1

BASIC CONCEPTS

1. Do Cement Concrete Armour Units constitute excisable goods?

Board of Trustees v. Collector of Central Excise 2007 (216) ELT 513 (S.C.)

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. The Apex Court reiterated the settled principle that in order to constitute excisable goods, twin tests of process amounting to manufacture and marketability had to be satisfied.

The Apex Court stated that goods were manufactured with the object of being sold in market. 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.

2. Whether process of converting raw asfoetida into compounded asfoetida amounts to manufacture?

CCEx. v. Laljee Godhoo & Co. 2007 (216) ELT 514 (S.C.)

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

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

Union of India v. Banswara Syntex Ltd. 2008 (221) ELT 360 (Raj.)

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

4. **Does an article become excisable by mere mention in Excise Tariff?**

CCEx., Chandigarh Vs Gurdaspur Distillery 2008 (224) ELT 337 (S.C.)

The assessee was engaged in the manufacture of de-natured Ethyl alcohol. During the manufacture of de-natured Ethyl alcohol, a residue known as spent wash came into existence. The same was reacted in a closed type digester and methane gas was being produced. This methane gas was being 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.

Tribunal referred to the case of *Bhor Industries Ltd. v. Collector of Central Excise 1989 (40) ELT 280* wherein it was held that marketability is an essential ingredient in order to attract excise duty and decided the case in favour of the assessee. 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 Central Excise Tariff Act, 1985 unless it was salable and known to market. Since, the Department failed to prove the marketability of the goods in question, it was held that the methane gas produced by respondent was not marketable and hence, was not liable to duty.

5. **Is excise duty leviable on intermediate product when finding on marketability is absent?**

White Machines v. CCEx., Delhi 2008 (224) ELT 347 (S.C.)

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.

6. **Whether labeling or relabeling without repacking from bulk to retail amounts to "deemed manufacture"?**

CCEx., Mumbai v. BOC (I) Ltd. 2008 (226) ELT 323 (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.

Note 10 of Chapter 28 of First Schedule to Central Excise Tariff reads as under:

"……..in relation to products of this Chapter, labeling or relabeling of containers and repacking from bulk packs, or the adoption of any other treatment to render the product marketable to the consumer, shall amount to manufacture".

In the case of *CCEx., Mumbai v. Johnson & Johnson Ltd 2005 (188) ELT 467 (S.C.),* 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.

Note - Section 2(f) of Central Excise Act states that "manufacture" includes any process - (i) incidental or ancillary to the completion of manufactured product or (ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture, or (iii) which, in relation to goods specified in third schedule to the CEA, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers or declaration or alteration of retail sale price or any other treatment to render the product marketable to consumer. Clauses (ii) and (iii) of section 2 (f) ibid pertain to "deemed manufacture". Abovementioned case relates to clause (ii) of the said section.

7. Whether swaging process amounts to manufacture in terms of Section 2(f) of the Central Excise Act, 1944?

Prachi Industries vs. CCEx., Chandigarh 2008 (225) ELT 16 (S.C.)

The appellant used to purchase duty paid MS tubes from its manufacturers and cut the same into requisite length. Thereafter, put it in the swaging machine for undertaking swaging process whereby dies fitted in the machine imparted "folds" to the flat surface of the MS tube/pipe. The Department took the plea that swaging process amounted to manufacture and hence, duty was payable on the goods manufactured by the appellant.

The Apex Court held that process of swaging amounted to manufacture and assessee was liable to pay duty thereon. As per Section 2 (f), 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.

SC 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 and use.

SC clarified that MS plane pipe/tube could carry water to the overhead tank whereas the work piece produced in the present case was useful as a decorative item or as an item which provided a strong grip in auto-rickshaw. Hence, SC held that swaging amounted to manufacture and thus, excise duty was payable by the assessee.

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

CCEx., Pondicherry v. Sunco Rubbers Ltd. 2008 (228) ELT 27 (Mad.)

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

High Court ruled that having regard to the activities like deflashing, testing, inspection etc. being undertaken by the primary manufacturers, it was evident that the goods were made ready for marketing only after the same were subjected to the above mentioned processes at the hands of the raw material suppliers. Hence, the manufacturing process was complete only after these processes were carried out at the premises of the suppliers. The job worker collected only job charges for the various processes undertaken by him on the goods. Moreover, as per section-2(f)(i), any activity which is incidental or ancillary to the manufacture of the final product would be considered as a manufacturing activity. Therefore, the goods cleared from the premises of the job worker, could not be regarded as fully manufactured goods, and as such, the activity undertaken by the assessee could not be regarded as a manufacturing process, as required under erstwhile rule 57F (2)/57F (3) of the Central Excise Rules, 1944 (now rule 16A of Central Excise Rules, 2002).

Note – Rule 16A of Central Excise Rules, 2002 relating to removal of goods for job work, etc. reads as under-

Any inputs received in a factory may be removed as such or after being partially processed to a job worker for further processing, testing, repair, re-conditioning or any other purpose subject to the fulfilment of conditions specified in this behalf by the Commissioner of Central Excise having jurisdiction.

9. Can transmission apparatus installed in mobile tower stations be excisable?

CCEx., Mumbai-IV v. Hutchison Max Telecom P. Ltd. 2008 (224) ELT 191 (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 High Court 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, firstly, 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. This involved damages to certain parts like cable trays, etc. which were embedded/fixed to the civil structure as also the BTS microwave equipment itself. Secondly, all the components of the new product could not be shifted as an illustration the room housing the equipment because this act of dismantling from the permanent site would render such goods not marketable. Thirdly, the goods could not be re-erected as in the previous place as the requirement of each place was different. In the light of all these facts, the court inferred that the tests of marketability and mobility were not satisfied.

As per order dated 15-1-2002 by CBEC, New Delhi, 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.

2

CLASSIFICATION OF EXCISABLE GOODS

1. **Whether parts of compressor cleared as a 'stand alone item' should be classified along with the compressor?**

   CCEx. v. Frick India Ltd. 2007 (216) ELT 497(S.C.)

   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 Central Excise 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 General Interpretative Rules for Classification, safety valves and filters should be classified along with the compressors as they were essential parts of the compressors. Consequently, the Department contended that the value of the safety valves and filters together with the value of bought-out items should be includible in the assessable value of the compressor.

   The Supreme Court observed that Rule 2(a) of the General Interpretative Rules 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.

   However, the Apex Court remanded back the matter relating to valuation to the Commissioner for denovo consideration so as to examine the pricing aspect of entire package supplied by the assessee to its buyers.

2. **Whether the latex (rubber) based adhesive would be classified under tariff heading 35.06 falling under Chapter 35 on "enzymes, modified starches, glues and albuminoidal substances" or tariff heading 40.01 falling under Chapter 40 on "rubber and articles thereof"?**

   CCEx. v. Mannampalakkal Rubber Latex Works 2007 (217) ELT 161 (SC)

   The assessee was engaged in the manufacture of latex (rubber) based adhesive. The rubber content in the adhesive was above 90%. It was claimed by the Department that latex based adhesive manufactured by the assessee was covered under tariff heading 35.06. According to the Department, the said product was covered under tariff heading 35.06 as it was being sold as an adhesive to the leather footwear manufacturers. Heading 35.06 covers "Prepared glues and other prepared adhesives, not elsewhere specified or included".

The Supreme Court observed that as per Note 5(b) to Chapter 40, the test to distinguish between rubber based adhesives and non-rubber based adhesives or other adhesives was the test of composition and not the test of end-user. The Apex Court opined that in matters of classification "composition test" was an important test and "end-user test" applied only if the entry said so. Therefore, the Supreme Court held that the latex based adhesives manufactured by the assessee would fall under heading '40.01' and not under heading '35.06'.

Note - Note 5(b) of Chapter 40 of the Central Excise Tariff states as under:

"5(b)- The presence of the following substances in any rubber or mixture of rubbers shall not affect its classification in heading No. 40.01 or 40.02, as the case may be, provided that such rubber or mixture of rubbers retains its essential character as a raw material:

(i) emulsifiers or anti-tack agents;

(ii) small amounts of breakdown products of emulsifiers;

(iii) very small amounts of the following:

heat-sensitive agents (generally for obtaining thermosensitive rubber latexes), cationic surface-active agents (generally for obtaining electro-positive rubber latexes), anti-oxidants, coagulants, crumbling agents, freeze-resisting agents, peptisers, preservatives, stabilizers, viscosity-control agents or similar special purpose additives".

3. Where would the processed cashew nuts, peanuts, almonds etc. manufactured by dry roasting, oil roasting, salting, and seasoning would be classifiable: Chapter 20 or Chapter 8 of the Central Excise Tariff?

CCus. & CEx. v. Phil Corporation Ltd. 2008 (223) ELT 9 (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 Harmonised System of Nomenclature (HSN) provide that Chapter 20 includes "almonds, ground nuts, areca (or betel) nuts and other nuts, dry-roasted, 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 Central Excise Tariff Act was broadly based on the system of classification from the international convention called the Brussels' Convention on the Harmonised Commodity Description and Coding System (Harmonised System of Nomenclature) with necessary modification. 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 Central Excise tariff and not under Chapter 8 in view of HSN explanatory notes to Chapter 20.

4. What is the relevance of description in RC (Registration Certificates) for classification of the vehicles?

CCEx., T.N. vs. Vinayaga Body Building Indus. Ltd. 2008 (224) ELT 3 (S.C.)

The assessee was engaged in the manufacture of bodies of a maxi-cab with a seating capacity of 12 + 1 (12 passengers and 1 driver) on the chassis (on which duty had already been paid) purchased from its manufacturers. The manufactures of chassis in their invoices placed them under heading 8706.29. Heading 8706.29 is for the chassis of the vehicles of sub-heading 8702.90. Accordingly, the assessee classified his product under the corresponding heading 8702.90 wherefore National Calamity Contingency Duty (NCCD) was not payable. However, the Revenue contended that the goods should be classified under chapter heading no. 8702.10 and thereby a NCCD @1% thereon was payable by the assessee.

Chapter 87 of the Act as applicable in the year 2003 contains the heading "Vehicles other than Railway or Tramway Rolling Stock and Parts and Accessories thereof". Sub-heading 8702.10, 8702.90 and 8706.29 thereof read as under:

Heading No.	Sub-Heading no.	Description of goods	Rate of Duty
87.02		Motor Vehicles principally designed for the transport of more than six persons, excluding the driver, including station wagons	

	8702.10	Motor Vehicles principally designed for the transport of more than six persons, but not more than 12 persons, excluding the driver, including station wagons	16%
	8702.90	Other	16%
87.06		Chassis fitted with engines, for the motor vehicles of heading no.s 87.01 to 87.05	
	8706.29	Chassis of the vehicles of sub-heading 8702.90	16% plus Rs 10,000 per chassis

The assessee pleaded that since job cards issued by them indicated that the orders were for fabrication of more than 16 seats in the cab and as such thereby the "goods" manufactured by them should be classified under sub-heading 8702.90.

The Apex Court observed that only because the manufacturers of chassis had classified them under sub-heading 8702.90, the same having regard to the independent manufacturing activities carried on by the assessee, was not decisive. The question in regard to the payability of duty would furthermore depend upon the RC (Registration Certificates) of the vehicle in question as it is a statutory document, granted under the provisions of Motor Vehicles Act, 1988, issued upon an inspection of the vehicle by the authorities of the transport Department.

What was relevant was the terms of the contract entered into by and between the respondent and their customers. On a chassis classifiable under sub-heading 8706.29, the manufacturer could make a body thereupon having regard to the nature of orders placed by their customers. In a given case, it might be of sixteen seating capacity but it might be more or less than the same in some other cases. What was, therefore, relevant was the seating capacity for which RC had been granted and not the opinion of the manufacturer of the chassis. Hence, it was concluded that the maxi cab was classifiable under sub-heading 8702.10 and not under sub-heading 8706.29.

5. What is the difference between parts and accessories?

CCEx., Delhi v. Insulation Electrical (P) Ltd. 2008 (224) ELT 512 (S.C.)

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.

Andhra Pradesh High Court, after considering in detail the difference between “accessories” and “parts” in case of *Pragati Silicons Pvt. Ltd. v. CCEx., Delhi*, concluded that “accessory” is something supplementary or subordinate in nature and not be essential for the actual functioning of the product. A “part” is an essential component of the whole without which the whole cannot function.

With regard to rail assembly front seat and adjuster/assembly slider seat manufactured by the assessee, SC held that these were fixed on the floor of the motor vehicles. When seats were affixed on these rails, seats could slide back and forth which enabled the driver or the passenger, to adjust the position of the seat to suit his comfort and convenience. So, it 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. YE-2 rear back lock assembly fixed the position of the rear seat of the car in the most comfortable and convenient position. The lock assembly did not form a part of the car seat at all and the seat was complete without it.

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.

6. Whether an erroneous claim precludes assessee from making correct claim subsequently?

Guljag Industries Ltd. vs. Union of India, Rajasthan HC 2008 (224) ELT 38 (Raj.)

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 84.19.

Adjudicating Authority disallowed the assessee’s claim of CENVAT credit in respect of the input/capital goods used for the construction of tank by taking the classification of the product under Chapter 73. Its primary contention was that classification once opted by the manufacturer could not be altered subsequently. Learned counsel for appellant stated that earlier claim to a particular classification by the manufacturer did not stop the assessee from claiming correct classification under different head by pointing out that the classification earlier claimed was erroneous.

Rajasthan High Court decided that assessee’s contention was justified. Erroneous claim made by the assessee earlier did not preclude him from subsequently making a claim for correct classification. Adjudicating Authority should first decide the question of proper classification of the articles in question and on that premise should determine the consequential order about CENVAT Credit.

7. **Can internet sources like Wikipedia be relied upon, for classification/interpretation of tax statute?**

Ponds India Ltd. v. Comr. of Trade Tax, Lucknow 2008 (227) ELT 497 (S.C.)

The assessee was a manufacturer of petroleum jelly. Now the question before the Apex Court was whether it should be classified as a drug or a cosmetic? For the purpose of this classification, the assessee referred to Wikipedia which described the white petroleum as follows:-

"Petroleum jelly, Vaseline, petrolatum or soft paraffin……………………..it is recognized by the U.S. Food and Drug Administration as an approved over-the-counter (OTC) skin protectant and remains widely used in cosmetic skin care." On the basis, the assessee contended that it should be classified as a cosmetic.

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.

8. **How far is the chemical composition and actual use relevant for classification of goods?**

Godrej Indus. Ltd. v. D.G. Ahire, Asstt. Collector of Central Excise 2008 (228) ELT 321 (S.C.)

The appellant-assessee was manufacturing 'liquid hair dyes' since 1974, when there was no specific entry relating to "hair dyes" under the Central Excise Tariff Act. Under Tariff Item 14F, "hair lotion" was specified. However, Department never raised the claim that the assessee's product should be classified under Tariff Item 14F under heading "hair lotion" and no excise duty was demanded from the assessee. With effect from 1st March, 1975, Tariff Item 68 was introduced under which the hair dyes got covered.

Tariff Item 14F reads as under:

"14F – Cosmetic and Toilet Preparations not containing alcohol or opium India Hemp or other Narcotics Drugs or Narcotics, namely:

(i) Face Cream and Snow;

(ii) Face Powder

(iii) Talcum Powder

(iv) Hair Lotion, Cream and Pomade"

Tariff Item 68 reads as under:

"68 – All other goods, not elsewhere specified"

The assessee started paying duty on the said product under Tariff Item 68 w.e.f. 1st March, 1975. Apparently, the classification list, which was submitted by the assessee classifying the aforesaid product under Tariff Item 68, was also duly approved.

In July 1982, Revenue contended that assessee's product - "liquid hair dye" should be classified under Tariff Item 14F and should be charged with duty accordingly. While the excise duty in respect of items classified under Tariff Item 68 was payable at the rate of 8%, the excise duty payable for items classified under Tariff Item 14F was 105%.

The Apex Court observed that the chemical analysis of the assessee's product did not show that it could be applied to the scalp for restoration or nourishment of hair so that it could be brought within the definition of "lotion'" as a medicinal product. Apart from above, even in common parlance or trader's jargon a hair dye, unless it had other properties besides the capacity to darken hair, could not be equated with hair lotion. The SC held that while in a generic sense, a hair dye might also be referred to as hair lotion, for the purposes of a taxing statute, its chemical composition and actual usage became relevant. Hence, the demand made on behalf of the Revenue for payment of duty according to Tariff Item 14F was erroneous.

9. When goods are classifiable under two headings, whether assessee should be given benefit?

CCEx., Calcutta v. Calcutta Springs Ltd. 2008 (229) ELT 161 (S.C.)

The Apex Court clarified that if a particular product was capable of being classified under two chapter headings of Tariff simultaneously i.e. in case of a classification dispute, the benefit should be given to the assessee.

Note - The Headings cited in some of the case laws mentioned above may not co-relate with the Headings of the present Excise Tariff as these cases relate to an earlier point of time.

3

VALUATION OF EXCISABLE GOODS

1. When should the excisable goods be valued on the basis of retail sale price?

Jayanti Food Processing (P) Ltd. v. CCEx., Rajasthan 2007 (215) ELT 327 (SC)

The Supreme Court elaborated on the scope of maximum retail price (MRP) based valuation under section 4A of the Central Excise Act, 1944 in this case. The Apex Court observed that excisable goods are valued on the basis of retail sale price when following conditions are fulfilled:

(i) where the excisable goods are packaged and

(ii) such packages are required to mention price thereof under Standards of Weights and Measures Act, 1976 or the Rules made thereunder or under any other law and

(iii) such goods are specified by the Central Government by notification in the Official Gazette.

The Supreme Court held that nature of sales was not relevant for determining the application of section 4A. The following issues were discussed by the Supreme Court in the instant case:

(i) The assessee sold four litre pack of ice-cream to intermediary (hotels) which ultimately sold the ice-cream in scoops (not the package) to individuals or group of individuals. The Supreme Court held that the package sold by the assessee could not be termed as retail package nor the sale thereof be termed as a retail sale and as such there was no requirement of mentioning the retail sale price on that package. Thus, the Apex Court held that section 4A of the Central Excise Act, 1944 would not apply to ice-cream sold by the assessee.

(ii) The assessee sold telephone instruments to Department of Telecommunications, MTNL and BSNL who in turn provided such instruments to general public on rental basis. MRP's were declared on all the instruments in question. The Supreme Court held that sale of telephone instruments would be covered under retail sale and the package would be a retail package. The Supreme Court rejected the argument that since the purchasers were not the ultimate consumers, the sale was not a retail sale. The Court held that since purchasers used the telephone instruments for supplying to their customers on rental basis or on some other basis, it could not be said that they were not ultimate consumers. Thus, the Apex Court held that the assessment should be done under section 4A of the Central Excise Act, 1944 and not under section 4.

(iii) Refrigerators were sold to bottling companies like Pepsi, Coca Cola etc., packed in a package declaring MRP on them. However, MRP and contract price were different. The Supreme Court held that duty should be paid on MRP and not on contract price and hence assessment should be done under section 4A of the Central Excise Act, 1944 and not under section 4.

2. Whether two parties can be deemed to be 'related persons' if the registered offices of both the parties are located in the same premises?

CCEx. v. Damnet Chemicals Pvt. Ltd. 2007 (216) ELT 3 (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.

3. Whether only the effective rate of taxes i.e., the rate as reduced by the concession provided by the exemption notification, if any, should be claimed as a deduction under section 4 for computing the assessable value?

Modipon Fibre Company v. CCEx. 2007 (218) ELT 8 (SC)

The assessee manufactured nylon and cleared it from its factory to its various depots in other States. Turnover tax on such clearances was payable at dual rate of 0.5% for sales in backward areas and at 2% for normal areas. The concession in rate of turnover tax, in case of backward areas, was given vide an exemption notification. However, the assessee claimed deduction under erstwhile section 4 at full rate of 2% in respect of entire clearance of goods.

The issue under consideration was that whether the deduction of 2% could be claimed in respect of entire clearance of goods i.e., even in case of clearance in backward areas where 0.5% turnover tax was paid.

The Supreme Court observed that erstwhile section 4 of the Central Excise Act, 1944 prescribed that only actual value of duty payable i.e., the effective duty of excise payable on the goods should be considered while computing the assessable value. Such effective duty of excise should be calculated on the basis of prescribed rate as reduced by the concession provided by the exemption notification, if any. The Apex Court ruled that such a principle would also apply in respect of actual value of any other tax including turnover tax.

*Note - The principle enunciated in this judgment will hold good in respect of new section 4 also as the new section 4 also prescribes that transaction value is "the price actually paid or payable for the goods, when sold …………………… but does not include the amount of duty of excise, sales tax and other taxes, if any, **actually paid or actually payable** on such goods." Thus, only effective rates of taxes are deductible under the scheme of new section 4 as well.*

4. Is a refrigerator a pre-packed commodity for the purpose of valuation under section 4A?

Whirlpool of India Ltd. v. Union of India 2007 (218) ELT 167 (SC)

The appellant manufactured refrigerators. A notification issued by the Central Government under section 4A (1) and (2) covered refrigerator. Therefore, the refrigerator had to be valued on the basis of retail sale price under section 4A with the prescribed abatement of 40%. 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 Standards of Weights and Measures Act, 1976 and Standards of Weights and Measures (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 of the Central Excise Act, 1944 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.

5. Should the free samples be valued as per rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and not as per rule 4 as clarified vide *Circular No. 813/10/2005 CX dated 25.04.2005*?

Indian Drugs Manufacturer's Assn. v. Union of India 2008 (222) ELT 22 (Bom)

The High Court observed that since rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 only covers cases where goods are not sold but are cleared exclusively for use and consumption in the manufacture of other articles, it would not apply in the instant case as the samples were not cleared for captive consumption but were identical or similar to goods cleared on sale in wholesale trade. The fact that physician's samples might be distributed in a different pack or in a different bottle would not make them different from goods sold in the open market.

The High Court observed that there was nothing in rule 4 which suggested that it applied only to goods sold but not delivered at the time and place of removal; rather, rule 4 was a general rule and words “such goods” therein clearly meant that goods in question must be similar or identical to and had same quality or character to the goods sold and delivered. The High Court further explained that by use of words “if necessary” in rule 4 it was made clear that adjustments should be permitted, wherever necessary.

Thus, the High Court held that physician’s free samples would be valued under section 4(1)(b) of Central Excise Act, 1944 read with rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, i.e., the free samples would be valued based on the value of such goods sold and delivered at any other time nearest to the time and place of removal of such samples.

Note - This case establishes that Circular No. 813/10/2005 CX dated 25.04.2005 states the correct position of law and is in consonance with the Central Excise Act, 1944 and the rules made thereunder.

6. How will assessable vale of goods sold to related person at or about the same price at which it is sold to non-related parties be ascertained?

CCEx., Chandigarh v. Bharti Telecom Ltd. 2008 (226) ELT 3 (S.C.)

The assessee, Bharti telecom Ltd. (BTL), sold 75% of its product - electronic push button telephones - to Department of Telecommunications (DOT) and Mahanagar Telephone Nigam Limited (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 held that even if STL was taken to be a related person to BTL (though the Court did not hold so); 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.

7. Whether under-valuation arises when goods are sold to the Holding company at same prices as to others?

Commr. of C. EX., New Delhi v. India Thermit Corpoartion Ltd. 2008 (226) ELT 164 (S.C.)

In this case, the assessee, Asiatic Thermics Ltd. (ATL) was engaged in the manufacture of dry moulds and thermit welding equipments and was solely dependant 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 (though the court did not hold so) 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.

Note – In the above mentioned case, the demand raised by Revenue is based on the rule 9 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 wherein it was stated that when the goods are sold by assessee to related person only, the assessable value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person).

8. Whether additional consideration is includible without establishing nexus to negotiated price?

CCEx., Belgaum v. Mysore Kirloskar Ltd. 2008 (226) ELT 161 (S.C.)

The assessee, MKL, entered into an agreement with ITC for manufacture of the machines. The agreement stipulated that MKL would manufacture the machines as per the specifications, prototype drawings and patterns prepared by it and approved by ITC and the price of the machines would be stipulated by ITC in orders to be placed upon MKL. Moreover, ITC should reimburse MKL the amount of excise duty paid on manufacture of machines. For the agreement in question, ITC paid a sum of Rs 43 lakhs to the assessee. Revenue alleged that duty should be levied on this additional consideration of Rs 43 lakhs.

SC held that in order to demand the duty on additional consideration of Rs 43 lakhs, Department should first establish that consideration had a nexus with the negotiated price of assessable goods under clearance. Since, each clearance was an assessment based on a separate contract, the contract price would normally be the value of the assessable goods. Therefore, loading thereon of the entire amount of Rs 43 lakhs without such a finding and recovery of duty thereon was not permissible at all.

4

CENVAT CREDIT

1. **Whether reversal of credit amounts to not taking of credit?**

   CCEx. v. Bombay Dyeing & Mfg. Co. Ltd. 2007 (215) ELT 3 (SC)

   The assessee manufactured gray fabrics from yarn. The gray fabric was exempt from excise duty under a notification if the following two conditions were satisfied:

   (i) the duty on yarn (input) was paid before claiming the exemption and

   (ii) CENVAT credit for duty paid on yarn (input) was not taken.

   The duty on yarn was supposed to be paid at the spindle stage. However, owing to practical difficulties the assessee deferred the payment of duty from spindle stage to the stage of clearance of gray fabric. At this stage the duty was paid along with the appropriate interest. The assessee took the credit for duty paid on yarn but reversed the same before its utilization.

   The Apex Court observed that both the conditions of the notification were fulfilled as duty on yarn, though paid on deferred basis, was paid before the clearance of gray fabric on which exemption was claimed. Hence, payment was made before stage of exemption. Further, the assessee did not utilize the credit, which it got on payment of duty on input (yarn). The Supreme Court held that since the entry for credit was reversed before utilizing the same, it would amount to not taking of credit. Thus, gray fabrics were subject to nil rate of duty.

2. **Whether provisions of erstwhile rule 57CC of the Central Excise Rules, 1944 [now rule 6(3) (b) of the CENVAT Credit Rules, 2004] would apply when there is no sale but just stock transfer?**

   CCEx. v. Ballarpur Industries Ltd. 2007 (215) ELT 489 (SC)

   As per erstwhile rule 57CC of the Central Excise Rules, 1944, where common inputs, on which credit is taken, are used to manufacture dutiable and exempted final products and separate accounts are not maintained, the manufacturer has to pay an amount equal to 8% (now 10%) of the price (excluding sales tax and other taxes, if any, payable on such goods) of the price of the exempted final goods charged for sale of such goods at the time of clearance of such goods from the factory.

The Tribunal, when the issue was brought before it, opined that rule 57CC would not apply in case of stock transfer as it applies only in case of sale. However, the Supreme Court rejected the Tribunal's view. The Apex court observed that erstwhile rule 57CC was a provision which sought to recover presumptive amount @ 8% of the price of exempted final goods at the time of removal for sale. Thus, rate of 8% was the measure to calculate the presumptive sum. The Court opined that since the entire rule was based on "deemed price" and "recovery of presumptive amount" hence, the words "price charged at the time of sale" must be read as "eight percent of the value of exempted goods". Thus, the Supreme Court held that rule 57CC applied in cases of stock transfers also.

Note - Rule 6(3) (b) of the CENVAT Credit Rules, 2004 corresponds with the erstwhile rule 57CC of the Central Excise Rules, 1944. Thus, the principle enunciated in this case law will hold good for present rule 6(3) (b) of the CENVAT Credit Rules, 2004 as well.

3. Does cement used in constructing foundation for machinery qualify as an eligible input for the purpose of availing CENVAT?

Union of India v. Hindustan Zinc Ltd. 2007 (218) ELT 503 (Raj.)

The assessee availed credit of duty paid on cement which was used in the construction of foundation for machineries and as a building material. The Revenue claimed that cement was not an eligible input in terms of explanation II to rule 2(g) of the erstwhile CENVAT Credit rules, 2002 (now explanation II to rule 2(k) of the CENVAT Credit Rules, 2004).

The High Court observed that cement used as building material for laying foundation could not be directly or indirectly said to be an integral part in connection with the manufacture of final product. Further, the High Court opined that foundation made of cement would not fall under the category of capital goods as defined under rule 2(b) of the erstwhile CENVAT Credit Rules, 2002 (now rule 2(a) of CENVAT Credit Rules, 2004). Thus, cement would not qualify to be an input in terms of explanation II of rule 2(g) of erstwhile CENVAT Credit rules, 2002 (now explanation II of rule 2(k) of CENVAT Credit Rules, 2004).

4. Whether CENVAT credit can be taken in respect of duty paid on inputs lost in transit when the entire goods received under the consignment are used for manufacture?

Union of India v. Bhilwara Spinning Ltd. 2008 (222) ELT 362 (Raj)

The assessee imported certain goods and paid countervailing duty (CVD) on them. Credit of such duty was availed of by the assessee on the basis of the invoice evidencing such payment. The consignment of the goods was received directly in the factory but the actual quantity of the imported goods was marginally less than the actual quantity stated in invoice. The Assistant Commissioner contended that the assessee would not be entitled to the credit on the goods received short in the factory.

The High Court observed that the short receipt of the goods in the factory premises was found to be less than ½% of the total quantity which according to the fact finding authority was due to normal transit loss. The High Court made the following observations:

(i) there was no diversion of the goods covered under the invoice

(ii) the entire goods received under the consignment had been put to use for manufacturing the final product

(iii) the transit loss was found by the Tribunal to be normal loss due to evaporation

Further, the High Court elaborated that the mode of proof of quantity and payment of duty on inputs received and used as inputs is the invoice. Thus, only when the invoice is found to be wrong or diversion of inputs received under invoice to any other use is found, lesser CENVAT credit than what has been proved to have been paid on entire goods received and used in factory of manufacture would be allowed. Therefore, the High Court concluded that full credit of CVD paid by the assessee in respect of the goods entirely used as inputs in manufacture of end product could be availed of.

5. Whether Cement, used as construction/building material in the mines is eligible as input for the purpose of availment of CENVAT credit?

Union of India v. Hindustan Zinc Ltd. 2008 (225) ELT 183 (Raj.)

The respondent - assessee availed a CENVAT credit on cement, explosives and oil and lubricants used in the mining area treating them as inputs. Revenue contended that assessee had wrongly availed the CENVAT credit. The goods in question could not be termed as inputs as these were not being used in the factory premises [as defined under Section 2(e) of the Central Excise Act, 1944] of the assessee. The same was used in the mining area for evacuation of ores while as per erstwhile rule 2(g) of the CENVAT Credit Rules, 2002 [now rule 2 (k) of CENVAT Credit Rules, 2004], inputs must have been used within the factory of production.

Revenue further contended that the Ordinary Portland Cement had been used in the mining area located at the depth of 100 meters to 600 meters below the ground level for the purpose of filing the gaps in the form of cut and filled the same for evacuation of ores so as to provide strength and safety to the roof of the mining area. Being a construction material, cement was not eligible as input for taking CENVAT credit under the aforementioned rule as it was not integrally connected or co-extensive with the process of manufacture.

Learned counsel appearing on behalf of the respondents submitted that cement was used for keeping the mines in a proper condition and unless the mines were protected and kept in a proper condition, the assessee could not carry his manufacturing activities and manufacture the final product as well. The cement was the most important article and without the same the final product was not possible.

Considering the above arguments, Rajasthan High Court decided that although factory and mines might be treated as part of the same establishment, yet the cement was always used as building or construction material. Therefore, even if it was used for keeping the mines in proper condition and without the use of the same, mines were liable to cave in and might crumple down, yet it could be said that it was always used as a building/construction material or for the purpose of repairing or maintaining the structure. In that view of the matter, the cement which was used as a building material could not be considered as inputs as per erstwhile rule 2(g) of CENVAT Credit Rules, 2002 [now rule 2 (k) of CENVAT Credit Rules, 2004]. Therefore, it was not eligible for CENVAT Credit.

6. Is CENVAT credit in respect of welding electrodes used for repairs and maintenance of plant and machinery admissible?

Hindustan Zinc Ltd. v. Union of India 2008(228) ELT 517 (Raj.)

The assessee was availing the credit of duty paid in respect of welding electrodes as capital goods. However, the Department denied the credit to the assessee contending that the said goods were not covered under the definition of capital goods. The assessee claimed that the welding electrodes were accessories of machinery used for soldering, drazing or welding falling under Chapter Heading No. 84.68. Since Chapter Heading No. 84.68 was an item eligible under erstwhile rule 2(b) (i) of the CENVAT Credit Rules, 2002 [now rule 2(a) (i) of the CENVAT Credit Rules, 2004], the welding electrodes acquired eligibility under erstwhile rule 2(b) (iii) [now rule 2(a) (iii) of the CENVAT Credit Rules, 2004]. The assessee further contended that if the credit was not allowed under capital goods scheme, then, the claim of the assessee might be considered treating the electrodes as inputs.

In *CCEx., v. Jawahar Mills*, SC held that capital goods could be machines, machinery, plant equipment, apparatus, tools or appliances. Even if they were not used for producing the final product, or for processing of any product, or for the manufacture of final product, or for bringing about any change in any substance, then also they would be eligible for CENVAT credit. The only requirement to determine CENVAT credit eligibility was the use in the factory of manufacturer.

In *JK Cottons SPG. & WVG Mills Co. Ltd v. Sales Tax Officer, Kanpur*, Hon'ble Supreme Court decided that the expression "in the manufacture of goods" should normally encompass entire process carried on by the dealer, of converting raw materials into finished goods. Further, where any particular process, or activity, was integrally connected with the ultimate production of the goods that process would, fall within expression "in the manufacturing of goods".

Considering the proposition propounded in two cases cited above, the Apex Court negatived the contention of the Revenue that the goods involved did not satisfy the requirement of capital goods and held that the appellant was entitled to the credit as availed by him.

5

GENERAL PROCEDURES UNDER CENTRAL EXCISE

1. Will an order served on an authorized signatory be a valid one, when the authorization to receive the same has not been given?

R.K. Agarwal v. CESTAT 2008 (221) ELT 486 (All.)

The petitioners are the Ex-Director of M/s. Kuwer Industries Ltd. A show cause notice demanding duty was served on the petitioners on 09.03.2000. The Commissioner, after considering the replies of the petitioner, imposed penalty and confirmed the demand vide order dated 30.10.2001.

There was some dispute between the Directors and the matter was referred for arbitration. The Arbitrator gave an award that the petitioners would have no concern with the working of the Company. Thus, the petitioners after 08.07.2001 never visited the office or the factory of the company. Consequently, they were ignorant about the adjudication order dated 30.10.2001. The petitioners came to know about the adjudication order in May 2002 and then they requested the Commissioner to give them a certified copy of the said order. The copy of the said order was made available to the petitioners on 17.07.2002. Thereafter, the petitioner preferred an appeal before CESTAT on 11.10.2002. An objection was raised regarding delay in filing the appeals. The petitioners filed applications for condonation of delay as the adjudication order was not served on them and when they came to know about the said order they applied for a copy of the same and it was received by them only on 17.07.2002.

The Tribunal observed that the copy of the order was served on the last known address of the petitioners and the same was duly received by the Authorized Signatory of the factory. Thus, the Tribunal rejected the application for condonation.

The High Court observed that there was nothing on record to establish that the petitioners had authorised anybody to receive the copy of the adjudication order on their behalf. The Authorised Signatory had received the order on behalf of M/s. Kuwer Industries Ltd. and therefore, the service of the adjudication order would not amount to service on petitioners. The High Court opined that it was incumbent upon the Department to serve the order on the petitioners also. Therefore, the date when the certified copy of the said order was made available to the petitioners (17.07.2002) would be treated as the date of service of the order.

2. Will education cess be payable on a product even if the excise duty is not payable thereon?

Indo Farm Tractors & Motors Ltd. v Union of India 2008 (222) ELT 184 (H.P)

The assessee manufactured tractors. Such tractors were exempt from payment of whole of the duty of excise or additional duty of excise leviable under the Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 vide an exemption notification. However, excise duty in the form of a cess was levied on automobiles under Industries (Development and Regulation) Act, 1951 (IDRA). Such cess was collectible under the Automobile Cess Rules, 1984. Further, the Finance Act, 2004 also imposed another excise duty called education cess @ 2% of aggregate of all duties of excise.

The Department contended that they were entitled to collect cess on tractors as per Automobile Cess rules. Further, it was submitted that the exemption applied only to the excise duty and not to the cess payable under the IDRA or education cess leviable under the Finance Act. However, the assessee contended that since tractors were exempt from payment of excise duty, no cess can be levied

The High Court observed that tractors could not be considered as automobile falling within definition of 'automobile' in Automobile Cess Rules, 1984. Tractors were treated differently from other automobile in the Automobile Cess Rules. The High Court opined that cess leviable on tractors could not be recovered under the Automobile Cess Rules. However, the High Court held that though cess could not be recovered but it would still be leviable as exemption from excise duty could not be extended to payment of cess provided under Industries (Development and Regulation) Act, 1951 and education cess leviable under the Finance Act, 2004. Further, the High Court stated that since the said exemption notification only made mention of the Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 and did not refer to the IDRA or the Finance Act, the assessee was liable to pay the cess on tractors as well as education cess.

The High Court further elaborated that the excise duty could always be calculated even if it is not collected and on this notional calculation, the education cess can be calculated and this cess should be collected in terms of the Finance Act.

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

Deepak Agro Foods v. State of Rajasthan 2008 (228) ELT 510 (S.C.)

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, non est 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.

6

DEMAND, ADJUDICATION AND OFFENCES

1. Whether the penalty under section 11AC and interest under section 11AB can be waived if the short-paid excise duty is paid under sub-section (2B) of section 11A of the Central Excise Act, 1944 before issuance of show cause notice?

CCE&C v. Padmashri VV Patil SSK Ltd. 2007 (215) ELT 23 (Bom.)

The High Court observed that section 11AC of the Central Excise Act, 1944 providing for imposition of penalty equal to the amount of duty evaded is penal in nature. This section comes into play when there is non-payment or short payment of duty due to fraud, collusion, wilful mis-statement or suppression of facts with intent to evade duty. The High Court held that by virtue of Explanation (1) to sub-section (2B) of section 11A the assessee cannot claim that penalty under section 11AC would not be imposed if the short paid duty is paid before issuance of show cause notice *in such cases where there is fraud, collusion, willful mis-statement/suppression of facts or contravention of any provisions of the Act or Rules with intent to evade the payment of duty*.

With regard to interest leviable under section 11AB of the Central Excise Act, 1944 the High Court observed that the same is a civil liability of assessee who has retained amount of public exchequer with himself and which ought to have been paid to the Central Government much earlier. The High Court stated that payment of interest is compulsory on non-payment or short payment of duty even though such evasion of duty is not mala fide or intentional. The High Court opined that the language of section 11AB is very clear and does not provide any discretion to the central excise officer to change the quantum of the interest. The interest has to be charged on such percentage as notified by the Government. The High Court elaborated that the use of words "shall" and "be liable" in section 11AB (1) clearly indicate that the interest is chargeable in all cases of non-payment or short payment.

On the question that whether the payment of duty under section 11A (2B) before issuance of show cause notice exempts the assessee from the liability to pay interest, the High Court observed that by virtue of explanation 2 to this sub-section the assessee is liable to pay interest on the amount paid under this sub-section and also on the amount of short payment of duty if any as may be determined by the central excise officer.

The High Court rejected the assessee's contention that once the short duty is paid before issuance of show cause notice under section 11A (2B), the Department is prohibited from issuing show cause notice. The High Court explained that there is no prohibition on issuing show cause notice for charging interest or imposing penalty even if the duty is paid. Also, show cause notice can be issued if the duty paid as ascertained by the assessee is less than the amount ascertained by the Department. The High Court made it clear that even if no notice is issued, interest is liable to be paid for the delay.

Note - In this case, the High Court dropped the penalty leviable under section 11AC not because the short paid duty was paid before issuance of show cause notice but due to the reason that there was no malafide intention on the part of the assessee.

Students may note that this case relates to the present position of law. In this context, it may further be noted that the case of Union of India v. TPL Industries Ltd. 2007 (214) ELT 506 (Raj.) reported in October issue of this Newsletter relates to the position before 11.05.2001, the date when the Finance Act, 2001 came into force. Sub-section (2A), (2B) and (2C) of section 11A were introduced vide the Finance Act, 2001.

2. 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 (216) ELT 177 (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. There cannot be a non-wilful suppression or mis-statement of a fact. Mis-statement of fact must be wilful.

The Supreme Court elaborated further that as far as words 'fraud and collusion' used in the proviso to section 11A are concerned, it is evident that the intent to evade duty is built into these very words. Similarly, the words 'mis-statement or suppression of facts' are clearly qualified by the word 'wilful' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.'

3. Whether the time for issuing the show cause notice can be extended by merely invoking the provisions of section 11A of Central Excise Act, 1944 without invoking the proviso thereof?

CCEx. v. Shree Ram Steel Rolling Mills 2008 (221) ELT 333 (Bom.)

The High Court observed that the extended period could be invoked only if the proviso was invoked. In the instant case, the show cause notice did not indicate that the proviso was invoked. The proviso requires that when the duty has not been paid, it must be by reason of fraud, collusion or willful misstatement or suppression of facts or in contravention of the rules with a view to evade the payment of duty. This fact was not stated in the show cause notice. In other words, the respondents had no notice of the same. Thus, the High Court held that merely invoking the provisions of section 11A without invoking the proviso would not extend the time.

4. **Whether interest would be payable on delayed payment of duty when differential duty is paid on own accord on retrospective revision of duty rate?**

CCEx. v. Maris Spinners Ltd. 2008 (223) ELT 163 (Mad.)

The assessee manufactured goods and cleared them to the customer on payment of excise duty. After the clearance of the goods, the assessee came to know about the enhancement of the duty rate with retrospective effect. The assessee, therefore, calculated and paid the differential duty by issuing the supplementary invoice to the customer.

The Department claimed that interest ought to have been paid under section 11AB of the Central Excise Act, 1944 on this differential duty paid in accordance with the supplementary invoice. Such claim was based on the contention that since the goods were cleared earlier, the entire duty was payable on the date of clearance of the goods and therefore, interest would be payable on the differential duty paid by the assessee voluntarily.

Section 11AB provides that where any duty of excise has not been levied or has been short levied or short levied or short paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2) or has paid the duty under section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below (ten percent) and not exceeding thirty-six percent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, *from the first date of the month succeeding the month in which the duty ought to have been paid under this Act."*

The High Court observed that the section comes into play if the duty paid/levied is short. The High Court noted that both the Commissioner (Appeals) and the CESTAT had observed that the assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The High Court stated that though the differential duty was due at that time i.e. when the revised rates applicable with retrospective effect were learnt by the assessee, which was much after the clearance of the goods, still the question of payment of interest would not arise as the duty was paid as soon as it was learnt that it was payable. The High Court held opined that the instant case was not a case where duty of excise has not been paid or short-paid. Therefore, the provisions of section 11A (2) and 11A (2B) were not applicable. Section 11AB (1) was not at all applicable, and therefore, the assessee was not required to pay interest.

5. **Is penalty simultaneously imposable on both proprietor and his firm?**

Anil Kumar Mahensaria v. CCus. 2008(228) ELT 166 (Del.)

In this case, the appellant contended that penalty could not be imposed both on the proprietorship firm and its sole proprietor for the same offence, since there was no difference between them. However, the Revenue took the plea that penalty was imposable on both proprietor and proprietorship concern. Delhi High Court answered the substantial question of law in the negative, which was, in favour of the assessee and against the Revenue. It ruled that the only one set of penalty could be imposed against the assessee, either as a sole proprietor or as a proprietorship firm. It further directed that since the proprietor was the appellant before us, the penalty amount was required to be paid by him and not by the proprietorship firm.

6. **Whether there is any discretion under section 11AC of the act to impose penalty less than the amount equal to duty evaded?**

C.C.E. & C., Aurangabad v. Godavari Manar Sahakari Sakhar Karkhana Ltd. 2008 (228) ELT 172 (Bom.)

Bombay High Court 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 act 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.

Note - Relevant portion of section 11AC of the Act reads as under:

"Where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under subsection (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined.

Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent."

7. Can a quantum of duty already accepted by jurisdictional officers of the supplier unit be contested by the officers in charge of recipient unit?

CCEx. & Cus. v. MDS Switchgear Ltd. 2008 (229) ELT 485 (S.C.)

The assessee - MDS Switchgear Ltd., Jalgaon was receiving 'tripstar MCB's single pole' of various configurations in semi-finished condition from their sister concern - MDS Switchgear Ltd., Sinnar. After carrying out certain operation, they cleared the goods at lower value than the landing cost of semi finished goods received from the supplier. The Revenue, after a detailed verification of record, came to the conclusion that the value of intermediate goods had been inflated by the supplier and alleged that the assessee had deliberately entered into practice of raising the value of semi-finished goods by adding CENVAT element in it and rounding off the value to higher figure so as to pass on the excess CENVAT credit. Therefore, the excess credit availed should be disallowed under Rule 57-I of Central Excise Rules, 1944 (Rule 14 of CENVAT Credit Rules, 2004).

Tribunal stated that if the Department was of the opinion that the value of the final product was depressed, then they should have charged the Jalgaon unit with under invoicing of their product which had not been done in the present case. The valuation as given by the Sinnar unit was duly approved by the Department and the payment of duty was also duly accepted. There was no legal basis on which learned Commissioner converted a part of the duty so paid into 'deposit of duty'. The CENVAT Credit Rules entitled the recipient unit (MDS Switchgear Ltd., Jalgaon) to avail of the benefit of the duty paid by the supplier unit (MDS Switchgear Ltd., Sinnar). A quantum of duty already determined by the jurisdictional officers of the supplier unit could not be contested or challenged by the officers in charge of recipient unit.

SC upheld the Tribunal's decision and decided that amount of CENVAT credit availed by the assessee was justified in present case.

7

REFUND

1. **Whether a refund claim for excess interest paid by the assessee can be filed under section 11B of the Central Excise Act, 1944?**

   CCEx. v. Northern Minerals Ltd. 2007 (216) ELT 198 (P & H)

   The assessee had paid excess amount of interest under section 11AB of Central Excise Act, 1944. Consequently, a refund claim for the said interest was filed by the assessee under section 11B. The Department objected to the refund claim on the ground that section 11B merely provides for refund of duty paid erroneously and not interest.

   The High Court observed that the payment of interest is inextricably laced with payment of duty in case of delayed payment thereof and also in case of delayed payment of refund of duty. Thus, the High Court held that payment of interest cannot be excluded from provisions of section 11B merely because it uses the expression 'refund of duty'. Further, such a collection of excess interest on account of delayed payment of duty would be unauthorized imposition of tax which is impermissible under the Constitution of India.

8

APPEALS

1. Whether the appeal filed by the Commissioner himself under erstwhile section 35B (2) of the Central Excise Act, 1944 is maintainable?

CCEx. v. Lloyd Insulation (India) Ltd. 2007 (216) ELT 201 (Tri.-LB)

Erstwhile section 35B (2) provides that the Commissioner of Central Excise may, if he is of opinion that an order passed by the Appellate Commissioner of Central Excise under section 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) under section 35A, is not legal or proper, direct any Central Excise Officer authorized by him in this behalf to appeal on his behalf to the Appellate Tribunal against such order.

In this case, the Commissioner had filed an appeal under section 35B (2). The respondents contended that section 35B (2) allowed a Commissioner to only "direct any Central Excise Officer authorized by him to appeal on his behalf to the Appellate Tribunal". The section did not permit the filing of appeals by Commissioner themselves. Thus, the appeal filed by the Commissioner under section 35B (2) was not maintainable.

The Supreme Court held that an appeal filed by a Commissioner of Central Excise himself (not through the Central Excise Officer authorized by him) is also maintainable under section 35B(2) of Central Excise Act, 1944. The Apex Court observed that even if such appeals are treated as defective, the defect is curable. Under section 35B (2), Commissioner shall cause Revenue appeals to be filed against an order passed by the Appellate Commissioner, if he is of the opinion that the order "is not legal or proper". The Apex Court explained that the intention of the law is that illegal and improper orders should not become final and should be taken in appeal before the Appellate Tribunal. Therefore, the provision of section 35B (2) should be implemented in order to facilitate this purpose and should not be used to subvert it. Thus, if appeals filed against illegal or improper orders are rejected at the threshold for the reason that they are defective in regard to filing, then it will defeat the very purpose for which appeals are provided for.

The Supreme Court explained that a statutory provision should be interpreted in its context and also to advance the true intention and purpose of law.

Note - Section 35B(2) was amended vide the Finance Act, 2005 to provide that instead of Commissioner of Central Excise, a Committee of Commissioners of Central Excise shall review the orders of Commissioner of Central Excise (Appeals) and direct any Central Excise Officer authorized by him to appeal on its behalf to the Appellate Tribunal. However, the principle enunciated in this judgment will hold good in respect of amended section 35B (2) as well.

2. Is CESTAT correct in dismissing appeal without stating reason?

Nagreeka Foils Ltd. v. CCEx. & Cus. Vapi 2008 (227) ELT 348 (Bom.)

Bombay High Court held that the Tribunal was a final fact finding body on the question of facts and the appeal lied to the High Court (under section 35G of the Central Excise Act, 1944) on the substantial question of law only. In the circumstances, the Tribunal had to go into all the issues of the facts and the contentions raised before it and came to a definite finding with the reasons therefore while disposing of the appeal.

Hence, HC concluded that the Tribunal was not correct in dismissing the appeal (without assigning any reason) merely by stating that since the Commissioner (Appeals) had already granted substantial relief to the appellant, further reduction or setting aside of the penalty was not called for.

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

C.K. Gagadharan v. CIT, Cochin 2008 (228) ELT 497 (S.C.)

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 mala fides. 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.

4. Whether order passed by CESTAT without considering case laws relied on by the party is proper?

Stanlek Engineering Pvt. Ltd. v. CCEx., Mumbai – II 2008 (229) ELT 61 (Bom.)

The appellant had filed appeal before the CESTAT, Mumbai. While that appeal was pending, appellant filed written submissions claiming that the appeal of the appellant was covered by two decisions of the Tribunal. On subsequent hearing, nobody had appeared on behalf of the appellant. The Tribunal, relying upon a SC judgment and without referring to judgments of the Tribunal which were relied upon by the appellant, disposed of the appeal. The appellant, therefore, filed an application for rectification pointing this fact out. His application was also disposed of without referring to the said two judgments.

As per the decision of SC, the course adopted by the Tribunal, of even not referring to the judgments relied upon by the appellant, was not proper and was not in accordance with law. Since the written submissions of the appellant were before the Tribunal, Tribunal should have considered the case of the appellant before disposing of the appeal. After considering those judgments, the Tribunal was free to rely upon the judgments of the Supreme Court. SC viewed that if after considering the judgments of the Tribunal on which the appellant was relying, Tribunal was of the opinion that those judgments were not relevant; it was for the Tribunal to point out, that, how those judgments were not relied and how, according to the Tribunal, the matter was covered by the judgment of the Supreme Court. So, the order was set aside and the appeal was remanded back to the Tribunal for de novo consideration and decision in accordance with the law.

5. What are the consequences of tampering with judicial record after an order is written and signed?

Dinker Khinderia v. UOI 2008 (229) ELT 63 (Del.)

In this case, the Tribunal passed the order on 5th July. On 25th July, Tribunal again passed an order in the same case and arrived at an entirely opposite conclusion.

Delhi HC held that after an order had been written and signed, it could not subsequently be changed and the decision reversed, whatever be the circumstances, particularly without any notice to any of the parties to the case. This really amounted to tampering with the judicial record. As per the court, this was quite a serious matter because if this was allowed to go unchecked, an order passed by the Tribunal would have no sanctity because it could be changed at will and different conclusions arrived at on different dates in respect of the same case.

6. Whether the limitation period for filing rectification of mistake is also the time limit for deciding the rectification of mistake?

Sree Ayyangar SPG & WVG Mills Ltd. v. CIT 2008 (229) ELT 164 (S.C.)

In this case, SC was only concerned with the interpretation of section 254(2) of the Income Tax Act, 1961 regarding powers of the Tribunal in the matter of rectification of mistakes apparent from the record. Section 254(2) of the Income Tax Act, 1961 reads as follows:

"The Appellate Tribunal, may at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer."

The Apex Court observed that application for rectification had been made well within four years. It was the Tribunal which had taken its own time to dispose of the application. Therefore, in the circumstances, the High Court had erred in holding that the application could not have been entertained by the Tribunal beyond four years.

Applying the ratio derived from *Harshvardhan Chemicals and Minerals Ltd. v. Union of India and Another [2002 (256) ITR 767],* SC ruled that once the assessee had moved the application within four years from the date of appeal, the Tribunal could not reject that application on the ground that four years had lapsed, which included the period of pendancy of the application before the Tribunal. Therefore, it concluded that if the assessee had moved the application within four years from the date of the order, the Tribunal was bound to decide the application on the merits and not on the ground of limitation.

Note - The principle enunciated in above mentioned case, viz., limitation period for filing rectification of mistake is not the time limit for deciding the rectification of mistake, may be applied to section 35C(2) of the Central Excise Act, 1944 and section 129B(2) of Customs Act, 1962- sections corresponding to section 254(2) of Income Tax Act, 1961. Hence, it appears that if the assessee has moved the application within six months from the date of order, the CESTAT shall not reject that application on the ground that six months has lapsed, which includes the period of pendancy of the application before the CESTAT.

9

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. Whether printing of a design/shape on visiting cards of executives of the company and drawings of the same company can confer any right or ownership of the said company over the said design/shape?

Nirlex Spares Pvt. Ltd. v. CCEx. 2008 (222) ELT 3 (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 Supreme Court observed that the printing of the said design on the visiting cards of the executives of the company 'X' and a drawing of the same company could not confer any right or ownership of the company 'X' over the said hexagonal shape/design nor would it show that such design had any association with company 'X". The Apex Court stated that the hexagonal design affixed on the corrugated boxes of the assessee did not reflect the nexus between the concerned goods and the company 'X'. Further, the said hexagonal shape/design was only printed on the visiting cards of the two executives of the company 'X' and the same was not even printed on the commercial documents like letter heads and sales invoices of the company 'X'. The design printed on the letterheads and sales invoices of the company 'X' was totally different. Moreover, company 'X' never came forward to say that the hexagonal design belonged to them and they had permitted the appellant to use the same on their corrugated boxes.

Thus, 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.

2. **Whether two or more units can be clubbed together simply for the reason that they have common employees or have adjoining premises?**

CCEx., Jaipur v. Electro Mechanical Engg. Corpn. 2008 (229) E.L.T. 321 (S.C.)

The Revenue contended that the assessee, M/s EMEC, had floated two front units, viz., M/s Cold Steel Corporation and M/s Super Steel Corporation in order to fraudulently avail the benefit of SSI exemption under notification no. - 8/2003 – C.E., which exempted the clearances of specified goods from the payment of duty and concessional duty in the case of certain SSI units. The Revenue further contended that since the assessee had deliberately and willfully suppressed the facts regarding its relationship with M/s Cold Steel Corporation and M/s Super Steel Corporation, hence, the SSI exemption available under the aforementioned notification should be denied to them.

The assessee replied that all the three units were in existence and were independent of each other. Each of the units was separately registered and there was no flow back of money from one unit to another and that they had not suppressed the facts from the Department. The proprietor of M/s EMEC was the partner in the other two firms which were undertaking their business independently.

The Apex Court upheld the Tribunal's decision who, relying upon the judgment of Rajasthan High Court in case of *Renu Tandon v. Union of India – 1993 (66) E.L.T. 375*, had decided that merely because there were some common employees, the value of the clearances of two units could not be clubbed unless there was evidence to prove that there was mutuality of business interest and the units were having financial flow back. The Apex Court agreed with the finding recorded by the Tribunal that there was no deliberate or willful suppression of any material facts by the respondent from the Department. Further, there was no evidence on record to prove that there was mutuality of business interest or there was flow back of funds from one unit to another. Hence, SC arrived at the conclusion that the clearances of two units could not be clubbed and the SSI exemption available under the aforementioned notification should not be denied to them.

10

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

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 (229) ELT 641 (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.

11

SETTLEMENT COMMISSION

1. **Can Settlement Commission reject an application on the ground that applicant has not made full true disclosure?**

   Cus. & C Ex. Settlement Commission v. Mars Therapeutics & Chem. Ltd. 2008(223) ELT 363 (HC)

   High Court held that an application made under section 32E of Central Excise Act, 1944 could be admitted and proceeded with only when Settlement Commission was satisfied that applicant had made a full and true disclosure of duty liability and the manner in which same was arrived at. The assessee's plea that obligation to make truthful disclosure of duty liability would arise after application was admitted and not before and that Revenue was required to first establish the stand taken in show cause notice, was not acceptable.

   SC further clarified that the onus was on the applicant to make a full and true disclosure of the duty liability and the manner in which the same was arrived at. Hence, it was only when the Settlement Commission was satisfied that the applicant had made a full and true disclosure, the application could be admitted and proceeded with. This was for the reason that the object behind the enactment of the provisions relating to settlement was the creation of a forum for self- surrender. The Settlement Commission was constituted as an extraordinary measure for providing an opportunity to such persons to make a true confession and to have matters settled once for all. The Settlement Commission was not a forum for challenging the legality of orders passed under the provisions of the Act. The Settlement Commission in the case on hand having found that the applicant-petitioner did not fully satisfy the mandatory requirements of full and true disclosure of its liability, the said decision could not be said to have no nexus with the ultimate decision taken by the commission to reject the application.

1

BASIC CONCEPTS

1. Whether a show cause notice issued for demanding customs duty in respect of clearances made by a 100% export oriented undertaking (100% EOU) in domestic tariff area is defective in law?

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

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

2

LEVY AND EXEMPTIONS FROM DUTY

1. Is furnishing of security required under section 18 in a case where there is no difference between the provisionally assessed duty and finally assessed duty?

Jhoola Refineries Ltd. v. Union of India 2007 (218) ELT 181 (Guj.)

Certain imported goods were seized on account of some dispute regarding availament of exemption. The assessee was asked to furnish a bond applying full rate of duty (without the concession provided by the exemption notification) and bank guarantee for 25% of the duty. Goods were ordered to be provisionally assessed at the full rate of duty. The assessee agreed to pay full rate of duty. However, he objected to furnishing a security.

The High Court observed that section 18 of Customs Act, 1962 could not be invoked for seeking security in such a case as the assessee agreed to pay the entire duty at the rate fixed by the proper officer and thus there was no deficiency or short payment of duty. The High Court stated that in order to seek security under the provisions of section 18 there has to exist a deficiency between provisionally assessed duty and finally assessed duty.

Thus, the High Court directed that goods should be provisionally assessed without imposing any condition regarding furnishing of security.

3

CLASSIFICATION OF GOODS

1. Whether a laptop computer with hard disc having preloaded software is assessable as a single unit under customs laws?

CCus. v. Hewlett Packard India Sales (P) Ltd. 2007 (215) ELT 484 (SC)

The assessee had imported laptops containing preloaded Hard Disc Drives (HDD). The said drives were preloaded with operating system (software). The Department claimed that the said laptop along with the operating software was classifiable as a machine under Heading 84.71. However, the assessee contended that software loaded hard disc drive should be classified separately from the laptop under Heading 85.24. The assessee classified the software separately and claimed exemption from the duty payable on the same vide an exemption notification.

The Supreme Court observed that the pre-loaded operating systems recorded in Hard Disc Drive in the laptop (item of import) forms an integral part of the laptop as the laptop cannot work without the operating system. The computer cannot even open without the operating system. A laptop without an operating system is like an empty building.

The Apex Court held that when a laptop is imported with in-built pre-loaded operating system recorded on HDD, the said item forms an integral part of laptop (Computer system). Hence, laptop should be treated as one single unit classifiable under Heading 84.71 of Customs Tariff Act, 1975. However, if the operating system is imported as packaged software like an accessory, then it would be classifiable under Heading 85.24.

Note - The Headings cited in this case law may not co-relate with the Headings of the present Customs Tariff as this case relates to an earlier point of time.

4

VALUATION UNDER CUSTOMS ACT, 1962

1. Can unsigned xerox copies of documents be relied upon for claiming under-valuation of imported goods?

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

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

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

2. Whether price reduction due to increased volume of imports amounts to under-valuation?

CCus. v. Initiating Explosives Systems (I) Ltd. 2008 (224) ELT 343 (S.C.)

The assessee- respondent had been importing "Orange Shock Tube" from the exporter at a unit price of US$ 0.0150 per ft till November, 2000 when the price was reduced to US$ 0.0141 per ft. However, in June, 2001, the importer declared the value of the imported tubes at a unit price of US$ 0.0100 per ft. Revenue contended that declared value was substantially lower than the actual value i.e. the assessee had under-valued the goods. Therefore, the value had to be determined as per erstwhile rule 5 of Custom Valuation Rules, 1988 [now rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007], viz., transactional value of identical goods. In this regard, the assessee provided the explanation that the reduction in price was subject to the mutual agreement that he would purchase 100% of its annual requirement from the same exporter.

The Apex Court held that the assessee's contention, that the said increase in the volume of import had been the reason for decrease in the price, was tenable. Further, the Revenue had failed to place any contemporaneous imports of identical goods by any other importer during the material time showing the purchase to be at more than US$ 0.0100 per ft. The burden to prove, that the goods in question were under - valued by the respondent, lied on the Revenue which it had failed to discharge. Hence, transactional value should be accepted as assessable value.

3. Whether the adjudicating authority is justified in including the royalty/license fee payment in the price of the imported goods by taking its peak price?

Wep Peripherals Ltd. v. CCus., Chennai 2008 (224) ELT 30 (SC)

The assessee was the manufacturer of printers. The shuttle, an integral part of a printer, was imported by him. The question which arose for determination was whether the adjudicating authority was entitled to load the royalty/license fee payment on the price of the imported goods, viz., shuttle by taking its peak price.

SC observed that the importer used to negotiate the price on a quarterly basis. The correspondence between importer and the foreign supplier was placed before adjudicating authority before conclusion of enquiry which indicated that the reason for reduction in the prices of printers was a bulk order received by the assessee for printers. Such correspondence was not considered by adjudicating authority while invoking erstwhile rule 9(1)(c) of Customs (Valuation) Rules, 1988 [now Rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

SC further clarified that in the present case, there was nothing to indicate that royalty payment was a condition pre-requisite to the sale of shuttle. Moreover, royalty payment was not based on value. Hence, the Department's contention for invoking aforementioned rule that shuttle was an integral part of the printer, was not tenable.

Therefore, SC overruling the Tribunal's decision held that the royalty/license fee payment could not be included in the price of the imported goods by taking its peak price.

5

IMPORTATION, EXPORTATION, AND TRANSPORTATION OF GOODS

1. **Whether demand of duty and penal action taken on the ground that the vessel has finally gone out of the country is justified?**

   CCus., Kandla v. Jaisu Shipping Co. Pvt. Ltd. 2008 (226) ELT 347 (Guj.)

   The Gujarat High Court held that considering that the vessel had finally gone out of the country and considering that the transshipment permission was validly given by Mumbai Customs Authorities, the demand of duty and penal action taken by Kandla Customs was not justified. Further, there was no finding that the materials were consumed while the vessel was in Kandla Port. Even otherwise, as per Section-2(21)(ii) and (iii) read with section 87of the Act, it was a foreign going vessel and hence, no duty was payable thereon.

2. **Discuss the implications of the assessee failing to export re-imported goods after repairs within time limit. Can the assessee change its option and avail the benefit under other notification?**

   CCus., Calcutta v. Indian Rayon & Industries Ltd. 2008 (229) ELT 3 (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 due to recessionary conditions in the textile industry. It 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.

   Revenue's reply to the said contention was that it was not correct to say that if two notifications were applicable, assessee after having opted to take the benefit under one of the notifications could change its option and avail the benefit under the other scheme because of the nature and contents of the notification.

   As per notification no. 158/95-Cus. dated 14th Nov, 1995, goods manufactured in India and re-imported in India for repairs or for reconditioning are exempted from whole of the duty of customs leviable on them as well as additional duty subject to the condition, *inter alia,* that the goods are re-exported within six months of the date of re-importation or any extended period as may be allowed and a bond is executed at the time of importation to export within the said period and, in the event of failure to do so, pay an amount equal to the difference between the duty levied at the time of re-import and the duty leviable on such goods at the time of importation.

The Apex Court observed that the assessee's contention, that he could change its option at a later stage also, was not tenable. The only notification which was available to the assessee at the time of import and which granted the assessee the right to import duty free goods was notification no. 158/95-Cus. 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.

6

WAREHOUSING

1. Does the owner of the warehoused goods have the right to relinquish his title to such goods after the expiration of warehousing period or after the expiration of extended warehousing period?

CCus. v. i2 Technologies Software (P) Ltd. 2007 (217) ELT 176 (Kar.)

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 said 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.

The High Court 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.

The High Court elaborated that on a plain reading of the provisions of section 23(2), 47, 68 and the proviso to section 68, it is clear that the owner of warehoused goods has the right to relinquish his title to such 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. The Court however made it clear that interest and rent payable under section 68 would be recoverable from the date of deposit of the goods in the warehouse to the date of relinquishment of title of such goods. Thus, the High Court dismissed the Department's appeal.

2. Can goods cleared under section 68 of the Customs Act, 1962 be treated as warehoused goods if the same are kept in the warehouse under the provisions of section 49 of the Act?

CCus. v. Biecco Lawrie Ltd. 2008 (223) ELT3 (SC)

Respondent imported certain goods and stored them storage tanks in a private warehouse. Subsequently, the respondent filed ex bond bill of entry (to get them de-bonded) for home consumption and paid full duty. The proper officer endorsed on the reverse of the bills of entry to the effect that the goods may be released by the officer-in-charge of the warehouse. The officer-in-charge.' in turn, released the goods and made on endorsement to this effect on the reverse of Bill of Entry. Since the goods were of highly combustible and could not be taken out of storage tank to store elsewhere, the respondent made an application under section 49 of the Customs Act to permit storage of such goods (which had been cleared for home consumption) in the same warehouse/ tank. The goods were stored in the storage tank of the private warehouse under an agreement entered into by the respondent with warehouse owner and the storage charges were paid by the respondent. The Customs Department demanded duty when the respondents cleared the goods from the storage tank as and when required.

The High Court observed that where the imported goods are allowed to be warehoused under section 68 of the Act and are subsequently cleared from the warehouse, the rate as applicable on the date of actual removal of the goods from the warehouse, is applicable*. The High Court stated that since in the instant case, full duty had already been paid by the respondent and the customs officer had permitted the clearance of the goods, the goods could not be held to be the warehoused goods. The goods were allowed to be kept in the warehouse only on account of an application made by the respondents in terms of the provisions of section 49 of the Act.

The High Court opined that in such a case the removal of the goods would not be governed by section 15(1)(b) but by section 15(1)(a) which provides that in the case of goods entered for home consumption under section 46, the duty leviable would be as on the date on which the bill of entry in respect of such goods is presented. In this case, full duty was paid when the bill of entry was presented by the respondent.

Thus, the High Court held that where duty on the warehoused goods is paid and out of charge order for home consumption is made by the proper officer in compliance of the provisions of section 68, the goods removed in smaller lots have to be treated as cleared for home consumption and importer would not be required to pay anything more.

**Note - Finance Act, 2003 has amended section 15(1)(b) to provide that the relevant date for determining the rate of duty and tariff valuation in case of goods removed from the warehouse would be the date of presentation of bill of entry for home consumption.*

3. Can the proviso to section 68 of the Customs Act, 1962 be invoked in a case where the warehoused goods are deemed to have been removed from the warehouse under section 72?

J.K. Cement Works v. CCEx. & Cus. 2008 (223) ELT 138 (Raj.)

The assessee had imported certain goods and kept them in warehouse. However, the goods were not removed from the warehouse at the expiration of the statutory time period during which such goods were permitted under section 61 to remain in a warehouse.

The assessee sought to relinquish the title to such goods under the proviso to section 68. However, the Department contended that since the goods were deemed to be improperly removed from the warehouse (considering the over stay of such goods in the warehouse) under section 72(1)(b), the case would not fall under section 68 and thus proviso to section 68 could not be invoked. It was submitted that before invoking the proviso to section 68, the conditions of section 68 must be fulfilled which was not done in the instant case.

The High Court observed that it is not necessary to fulfil conditions for clearance of warehoused goods prescribed in main provision for invoking the proviso to section 68. The High Court explained that the only condition for invoking the proviso is that order of clearance of goods for home consumption should not have been passed and goods must still be in the warehouse. The High Court stated that it is immaterial for the purpose of invoking the proviso that the goods remained in warehouse beyond permitted time limit.

The High Court clarified that the relinquishment of title does not absolve the importer from total liability. Only the liability to pay the duty is appropriated towards goods which vest in Revenue or such other specified authority. The other liabilities in respect of such goods including rent, interest etc. remain payable. The High Court added that acceptance of this option is not subject to discretion of proper officer, but only to fulfilment of conditions prescribed in proviso to section 68 of Customs Act, 1962.

The High Court rejected the Revenue's contention that the case must first come within the domain of section 68 to invoke the proviso because if the importer is able to pay full duty, the question of exercise of option for relinquishment would not arise. Therefore, to permit exercise of option of relinquishment only on fulfilment of conditions of section 68 [clause (b)] would nullify the effect of the proviso which was introduced to mitigate the hardship arising from non - removal of imported goods from warehouse. The High Court explained that even when order for clearance of goods under section 71(2) has been made, proper authorization and payments have to be made, before the goods are removed from warehouse.

4. Whether the right of the 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?

Associated Container Terminals Ltd. v. Union of India 2008 (226) ELT 169 (Del.)

The importer warehoused the goods after the execution of necessary bond but did not clear them within the warehousing period nor sought any extension. Meanwhile, the warehouse keeper auctioned the goods u/s 63(2) of the Act and sought permission from the Department for their clearance to the highest bidder and for the recovery of his warehousing charges. However, the custom authorities insisted that u/s 150 of the Act, the entire auction proceeds had to be first adjusted towards the custom duty.

Delhi High Court held that in section 150(2)(b), words *"and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods"* makes 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 Act. Viewing from this angle, the right of the warehouse keeper here to recover the warehousing charges from the sale proceeds appeared to be superior to the right of the Revenue to recover customs duty.

Note - Section-150(2) of the Act reads as under:-

The proceeds of any such sale shall be applied

(a) firstly to the payment of the expenses of the sale,

(b) next to the payment of the freight and other charges, if any, payable in respect of the goods sold, to the carrier, if notice of such charges has been given to the person having custody of the goods,

(c) next to the payment of the duty, if any, on the goods sold,

(d) next to the payment of the charges in respect of the goods sold due to the person having custody of the goods,

(e) next to the payment of nay amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs, and the balance, if any, shall be paid to the owner of the goods.

7

DEMAND AND APPEALS

1. What would be the relevant date of payment of duty: the date of payment of demand draft or the date of presentation of TR-6 challan to the customs authorities?

CCEx. v. Vijay silk house 2008 (223) ELT 30 (HC)

As per section 47(2) of the Customs Act, the duty has to be paid within two days excluding holidays on which the bill of entry is returned to the importer for payment*. A demand of interest was raised on the assessee on the ground that the TR-6 challan showing the payment of duty in respect of the bill of entry were presented after delay of five/seven days.

The High Court observed that the payment was made by the demand draft within two days of the return of the bill of entries after the assessment to the assessee. Therefore, the High Court conforming to the Tribunal's view held that the date on which the demand draft was deposited in the bank would be treated as the date of payment even though TR-6 challans were presented to the customs authorities at a subsequent date.

The High Court observed that the view taken by the Tribunal was in conformity with the law laid down by the Apex Court in the case of Commissioner of Income-tax, Bombay South v. M/s. Ogale glass Works Ltd., AIR 1954 SC 429 and K. Saraswathy v. P.S.S. Somasundaram Chettiar, 1989 (4) SCC 527. The High Court pointed out that the Board's Circular No. 28/2002- Cus. dated 24-5-2002 where a reference has been made to the cheque and not to the demand draft would not make any material difference.

**Note - Under the existing provisions of section 47(2) of the Customs Act, 1962 the duty has to be paid within five days excluding holidays on which the bill of entry is returned to the importer for payment.*

8

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

1. What is the difference between detention and seizure?

Pro Musicals v. Joint Commissioner Customs (Prev.), Mumbai 2008 (227) ELT 182 (Mad.)

The goods imported by the petitioner – the assessee were detained on 22-5-2006. However, the petitioner did not produce the documentary evidence. Consequently, the impugned goods were seized on 2-8-2006. The Department issued a show cause notice to the assessee on 15-1-2007. The assessee put forth the question of limitation alleging that the impugned show cause notice had been issued after a period of six months from the date of the seizure as one envisaged under section 110(2) of the Customs Act, 1962 and hence, it was time-barred. The goods were taken on 22-5-2006; but, the show cause notice was issued on 15-1-2007 which was after a lapse of six months. So, the petitioner sought for quashing of the show cause notice and also for the return of the goods.

After going through the relevant provisions u/s 110(2) of the Act, the Apex Court observed that the show cause notice issued to assessee was not out of time because time limit under section 110(2) reckoned from the date of seizure and not from the date of detention. Further, detention could, at no stretch of imagination, be considered to be same as seizure.

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

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

Hence, the Supreme Court ruled out the assessee's contention that detention and seizure were one and the same and held that the show cause notice issued by the Department was valid.

9

REFUND

1. Whether the refund of wrongly encashed bank guarantee would be governed by the provisions of section 27(1) (b) of the Customs Act, 1962?

CCus. (Exports) v. Jraj Exports (P) Ltd. 2007 (217) ELT 504 (Mad.)

The assessee had imported capital goods under a licence with the condition to fufill the export obligation within the prescribed time limit. However, the assessee failed to discharge the export obligation. Consequently, the Department invoked the bank guarantee and realized the amount. However, subsequently, the assessee fulfilled the export obligation and as a result of which the Department cancelled the bank guarantee. Accordingly, the assessee filed a refund claim for the amount realized by invocation of the bank guarantee. However, the Department rejected the refund claim on the ground that it was time barred in terms of section 27(1)(b) of the Customs Act, 1962.

The High Court observed that when the Department had accepted the fulfilment of export obligation there was no need to invoke the bank guarantee and retain the amount. The High Court opined that the Department's claim of refund being time barred was not sustainable as furnishing of bank guarantee in order to fulfill the export obligation could not be regarded as payment of duty. The High Court relied on the Supreme Court's ruling in the case of *Oswal Agro Mills Ltd. and Another v. Asstt. Collector of Central Excise 1994 (70) ELT 48 (SC)* wherein it was held that furnishing of bank guarantee pursuant to an order of the Court would not be equivalent to payment of excise duty. The furnishing of bank guarantee is only a security to safeguard the interest of the Revenue.

Note - This case establishes that only refund of duty is governed by section 27 of the Customs Act, 1962. Therefore, the limitation period prescribed in the section for refund of duty arising in various circumstances would not apply to refund of a bank guarantee wrongly encashed by the Department as furnishing of a bank guarantee cannot be equated with payment of duty.

10

DUTY DRAWBACK

1. Can delay in filing drawback claim be condoned when the documents necessary for availing the same are returned late by the Department itself?

Stovec Industries Ltd. v. Union of India 2008 (221) ELT 328 (Guj.)

The petitioner imported raw materials for manufacturing two machines. Material for both the machines were common. When he exported the first machine, the entire papers of import of raw material were submitted before the Authorities for claiming drawback. Subsequently, when the petitioner exported the second machine and again claimed drawback, those papers became necessary. However, those papers were lying with the Department and the same were returned to the petitioner only on 13-10-2004. Immediately, thereafter, on 26-11-2004, the petitioner submitted an application for the drawback.

However, the petitioner's claim for the drawback was denied on the ground that the application was submitted after the expiry of statutory period (90 days) allowed for filing the drawback claim under rule 6 of the Drawback Rules.

The High Court held that since the necessary papers on the basis of which the petitioner was claiming drawback were lying with the Department and they were returned only on 13-10-2004, delay in filing the application should be condoned under the provisions of rule 17 of the Drawback Rules of 1995.

Note - Rule 6 of the Customs, Central Excise Duties and Service tax Drawback Rules, 1995 provides that application for fixation of brand rate must be made within 60 days of export. This period can be extended by Central Government by further 30 days.

Rule 17 of the Customs, Central Excise Duties and Service tax Drawback Rules, 1995 provides that if the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorised agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback, it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods.

1

PRELIMINARY LEGAL PROVISIONS

1. **Whether value of materials supplied free of charge by service recipient is includible in gross amount?**

   Era Infra Engineering Ltd. v. U.O.I. 2008 (11) STR 3 (Del.)

   The assessee contended that materials supplied by NTPC, the third party, free of cost for contemplating the contract cannot be included in the gross amount charged for the purpose of determining the Service Tax payable.

   In the explanation to serial no. 7 in Notification No. 1/2006 – S.T., it is mentioned as follows:-

   "Explanation - The gross amount charged shall include the value of goods and materials supplied or used by the provider of the construction service for providing such service"

   "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"

   Considering above, it was held that any material which is supplied free of charge by NTPC would not be included in gross amount charged.

2. **Whether value of spares and parts is includible to arrive at service tax liability in case of an Annual Maintenance Contract?**

   Wipro GE Medical Systems Pvt. Ltd. v. Commr. Of S.T., Bangalore 2008 (11) STR 142 (Tri. – Bang.)

   It was held that while computing the service tax liability in case of Annual Maintenance Contract, value of spares and parts would not be included in the gross amount charged and service tax was payable only on commission received in terms of AMC.

3. **Whether parking charges includible in taxable value for 'mandap keeper service'?**

   Desert Inn Ltd. v. CCEx., Jaipur 2008 (10) STR 573 (Tri. Del)

   The assessee was providing the 'mandap keeper service' and was paying service tax in that regard. Adjoining the mandap, there was a parking place for which they were charging separately in the invoice and this fact had been reflected in their Balance Sheet. Revenue's contention was that the parking charges should be added to the assessable value.

   Tribunal held that parking charges were includible in taxable value for 'mandap keeper service' because parking was provided as a part of 'mandap keeper service' and could not be used by any other person who had not booked mandap.

2

GAMUT AND COVERAGE OF TAXABLE SERVICES

1. **Whether levy of service tax on chartered accountants, cost accountants and architects is constitutionally valid having regard to Entry 60 of List II of the Seventh Schedule to the Constitution?**

   All India Federation of Tax Practitioners v. Union of India 2007 (7) STR 625 (SC)

   The Constitution Bench of Supreme Court has upheld the Parliament's legislative competence to levy service tax on chartered accountants, cost accountants and architects. The Bench observed that the residuary entry 97 of the Union List of Constitution of India provided the authority to the Central Government to levy tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide Constitution (Eighty-Eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax.

   Entry 60 of List II refers to taxes on profession, trades callings and employments. List II contains the matters in respect of which the State Government can make laws. The Bench clarified that service and profession are not synonymous under Entry 60. The Apex Court observed that service tax and professional tax are distinct as professional tax is a tax on status whereas service tax can be levied only when a service is being provided. A chartered accountant or cost accountant obtains a license or privilege from competent body to practice. On that privilege the State is competent to levy professional tax under Entry 60. Professional tax has nothing to do with commercial activities undertaken by the chartered accountant as he has to pay professional tax till he remains in the profession. However, service tax is levied on each professional activity undertaken by chartered accountant/cost accountant/architect for a consideration. Thus, service tax is different subject as compared to taxes on professions, trades, callings, etc.

   Thus, the Supreme Court held that the Parliament has absolute jurisdiction and legislative competence to levy tax on services under Entry 97 of List I of the Seventh Schedule to the Constitution of India as Entry 60 of List II and Entry 92C/97 of List I operate in different spheres.

   In the instant case, Apex Court has also held that service tax is leviable on online information and database provided by website in the case of internet service providers. However, service tax is not leviable on e-commerce as database access is absent in this case.

2. **Whether hospitality services rendered at executive lounge at the airport come within the purview of airport services?**

Oberoi Flight Services v. CST 2007 (7) STR 516 (Tri. – Del.)

The appellant maintained an "Executive Lounge and Snack Bar" at transit area in the airport. The facilities provided at the lounge were that of newspaper, magazines, tea, coffee, snacks, cable TV, liquor, cigarette, computer with internet, STD/ISD etc. The Department contended that these services were airport services.

The Tribunal held that these services are not airport services as they have nothing to do with arrival or departure of aircraft which is the substance of airport service. Further, some of the services provided at the lounge like cable TV, STD/ISD are separately liable to service tax under their respective headings. The Tribunal explained that a service would not be treated as airport service just because it is rendered in airport. The Tribunal held that the appellant was in hospitality business and the running of the executive lounge to provide facilities to passengers would form part of hospitality service and not airport service.

3. **Does port service cover repair of vessels in dry docks?**

Homa Engineering Works v. CCEx., Mumbai 2007 (7) STR 546 (Tri.- Mum)

The appellant was engaged in repairing, chipping, cleaning and painting of vessels. The appellant had taken registration under maintenance or repair services. However, the Department relied on section 42 of the Major Port Trusts Act, 1963, which provides the scope of services to be provided by the Board or other person, and claimed that such service was port service. Clause (e) of section 42(1) provides that the Board shall *inter alia* have power to undertake piloting, hauling, mooring, remooring, hooking, or measuring of vessels or *any other service in respect of vessels.*

The Tribunal held that the expression 'any other services in respect of vessels' in the statutory definition could be extended only to the services which were connected with the movement of vessels. The Tribunal held that repairing of vessel in dry docks was not connected with the movement of vessel in any manner and thus such service would not be classified under port service.

The Tribunal further held that C.B.E & C Circular dated 10-11-2003 clarifying ship repair at dry docks taxable under port services was not in accordance with the law. The Tribunal stated that the impugned clarification was bin.

4. **Is the activity of collecting human blood samples and separating serum from it covered within the ambit of business auxiliary service?**

CCEx. v. Dr. Lal Path. Lab (P) Ltd. 2007 (8) STR 337 (P&H)

The assessee owned a collection centre at Ludhiana, which was engaged in the drawing of human blood, urine and stool samples on behalf of the Principal Lab at Delhi for conducting biological tests. The assessee sent the samples so collected to the principal company at New Delhi through a courier. The assessee received 25% commission for such service. The Department demanded service tax on such commission on the ground that the activity carried out by the assessee amounted to promotion or marketing of service provided by its Principal Lab at New Delhi and thus would be covered under business or auxiliary service.

The High Court held that merely because the assessee renders any incidental service like putting across or dropping of the name of the principal company, it would not become part of the definition of 'business auxiliary service'. The High Court observed that the activity undertaken by the assessee was covered by the exception postulated by sub-section (106) of section 65, which excluded any testing or analysis service provided in relation to human beings or animals from the scope of taxable 'technical testing and analysis' service.

The High Court reaffirmed the Tribunal's opinion that the drawing of test samples form part of testing and analysis service and it was not a separate service covered under business auxiliary service. Moreover, even if the drawing of samples and testing and analysis were seen as entirely separate and different services, drawing of sample and initial processing of the same were clearly connected or incidental to testing and analysis.

5. Whether 'retainer fee' is liable to service tax?

S. Maruthappan v. CCEx. 2007 (8) STR 228 (Tri-Chennai)

The appellant was engaged in the capacity of a consulting engineer by M/s Nagammal Mills Ltd. for supervising electrical works for a certain period. The remuneration paid to him by the company was accounted as 'retainer allowance' in the accounts of the company for the material period. The Department demanded service tax on such retainer allowance received by the appellant from the company.

The Tribunal opined that the transaction between a 'service provider' and a 'service recipient' must be on principal-to-principal basis. The Tribunal held that since this basic requirement was not satisfied in this case the demand of service tax was liable to be vacated.

6. Whether the activity of powder coating on furniture supplied by the customers is covered under the ambit of business auxiliary service?

A.G. Shibu v. CCEx. 2007 (8) STR 402 (Tri-Bang)

The Tribunal held that the activity of powder coating was a process of manufacture in terms of section 2(f) of the Central Excise Act, 1944. Therefore it was held by the Tribunal that the said activity did not fall within the definition of business auxiliary service.

7. Whether sale of lottery tickets is liable to service tax under the category of business auxiliary service?

Martin Lottery Agencies Ltd. v. Union of India 2007 (8) STR 561 (Sikkim)

The issue under consideration was that whether the sale of lottery tickets by the petitioner would be liable to service tax under the 'business auxiliary service' in terms of sub-clause (i) of section 65(19) of the Finance Act, 1994.

Section 65(19)(i) inter alia lays down that "business auxiliary service means any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client".

The High Court relied on the Supreme Court's decision in the case of *Sunrise Associates v. Govt. of NCT of Delhi 2006 5 SCC 603* wherein it was held that lottery tickets were actionable claims and not goods within the meaning of Sale of Goods Act. Thus, the High Court held that if the lottery tickets were not goods, the petitioner could not be said to be rendering any service in relation to the promotion of their client's goods, or marketing of their client's good, or sale of their client's goods.

8. Whether supplying of computers and other hardware items on hire and generation of MIS reports would come under the ambit of 'business auxiliary service'?

Bellary Computers v. CCEx. (Appeals) 2007 (8) STR 470 (Tri.-Bang.)

The appellant entered into an agreement with an electricity concern for providing software and hardware for implementation of the computerized billing revenue management system. A large number of computers were supplied to the electricity concern by the appellants and for the supply of these computers, printers and other hardware items, the appellants received hire charges. They were also required to generate MIS reports and did a lot of data processing and generated reports. The Department contended that the services provided by the appellant were business auxiliary services and were thus liable to service tax.

The Tribunal observed that the appellants were not actually promoting the business of the electricity concern. The Tribunal held that except billing all other services rendered by the appellant were related to information technology service and hence were excluded from the scope of the 'business auxiliary service'. Thus, the Tribunal remanded the case to the original authority for recomputation of service tax liability by excluding the amount charged for hiring hardware and information technology services.

Note - Section 65(19) of the Finance Act, 1994 inter alia lays down that business auxiliary service does not include information technology.

9. Whether sale of ready built flats is taxable under 'construction of complex service'?

Greenview Land & Buildcon limited v. CCEx., Chandigarh 2008 (11) STR 113 (Tri – Del.)

The assessee was engaged in construction of complex without engaging any contractor or service provider in relation to it. The entire work was carried out by appellant as developer and builder and ready built flats were sold.

Tribunal observed that as per CBEC Circular No. 96/7/2007-S.T. dated 23-8-2007, if no other person is engaged in construction work and the builder/promoter/developer/any such person undertakes construction work on his own without engaging the services of any other person, then in such cases, (i) service provider and service recipient relationship does not exist, (ii) services provided are in the nature of self-supply of services. Therefore, Tribunal held that sale of ready built flats in the instant case was not taxable under 'construction of complex service'.

10. **Whether making hoardings/signboards without preparing advertisement liable under 'advertising agency service'?**

Hitech Publicities v. CCEx., Madurai 2008 (11) STR 140 (Tri. – Chennai)

It was held that there could be no demand of service tax on a person in the category of 'advertising agency service' unless it was established that such person conceptualized and designed the advertisement matter displayed on the hoardings, signboards etc. Mere making hoarding/signboards for display of advertisements was not covered within the ambit of 'advertising agency service'.

11. **Is the promotion of any service which is not taxable liable to service tax?**

The Financers v. CCEx., Jaipur – II 2008 (11) STR 55 (Tri. Del.)

It was held that in respect of 'business auxiliary service', promotion of any service would be covered and it was not necessary that the service which was being promoted should be a taxable service only. The promotion of any service, whether taxable or non-taxable, would be taxable as a 'business auxiliary service'.

12. **Whether loading and unloading in a mine is covered under 'cargo handling service'?**

CCEx., & Cus., Bhubaneshwar-II v. B.K. Thakkar 2008 (9) STR 542 (Tri. – Kolkatta)

The assessee was engaged in excavation, transportation and feeding of iron ores to the hill top crusher plant for further processing of iron ore. Revenue contended that these activities should be classified under 'cargo handling service'. The assessee's plea was that as per section 65A(2) of the Act, a composite contract shall be classified under any one category on the basis of its essential character. The essential character of the composite services provided in this case was mining/production of iron ore.

Tribunal held that the activities undertaken by the respondents were primarily in the nature of mining activities comprising of excavation, transportation and feeding of iron ores to the crusher plant and even though these activities might incidentally involve some loading and unloading, the same could not be covered under the category of 'cargo handling service' because the iron ore which was being carried could not be commercially called 'cargo' in impugned case.

13. **Whether port services cover stevedoring, tug hire & labor supply?**

Velji P. & Sons (Agencies) P. Ltd. v. CCEx., Bhavnagar 2007 (8) STR 236 (Tri. - Ahmd.)

The appellant engaged in Customs House Agent services - handling, stevedoring, loading, unloading, tug hire and labour arrangement, **held a valid license** from the Customs under the provisions of Customs House Agent Licensing Regulations, 1984. The appellant, accordingly, was paying service tax under 'Customs House Agent services'. Revenue contended that the impugned services came under the ambit of 'port services'.

The Tribunal observed that as per the case of *Homa Engineering Works*, "Port Service" means any service rendered by a port or any person **authorized** by such port. Tribunal further noted that the Port had only issued license to the appellant which could not be considered as authorization. Such licenses were issued by the Port authorities to all the persons working in the Port to ensure the safety and security of the Port Area. License means a permission granted for specific purpose. Unlike an authorization holder, License holder does not have powers or authority of the person issuing the license, unless the license specifically mentions about it. Authorization may be issued by way of license, but not all licenses are authorizations.

Hence, the licenses issued by Ports to various agencies (under Sec. 123 of MPTA) should not be confused with the authorization (may be by way of license) issued under Section 42 of MPTA.

In the light of the foregoing discussion and applying the ratio of law declared by the Tribunal in the case of *Homa Engineering Works*, Tribunal was of firm view that activities undertaken by the appellant did not fall under the category of 'port services'.

14. Does Management Consultant Service cover marketing know-how?

Castrol Ltd. v. CCEx., Raigad 2007 (8) STR 254 (Tri. Mumbai)

In the instant case, Revenue contended that in an agreement between Castrol India and Castrol UK, Castrol India had requested Castrol UK to impart specialized technology and know-how in UK to enable it to blend, produce and market Castrol products. Since marketing would fall within the definition of working system of an organization, service tax was leviable under the heading of 'management consultant'.

The Tribunal held that Revenue's contention was not tenable. Know-how for marketing the products could not be considered to be in relation to the working system of the organization. It could never be considered as falling within the definition of 'management consultant'.

Moreover, agreement between them provided for payment of royalty in UK in Pounds Sterling on sale of all the products manufactured by the Castrol India and it was further provided that if in any financial year the Castrol India had no profits, no royalty would be payable to Castrol UK. This fact further established that payment was for the services rendered in relation to the products and royalty was payable on sale of products.

15. Does the 'tourist operator service' cover tourist vehicle used for non-tourist purpose?

Pandit Motor Service v. CCEx., Jaipur 2007 (8) STR 344 (Tri. - Del.)

The appellant had been granted a tourist permit under Motor Vehicles Act, 1988. However, he had been using its vehicles only as "stage carriages" i.e. picking and dropping passengers on the way between the place of departure and destination.

The appellant contended that inspite of the fact that appellant had a tourist permit; it was not 'tour operator' because the vehicles were being used as "stage carriage". The Revenue contended that appellant was authorized by the motor vehicle authorities to put its vehicles to use as "contract carriage" (tourist vehicle) and it was immaterial whether he had used them as "contract carriage' (tourist vehicle) or "stage carriage".

Delhi Tribunal held that as per clause (94), (95) and (96) of section 65 of the Finance Act and the definition of 'Taxable Service' specified in section 65(90) of the Act, it was not significant how the vehicle was used or abused. In its view, what was important was whether the vehicles were capable of being used as 'Tourist Vehicle' and whether same had been permitted by the appropriate authorities for such use as 'Tourist Vehicle'. Considering these factors, it held that assessee was liable to pay service tax under 'tourist vehicle service'.

However, during the hearing it was brought to the notice of Tribunal that Central Government had issued notification no. 15/2007-S.T. which stated that in case of a tour operator providing services in relation to transport of passengers from one place to another (other than services provided in relation to package tour) operating under a contract carriage permit issued by the appropriate transport authority, the service tax shall be calculated on 40% of the gross value charged by such service provider. So, matter was remanded to the adjudicating authority for re-calculation of duty and penalty amount after taking into consideration the above mentioned notification.

16. Whether vocational training institute requires registration with AICTE for exemption?

Wigan & Leigh College (India) Ltd. v. JC. S.T., Hyderabad 2007 (8) STR 475 (Tri. Bang.)

The issue under consideration was that whether for availing the benefit of exemption under notification no. 9/2003-S.T., dated 20-6-2003, the assessee needed to be registered with AICTE. The notification in question grants the benefit of exemption from service tax in relation to commercial training or coaching services by -

(a) a vocational training institute;

(b) a computer training institute; or

(c) a recreational training institute.

It clearly defines "Vocational Training Institute" as follows:

"Vocational Training Institute means a commercial training or coaching centre which provides vocational coaching or training that impart skills to enable the trainee to seek employment or undertake self-employment, directly after such training or coaching".

Taking the above definition in view, it was held that notification did not envisage registration of the institute with AICTE as a 'Vocational Institute'. Hence, the assessee could not be denied the benefit of exemption merely on the ground that appellant was not registered with AICTE.

17. Is service tax leviable on hire purchase finance?

CCEx. V. Bajaj Auto Finance Ltd. 2008 (10) STR 433 (S.C.)

The respondent - assessee was engaged in providing finance for vehicle purchase. SC pronounced in the present case that service tax was not leviable on hire purchase finance.

18. Whether rubber packaging amounts to manufacture or providing service?

Jayanthi Rubbers v. CCEx., Cochin 2008 (9) S.T.R.153 (Tri. – Bang.)

The appellant - assessee was a job worker for carrying on the process of rubber packaging on the semi – finished goods received from the EOU unit. The Revenue had proceeded to recover service tax under the category of 'business auxiliary service' from the appellant. The appellant contested the issue on the ground that the activity amounted to manufacture and covered under Central Excise Act, 1944 and not under service tax provisions.

After careful consideration of submissions made by both sides, the Tribunal held that, *prima facie,* the plea of the assessee, that carrying on the process of rubber packing and rubber edging of polypropylene carpets and bringing the goods into existence was an activity of manufacture, could not be denied in the present facts of the case. Hence, assessee's plea that service tax was not attracted was accepted.

19. Is the photography for elector identity card covered under 'photography service'?

C.C., C.E. & S.T., Hyderabad v. C.S. Software Enterprises Ltd. 2008 (10) S.T.R. 367 (Tri – Bang.)

The assessee was engaged in preparation of identity cards for electors for the purpose of elections on behalf of the Election Commission of India. The Revenue contended that the activity came under the ambit of 'photography service'. The assessee took the contention that the issue of identity cards was a sovereign function in terms of the Constitution of India and the same could not be brought within the ambit of service tax.

The Tribunal referring to the case of *CCEx., Hyderabad v. M/s Bajarang Infotech Systems Pvt. Ltd. M/s CMC Limited & Others,* held that activity of preparing elector photo identity cards could not be considered to fall within the ambit of photographic services as per section 65(78) as well as section 65(79) of the Finance Act.

3

SERVICE TAX PROCEDURES

1. Can penalty be imposed simultaneously under section 76 and section 78 of the Finance Act, 1994?

Opus Media and Entertainment v. CCEx. 2007 (8) STR 368 (Tri-Del.)

The Tribunal answered this question in negative. The Tribunal observed that section 76 was a provision which did not require a guilty mind and dealt with a case where the liability to pay service tax was not discharged under the provisions of the Act. However, section 78 specifically dealt with cases of evasion of payment of service tax with a guilty mind. The Tribunal opined that cases in which penalties were imposed under section 78 cannot fall, in respect of the same service tax evaded, under section 76 also. The Tribunal held that these two provisions were mutually exclusive and therefore there was no scope for imposing double penalty.

2. Whether clearances of two units, where there is no clear demarcation between the activities of two firms, should be clubbed?

Rao industries v. CCEx., Bangalore 2008 (9) STR 581 (Tri. Bang.)

The Tribunal held that members of same family were partners in both the units situated in same premises and managing partner of both firms was the same person - Mr. Rao, who admitted that these two firms were one and the same. The appellants were unable to distinguish and identify the trailers (product) manufactured by each unit. No Balance Sheet, accounts, reports had been produced to establish that the amounts received on behalf of the other unit had been a commercial transaction. Further, if the activities show that in the actual running of the units there was no distinction and demarcation, the corporate veil needed to be lifted. In such a case, clearances were to be clubbed.

3. Can outdoor catering services provided to the employees within the factory premises be regarded as input service?

Victor Gaskets India Ltd. v. CCEx., Pune-I 2008 (10) STR 369 (Tri – Mumbai)

The assessee was providing canteen facility in their factory for their employees because it was a statutory requirement under section 46 of the Factory Act. The appellant availed CENVAT credit on the strength of the invoices issued by the service provider. Now, the question under consideration in this case was whether outdoor catering services could be regarded as an input service under rule 2(l) of the CENVAT Credit Rules, 2004.

The Tribunal observed that the meaning assigned to "input service" is divided into two parts, first part giving the specific meaning and the second part givng the inclusive meaning of input service which otherwise would not have been covered in the main first part. From this, it was evident that the manufacturer/output service provider could take the credit of service tax paid on *business related activities*, which were specified in the expanded inclusive definition of "input service".

Referring to the judgment in the case of *Good Year Ltd. 1997 (95) E.L.T. 450 (S.C.),* the Tribunal clarified that expression "such as" in the definition was only illustrative and not exhaustive. Hence, the canteen services provided within the factory premises of the appellant exclusively for the factory workers was, although, not directly or indirectly related to manufacture of goods, was an activity in relation to the business of the appellant, and hence could be regarded as 'input service' within the ambit of rule 2(l) of the CENVAT Credit Rules, 2004.

Further, in the present case, the canteen facility, although not specifically stated in the list of activities mentioned in the definition, yet it was an activity relating to the business of appellant. The canteen facility was beneficial for the workers engaged in the business of the appellants, which was nothing but the manufacture of goods. Hence, in a way, the canteen facility provided was used by the manufacturer indirectly.

Tribunal also agreed with the assessee's contention that since they paid Fringe Benefit Tax (FBT) on canteen related expenses under Income Tax Act, 1961 and as FBT was a levy on business related expenses, the appellant's payment of these expenses would be considered as business related expenses.

In the light of foregoing discussions, the Tribunal held that the credit of the service tax paid on the outdoor catering (canteen) service was admissible as input service under rule 2 (l) of the CENVAT Credit Rules, 2004.

4. Whether booking of orders for foreign supplier for supply of goods in India can be treated as "Export of Services" under Export Services Rules, 2005?

Commr. Of S.T., New Delhi v. Cani Merchandising Pvt. Ltd. 2008 (11) STR 10 (Tri. - Del.)

The respondent, registered as a business auxiliary services provider, filed a rebate claim on the ground that since the service was delivered outside India; service was to be treated as 'Export of Service'. Revenue contended that as per the scope of export of service under Export Services Rules, 2005, such service is delivered outside India and used outside India and payment is received in convertible foreign exchange. However, the respondent was booking the orders on behalf of the foreign supplier for supply of goods and the goods were supplied in India on behalf of the foreign supplier. Hence, in the present case, service was not provided outside India and not used outside India.

It was held that since condition provided under Export Services Rules, 2005 was not satisfied, the impugned service could not be treated as export of service and no rebate in this regard was admissible.