received from EOU is to be restricted as per below formula:

Calculations w.e.f. 05-12-2008 – *Cenvat credit available = X multiplied by {(1+BCD/200) multiplied by (CVD/100)}.*

2. ***Repro India Ltd. V. UOI (2009)***
The assessee was engaged in the manufacture of packaged software (excise duty 8%), stationery books (excise duty NIL). The printed books were entirely exported by it under bond without payment of duty.

The assessee claimed refund of CENVAT credit attributable to inputs used in the manufacture of printed books exported by it.

The Department contended that since the printed goods were already exempt from excise duty, they could not be exported under bond. Further, since the assessee didn't maintain separate accounts for inputs used in dutiable and exempted goods, the Department demanded 10% of the value of printed books under Rule 6(3) of the CENVAT Credit Rules, 2004.

Held that, Rule 19 of the Central Excise Rules, 2002, uses the term 'excisable goods', therefore, both dutiable and exempted goods can be exported under Bond.

Rule 6(6) of the CENVAT Credit Rules, 2004 provides that the provisions of sub-rules (1) to (4) thereof shall not apply to "excisable goods" removed without payment of duty, which are cleared for export under bond. Since Rule 6(6) uses the term 'excisable goods', which includes exempted goods as well, therefore, in case of exempted goods can be required. Therefore, the demand by the Department was unsustainable.

3. ***CCEx. V. Gujarat State Fertilizers & Chemicals Ltd. (2008)***
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.

Export and Warehousing

1. ***Pan Masala products notified u/s 3A – No export without payment of duty [Rule 14A of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 w.e.f. 5-3-2009]***
Notwithstanding anything contained in these rules or in Central Excise Rules, 2002

- No notified goods shall be exported without payment of duty, and
- No material shall be removed without payment of duty from a factory or warehouse or any other premises for use in manufacture or processing of notified goods which are exported out of India.

Procedures under Central Excise

1. ***Rule 9 of Central Excise Rules***

A person manufacturing Compressed Natural Gas (CNG) and has more than one premises requiring registration under the Act, which fall within the jurisdiction of one Chief Commissioner of Central Excise, he may obtain a single registration for all such premises with any of the Commissioner of Central Excise falling within the jurisdiction of the said Chief Commissioner, by submitting the details of all such premises along with the application for registration, subject to the condition that prior intimation shall be given before starting any additional premises subsequent to obtaining such registration.

2. Can all irregular, erroneous or illegal assessment orders are held to be null and void?

Deepak Agro Foods v. State of Rajasthan 2008 (SC)

It was held that all irregular or erroneous or even illegal assessment orders could not be held to be null and void because there was a fine distinction between the orders which were null and void and the orders which were irregular, wrong or illegal. Where an authority lacked inherent jurisdiction in making an order, such order would be null and void ab initio because the defect of jurisdiction of an authority went to the root of the matter and struck at its very authority to pass any order. Such defect could not be cured subsequently even with the consent of the parties. However, where an authority exercised jurisdiction in a wrongful manner, order would not be null. It would be an illegal order capable of being cured in a duly constituted legal proceeding.

Exemption based on value of clearances (SSI)

1. No credit on inputs up to Rs. 150 lakhs

The manufacturer shall not avail the credit of duty paid on inputs used in the manufacturer of the specified goods cleared for home consumption, the aggregate value of first clearances of which does not exceed 150 lakhs.

Provided that nothing contained in this clause shall apply to the inputs used in manufacture of specified goods, bearing the brand name or trade name of another person, which is ineligible for grant of this exemption.

2. *Nirlex Spares Pvt. Ltd. v. CCEx. 2008 (S.C)*

The appellants manufactured goods and sold them in corrugated boxes under their own brand name which were affixed / printed on such boxes. However, the assessee started printing hexagonal artistic design on such boxes along with its brand name. On conducting investigation, the Department found that such hexagonal design was the monogram of its marketing company 'X'. Consequently, the Department contended that the benefit of small scale exemption would not be available to the assessee as they were using a brand name of another person on their goods.

The Apex Court ruled that the alleged monogram could not be said to be the brand name or trade name of company 'X' who itself disowned the said brand name.

Therefore, the Supreme Court held that the printing of hexagonal design on packing of the goods of assessee, where such hexagonal design was not owned by company 'X' would not disentitle the assessee from the benefit of small scale exemption.

3. Unison Electronics Pvt. Ltd. v. CCEx. 2009 (SC)

The assessee, a manufacturer of ice-cream makers and Popcorn makers, used to avail of the benefit of SSI-exemption. The said goods were sold under their own brand name "Cremica". However, in case of sale to United Tele-Shopping (UTS) and Tele-Shopping

Network (TSN), the supervisors of UTS and TSN used to examine the goods and affix a sticker thereon containing the names of UTS/TSN. The Department denied SSI-exemption in respect of goods bearing the names / symbols of UTS/TSN contending that the same amounts to affixation of brand-name so as to dis-entitle the exemption.

Held that the sticker containing names/symbols of UTS/TSN were fixed after quality checking and the same was a brand name used for the purpose of indicating a connection in the course of trade between the goods and UTS/TSN. Accordingly, the assessee was not entitled to SSI-exemption in respect of goods sold to UTS/TSN.

Demand, Adjudication and Offences

1. **Can omission to give correct information be construed as 'suppression of facts' for the purpose of the proviso to section 11A of the Central Excise Act, 1944?**

Continental Foundation Joint Venture v. CCEx. 2007 (SC)

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 not suppression of facts unless it was deliberate to stop the payment of duty. The Apex Court explained that an incorrect statement cannot be equated with a wilful mis-statement and suppression of facts.

2. **Recovery of sums due to the government**

Union of India vs Sicom Ltd 2008 (SC)

The Supreme Court of India, in its recent judgment, held that Government dues, including realization of arrears of the duty under the Central Excise Act, had no precedence over the secured debts under the State Financial Corporation Act.

Brief facts of the case are that Respondent No.2 ("Borrower") borrowed from SICOM Ltd. ("SICOM") and offered its property as security by an Indenture of Mortgage created under the provisions of the State Financial Corporation Act, 1951 ("Act"). The Borrower also owed to the Central Excise Department ("Government") by way of Central Excise duty under a confirmed assessment order.

The Borrower committed a default in repayment to SICOM, forcing SICOM to seize and take possession of mortgaged property ("Properties") under the provisions of the Act. On the other hand, the Government expressed its intention to proceed to recover the government dues from the said Properties, claiming first charge over the Properties.

The Supreme Court of India has given an upper hand to the secured creditors, keeping aside the common law doctrine of priority of State's debts. The present ruling is a relief to all the financial institutions, who were fighting with the government authorities, to safeguard their interests as provided under Securitization Act or under various other statutes.

Appeals

1. Whether non-filing of appeals in similar cases bars filing of appeal in other cases?

C.K. Gagadharan v. CIT, Cochin 2008 (SC)

The Apex Court held that if the assessee took the stand that the Revenue had acted mala fide in not preferring appeal in one case and filing the appeal in other case, assessee had to establish malafides. Learned counsel for the Department rightly contended that there might be certain cases where because of the small amount of revenue involved, no appeal was filed. Policy decisions had been taken not to prefer appeal where the revenue involved was below a certain amount. Similarly, where the effect of decision was revenue neutral there might not be any need for preferring the appeal. All these certainly provided the foundation for making a departure. It further stated that merely because in some cases the Department had not preferred appeal that did not operate as a bar for the Department to prefer an appeal in another case where there was just cause for doing so or it was in public interest to do so or for a pronouncement by the higher court when divergent views were expressed by the Tribunals or the High Courts.

Notifications, Departmental Clarifications and Trade Notice

1. Whether notification will have an overriding effect over circular issued by CBEC on the same matter?

CCEx., Belgaum v. Sandur Micro Circuits Ltd. 2008 (S.C.)

In present case, assessee – 100% E.O.U., cleared the goods to Domestic Tariff Area. The assessee claimed that he had a liability to pay only 50% of aggregated amount of custom duty. In this respect, CBEC circular no. 42/97 dated 19/9/97 was in conflict with notification no. 2/95 – C.E. as amended.

SC held that a circular could not take away the effect of notifications statutorily issued. In certain earlier cases also, it had been held that the circular could not whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. By issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down could not be imposed. The principle was applicable to the instant case also.

Customs Act

Basic Concepts

1. CCv. Malwa Industries Ltd. 2009 (SC)

- There was a Central-excise exemption notification in force exempting finishing agents, dye carriers, etc. from excise duty if "used in the same factory" for the manufacture of textiles and textile articles.
- The assessee imported certain finishing agents, dye carriers, etc. for manufacture of textiles and textile articles and claimed exemption in respect of CVD imposed u/s 3(1) of CTA, 1975 on the ground that the similar goods manufactured in India were exempt from excise duty.

The Department denied exemption contending that since the imported finishing agents, dye carriers, etc. were not manufactured by the assessee in its own factory, therefore, the condition that the said goods should be used in the "same" factory is not satisfied.

The use of the word 'same' in the exemption notification doesn't mean that for claiming exemption, the finishing agents, dye carriers, etc. must have themselves been manufactured by assessee. It simply means that goods must be used in the same factory in which textile articles are manufactured.
Since the imported finishing agents, dye carriers, etc. were used in the factory belonging to the importer – assessee where the manufacture of textiles and textile articles took place, therefore, the assessee was entitled to exemption.

Valuation under Customs

1. CC v. Atam Manohar Ship Breakers Ltd. 2009 (SC)

On 13-4-1999, the assessee-importer and the foreign-exporter entered into a Memorandum of Agreement (MoA) for importing the vessel for ship-breaking at a price of USD 9.7 lakh. On 29-4-1999, the assessee filed a bill of entry and on that date itself, an addendum was inserted in the MoA whereby the price was reduced to USD 8.7 lakh. The assessee claimed transaction value to be USD 8.7 lakh, while the Department assessed the imported goods at USD 9.7 lakhs.

Held that, the addendum, which sought to reduce the price, was neither dated nor contained any reason for reduction in price by USD 1 lakh. The said addendum appeared to have been executed at the instance of the buyer. Therefore, the value for the purposes levy of customs duty was USD 9.7 lakh only.

2. Varsha Plastics Pvt. Ltd. v. UOI 2009 (SC)

The transaction value can be rejected when the nature of goods has been misdeclared or the assessee has resorted to invoice manipulation, under-invoicing, etc. However, the burden to prove the same lies con the Department.

When the transaction value is rejected, the Department should proceed to determine the value on the basis of evidences relating to contemporaneous imports. However, in absence of any evidence relating to contemporaneous imports, reference may be made to foreign journals indicating international prices, but, whether such journal indicates correct value would depend up on facts and circumstances of each case.

Importation and Exportation

1. *CCus., Calcutta v. Indian Rayon & Industries Ltd. 2008 (S.C.)*
The goods initially exported by the assessee were re-imported back to India on being rejected by the foreign buyer as defective. The assessee initially claimed in the Bills of Entry the benefit of notification no. 158/95-Cus and also executed bonds for re-export, as required under the said notification. The assessee could not re-export the goods and claimed before the adjudicating authority that since it was not possible for it to re-export the goods, it should be allowed the benefits of another notification no. 94/96-Cus. which was in force at the time of the clearance from the factory originally. The main contention raised by the assessee was that if the benefits were available under the two notifications to the assessee, then the assessee could avail of the benefits under either of them.

The Court pronounced that once the assessee had sought for and taken the benefit of the notification no. 158/95 to import goods without payment of duty, assessee had to fulfil the conditions required to be fulfilled by the said notification. Now, it was not open to the assessee to contend that the conditions in the said notification need not be fulfilled, be it on the benefit under another notification was available to him or otherwise. Hence, demand raised by the Revenue was justified.

2. *Duty Drawback: Rubfila International Ltd v. CC 2008 (SC)*
Rule 3 of Drawback Rules: No Drawback shall be allowed if the exported goods have been produced or manufactured using imported materials or excisable materials on which duties have not been paid.

In this case, there was no duty incidence on 97% of the inputs used in the exported goods, the duty incidence on remaining 3% of inputs was insignificant. The rule covers the cases where almost whole of the inputs are non-duty paid. Since almost whole of inputs have not suffered any duty, it is evident that no duties have been paid. Accordingly as per Rule 3, no drawback can be allowed in this respect.

Service Tax

1. ***CCEx. V. Advantage Media Consultant (2009) SC***
   Where the assessee fails to collect service tax for the services rendered by it or tax is not paid separately by the customer, the total receipts for rendering services should be treated as inclusive of service tax and the service tax be worked out accordingly.

2. ***M.K. Jain Classes v. CCEx. [2008]***
Value of books sold not includible in value of commercial training or coaching service. The assessee, a provider of commercial training or coaching service, used to provide study materials / books published by it to its trainees for which no separate fee was charged. The said books were also sold to outsiders, who were not trainees of the assessee. The assessee claimed exemption for the value of books sold from the amount of gross fees collected by it, which was denied by the Department.

   Held that, since the gross amount of fees included the value of the books sold by the assessee, therefore, the assessee was entitled to exemption in respect of the value of the books so sold under Notification no. 12/2003. Even otherwise, value of such sale was outside the scope of levy of service tax.

3. ***A.P. Federation of Chit funds v. UOI [2009]***
In view of absence of any specific provision in the Finance Act, 1994 covering 'chit business' within the ambit of taxable services, the chit business is not liable to service tax. In absence of any specific definition of 'asset management', the 'chit business' cannot be covered by 'cash/asset management'. The CBEC Circular imposing liability of service tax on chit business is ultra vires the provisions of the Act and is set aside.

4. ***CCEx. V. Krishna Coaching Institute [2009]***

   The assessee was engaged in providing coaching for various entrance exams. It collected fees in advance during April, 03 to June 03, from the trainees / students for the coaching to commence on or after 1-7-03. Service tax became leviable w.e.f. 1-7-03 on "Commercial Training and Coaching". The assessee denied liability of service tax on advance received prior to levy of service tax on that service on the ground that since payment was received when service was not taxable, therefore, no tax is imposable thereon.

   Held that, the taxable event under service tax law is 'provision of service'. Therefore, all services rendered after the imposition of service tax thereon shall be liable to service tax. The bill, if any, prepared for advance received is for services yet to be rendered. The date of preparation of bill or the date of receipt cannot be considered as date of rendering service.

   Since, in the present case, payment was received in advance for the service yet to be rendered; and services were rendered later when service tax was attracted, therefore, such advance was liable to service tax

5. ***Rate of service Tax:*** It is levied at 10% w.e.f. 24-2-2009. Education Cess @ 2% and SAH Cess @1%. Thus, the effective rate of Service Tax is 10.3%.

6. ***Notification 01/2009***

Following services provided to a Goods Transport agency shall be fully exempt from Service Tax-

- Manpower recruitment or supply agency service
- Business Auxiliary Services
- Storage and Warehousing Service
- Business Support Services
- Packing Activity service
- Supply of Tangible goods Service
- Clearing and Forwarding Agent Service
- Cargo Handling Service

7. Notification 09/2009

- Any taxable services, which are provided in relation to the Authorized Operations in a Special Economic Zone,
- and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, shall be exempt from the whole of the service tax.

8. Import of Services - Jindal Steel & Power Ltd. v. CCEx. [2009]

(1) In case of services provided from outside India and received in India (i.e. in case of import of services), the recipient of service in India is deemed to be provider of such service;

(2) Such recipient is the 'person liable to pay service tax'; and

(3) All the provisions of the Act are to apply accordingly,

In such cases, it would not mean that the service so received is deemed to be "output service" for the recipient. In case of import of service, the recipient has two roles to play: (a) as the provider of service, for the purpose of discharge of service tax liability; and (b) as the actual recipient of service, for other purposes.

The right of the importer of service, as recipient of service, cannot be denied merely because the importer is required to pay tax on behalf of the foreign-provider of service.

Therefore, the service so received by the recipient of service may qualify as "input service" under Rule 2(1) of the CENVAT Credit Rules, 2004; and, if it is so, then, the recipient of service will be entitled to take the CENVAT credit of service tax paid by him on the service so imported and received by him.

9. CBEC Circular No. 111/05/2009 dt. 24-2-2009

Applicability of the provisions of the Export of Services Rules, 2005 in certain situations

In terms of rule 3 (2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if "*such service is provided from India and used outside India*"

Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under Rule 5 of the Cenvat Credit Rules, 2004 on the ground that these activities do not satisfy the condition 'used outside India',-

- Call centres engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;
- Medical transcription where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;
- Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;
- Foreign financial institution desiring transfer of remittances to India, engaging an Indian organisation to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organisation in foreign exchange for the entire activity being undertaken in India.

The departmental officers seem to have taken a view in such cases that since the activities pertaining to provision of service are undertaken in India, it cannot be said that the use of the service has been outside India.

Sub-rule (1) of Rle 3 of the Export of Services Rule, 2005 categorizes the services into three categories:

Category 1: For services (such as Architect service, General Insurance service, Construction service, Site Preparation service) that have some nexus with immovable property, it is provided that the provision of such service would be 'export' if they are provided in relation to an immovable property situated outside India.

Category 2: For services (such as Rent-a-Cab operator, Market Research Agency service, Survey and Exploration of Minerals service, Convention service, Security Agency service, Storage and Warehousing service) where the place of performance of service can be established, it is provided that provision of such services would be 'export' if they are performed (or even partly performed) outside India.

Category 3: For the remaining services (that would not fall under category 1 or 2), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable, the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category 3 services, it is possible that export of service may take place even when all the relevant activities take place in India so long as the **benefits of these services accrue outside India**.