

RECENT AMENDMENTS TO INDIRECT TAXES**A: AMENDMENTS BY THE FINANCE (NO. 2) ACT, 2009****I. EXCISE****A. Amendments in the Central Excise Act, 1944****1. Section 9A(2): Certain types of offences and circumstances excluded from the purview of the compounding provisions [(Effective from 19.08.2009)]**

Section 9A(2) provides that any offence under Chapter II of the Act may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of **such compounding amount** as may be prescribed.

Amendments in sub-section (2): For the words “such compounding amount”, the words “**such compounding amount and in such manner of compounding**” shall be substituted.

Finance (No. 2) Act, 2009 provides that the following mentioned persons shall not be eligible for compounding:-

a. Person allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of section 9(1)

A person who has been allowed to compound once in respect of any of the following offences:-

- (i) contravention of any of the provisions of section 8 or of a rule made under clause (iii) or clause (xxvii) of sub-section (2) of section 37;
- (ii) evasion of the payment of any duty payable under this Act;
- (iii) removal of any excisable goods in contravention of any of the provisions of this Act or any rule made there under or in any way concerns himself with such removal;
- (iv) - acquisition of possession of, or
- in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or - in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;
- (v) contravention of any of the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;
- (vi) failure to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information.

b. Offence committed by the accused also an offence under the Narcotic Drugs and Psychotropic Substances Act

A person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985.

c. Person allowed to compound once for goods of value exceeding Rs. 1 crore

A person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore.

d. Person convicted by the court

A person who has been convicted by the court under this Act on or after 30.12.2005.

2. Section 14A: Chartered Accountants can also be nominated for conducting the valuation audit (w.e.f 19.08.2009)

Background: Section 14A, *inter alia*, provides that only a cost accountant can be nominated by the Chief Commissioner of Central Excise to conduct the special audit in case where any Central Excise Officer not below the rank of an Assistant Commissioner/Deputy Commissioner of Central Excise is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person.

Section 14A has been amended to provide that now; the Chartered Accountants may also be nominated for the aforementioned purpose. For the purpose of this section, “Chartered Accountant” shall have the meaning assigned to it in section 2(1)(b) of the Chartered Accountants Act, 1949.

3. Section 14AA: Chartered Accountants can also be nominated for conducting the CENVAT audit (w.e.f 19.08.2009)

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Background: Section 14A, *inter alia*, provides that only a cost accountant can be nominated by the Commissioner of Central Excise to conduct the special audit in case he has a reason to believe that the credit of duty availed of or utilised under the rules made under this Act by a manufacturer of any excisable goods -

- (a) is not within the normal limits having regard to the nature of the excisable goods produced or manufactured, the type of inputs used and other relevant factors, as he may deem appropriate;
- (b) has been availed of or utilised by reason of fraud, collusion or any wilful misstatement or suppression of facts.

Section 14AA has been amended to provide that now; the Chartered Accountants may also be nominated for the aforementioned purpose. For the purpose of this section, "Chartered Accountant" shall have the meaning assigned to it in section 2(1)(b) of the Chartered Accountants Act, 1949.

4. Section 23A(e): Definition of "authority" substituted by a new definition (w.e.f 19.08.2009)

Definition of "authority" prior to amendment: "Authority" means the Authority for Advance Rulings (Central Excise, Customs and Service Tax) constituted under section 28F of the Customs Act, 1962.

Amendment made by Finance (No.2) Act, 2009

"Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorized by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962.

5. Section 35G: High Court empowered to condone the delay in filing the appeal

Section 35G(2) of the Act provides that the Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be filed within 180 days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party.

Sub-section (2A) inserted after sub-section (2)

Sub-section (2A) inserted after sub-section (2), **with effect from 01.07.2003**, provides that the High Court may admit an appeal after the expiry of the period of 180 days referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

Note: The amendments nullify the supreme court judgments held in the case of **Hongo India Ltd (2009)**, **Punjab Fibers Ltd. (2008)** wherein it was held that High Court have no power to condone the delay.

6. Section 35H: High Court empowered to condone the delay in filing the reference application and memorandum of cross objections

(1) Section 35H(1) provides that in respect of the order of the Appellate Tribunal (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), passed under section 35C of the Act **before 01.07.2003**, the Commissioner of Central Excise or the other party may file a reference application to the High Court within 180 days of the date upon which he is served with notice of the aforesaid order.

(2) Section 35H(3) provides that the person against whom such application has been made, may, notwithstanding that he may not have filed such application, file, a memorandum of cross-objections against any part of the order in relation to which an application for reference has been made within 45 days of the receipt of the notice.

Sub-section (3A) inserted after sub-section (3)

Sub-section (3A) inserted after sub-section (3) **with effect from 01.07.1999** provides that the High Court may admit a reference application or permit the filing of a memorandum of cross objections after the expiry of the relevant period referred to in sub-section (1) or sub-section (3) above, if it is satisfied that there was sufficient cause for not filing the same within that period.

7. Section 37(2)(id): Central Government empowered to make rules regarding manner of compounding

Section 37 empowers the Central Government to make rules generally to carry into effect the purposes of the Central Excise Act, 1944.

Clause (id) of sub-section (2) to section 37 provides that in particular, and without prejudice to the generality of the foregoing power, such rules may provide for the amount to be paid **for compounding** under section 9A(2).

Finance (No.2) Act, 2009 has substituted the words "**for compounding and the manner of compounding**" instead of the words "for compounding". (Effective from 19.08.2009)

KS: The Tax-Age**B. Amendments in the Central Excise Tariff Act, 1985****1. Excise duty rate**

There is no change in the mean CENVAT rate of 8% ad valorem. However, the concessional excise duty rate of 4% has been increased to 8%, with certain exceptions. The major items on which the 4% rate has been retained are:

1. Food items such as sugar confectionary, biscuits with retail price exceeding Rs.100/kg, cakes and pastries, sherbets, scented supari etc.;
2. Paraxylene;
3. Drugs and pharmaceutical products of chapter 30;
4. Paper, paperboard and articles made therefrom;
5. Footwear of retail price exceeding Rs.250 per pair but not exceeding Rs.750 per pair;
6. Pressure cookers
7. Power –driven pumps designed for handling water;
8. Water filtration/ purification equipment;
9. Specified textile machinery;
10. Compact fluorescent lamps (CFL) and vacuum and gas filled bulbs of retail price not exceeding Rs.20 per bulb; and
11. Medical equipment

Above list is not an exhaustive list. Consequent upon increase in excise duty rate from 4% to 8%, abatement rates have been revised suitably on items covered under RSP (Retail Sale price) based assessment.

2. Process of adding or mixing certain ingredients to betel nut in any form would amount to manufacture

In respect of 'betel nut product known as supari', it is prescribed that the process of adding or mixing certain ingredients to betel nut in any form would be a process amounting to manufacture. For this purpose, note 6 is being inserted in Chapter 21 of the First Schedule to the Central Excise Tariff Act. A corresponding note is being inserted in Chapter 8 so as to exclude this product from its purview.

II CUSTOMS**A. Amendments in the Customs Act, 1962****1. SECTION 26A: REFUND OF IMPORT DUTY [Newly inserted by the Finance Act, 2009]**

(1) Where on the importation of any goods capable of being easily identified as such imported goods, any duty has been paid on clearance of such goods for home consumption, such duty shall be refunded to the person by whom or on whose behalf it was paid, in such manner as may be prescribed and within a period not exceeding 30 days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47.

(2) If the following conditions are satisfied -

(a) the goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods. However, the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(b) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;

(c) the importer does not claim drawback under any other provisions of this Act; and

(d) (i) the goods are exported; or

(ii) the importer relinquishes his title to the goods and abandons them to customs; or

(iii) such goods are destroyed or rendered commercially valueless in the presence of the proper officer,

(3) The period of 30 days may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding 3 months.

(4) Nothing contained in this section shall apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

(5) No refund shall be allowed in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period.

(6) An application for refund of duty shall be made before the expiry of 6 months from the relevant date in such form and in such manner as may be prescribed.

Note: "relevant date" means,—

(1) in cases where the goods are exported out of India, the date on which the proper officer makes an order permitting clearance and loading of goods for exportation under section 51;

(2) in cases where the title to the goods is relinquished, the date of such relinquishment;

(3) in cases where the goods are destroyed or rendered commercially valueless, the date of such destruction or rendering of goods commercially valueless.

2. AUTHORITY FOR ADVANCE RULING [SEC. 28F – Customs]

(1) The Central Government shall, by notification in the Official Gazette, constitute an Authority for giving advance rulings, to be called as "the Authority for Advance Rulings (Central Excise, Customs & Service Tax)".

(2) The Authority shall consist of the following Members appointed by the Central Government, namely:-

(a) a Chairperson, who is a retired Judge of the Supreme Court;

(b) an officer of the Indian Customs and Central Excise Service who is qualified to be a Member of the Board;

(c) an officer of the Indian Legal Service who is, or is qualified to be, an Additional Secretary to the Government of India.

The following sub-sections have been inserted by the Finance Act, 2009 -

‘(2A) Notwithstanding anything contained in sub-sections (1) and (2), or any other law for the time being in force, the Central Government may, by notification in the Official Gazette, authorise an Authority constituted under section 245-O of the Income-tax Act, 1961, to act as an Authority under this Chapter.

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(2B) On and from the date of publication of notification under sub-section (2A), the Authority constituted under sub-section (1) shall not exercise jurisdiction under this Chapter.

(2C) For the purposes of sub-section (2A), the reference to “an officer of the Indian Revenue Service who is qualified to be a Member of Central Board of Direct Taxes” in clause (b) of sub-section (2) of section 245-O of the Income-tax Act, 1961 shall be construed as reference to “an officer of the Indian Customs and Central Excise Service who is qualified to be a Member of the Board”.

(2D) On and from the date of the authorisation of Authority under sub-section (2A), every application and proceeding pending before the Authority constituted under sub-section (1) shall stand transferred to the Authority so authorised from the stage at which such proceedings stood before the date of such authorisation.’.

3. High Court empowered to condone the delay in filing the appeal - Section 130 – similar to section 35G of Excise

4. High Court empowered to condone the delay in filing the reference application and memorandum of cross objections - Section 130A – Similar to section 35H of Excise

5. SECTION 137: COGNIZANCE OF OFFENCES [amendments in sub-section 3w.e.f 19-8-09]

(1) No Court shall take cognizance of any offence u/s. 132, section 133 or 135 or section 135A, except with the previous sanction of the commissioner of customs.

(2) Moreover a court shall take cognizance offence u/s. 136 only with the previous sanction of the following authority

Offences alleged to have been committed by –
Customs officer not lower in rank than Assistant/
Deputy Commissioner of Customs

Cognizance with the previous sanction of –
Central Government

Customs officer lower in rank than Assistant/ Deputy
Commissioner of Customs

Commissioner of Customs

(3) Any offences under this chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Customs on payment, by the person accused of the offence to the Central Government, **of such compounding amount and in such manner of compounding as may be specified.**

“Provided that nothing contained in this sub-section shall apply to-

(a) a person who has been allowed to compound once in respect of any offence u/s. 135 and 135A;

(b) a person who has been accused of committing an offence under this Act which is also an offence under any of the following Acts, namely:—

(i) the Narcotic Drugs and Psychotropic Substances Act, 1985; (ii) the Chemical Weapons Convention Act, 2000;
(iii) the Arms Act, 1959; (iv) the Wild Life (Protection) Act, 1972;

(c) a person involved in smuggling of goods falling under any of the following, namely:—

(i) goods specified in the list of Special Chemicals, Organisms, Materials, Equipment and Technology in Appendix 3 to Schedule 2 (Export Policy) of ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;

(ii) goods which are specified as prohibited items for import and export in the ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;

(iii) any other goods or documents, which are likely to affect friendly relations with a foreign State or are derogatory to national honour;

(d) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding Rs. 1 crore;

(e) a person who has been convicted under this Act on or after the 30th day of December, 2005.

Note: The amendments by inserting clause (d) & (e) above, nullify the earlier judgments held in the case of **Vinod Kumar Agarwal v. UOI [2008] 223 ELT 19 (Bom.)**

6. Section 156(2)(h): Central Government empowered to make rules regarding manner of compounding

Section 156 empowers the Central Government to make rules generally to carry into effect the purposes of the Customs Act, 1962. Section 156(2)(h) provides that in particular, and without prejudice to the generality of the foregoing power, such rules may provide for the amount to be paid **for compounding** under section 137(3).

Finance (No.2) Act, 2009 has substituted the words “**for compounding and the manner of compounding**” instead of the words “for compounding”. (Effective from 19.08.2009)

7. Clause (ai) and (aia) inserted in section 157(2): Section 157 empowers the Central Board of Excise and Customs to make regulations generally to carry into effect the purposes of the Customs Act, 1962. Finance (No.2) Act, 2009 has inserted clause (ai) and (aia) after clause (a) of section 157(2) which read as follows:-

In particular and without prejudice to the generality of the foregoing power, regulations under section 157 may provide for

Clause (ai) : the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under section 26A(1)(d).

Clause (aia): the form and manner of making application for refund of duty under sub-section (2) of section 26A. (Effective from 19.08.2009)

B. Amendments in the Customs Tariff Act, 1975

1. Additional duty of customs - Second proviso inserted to section 3(2):

Section 3 of the Customs Tariff Act, 1975 levies on any article which is imported into India, an additional duty of customs, equal to the excise duty for the time being leviable on a like article if produced or manufactured in India.

Finance (No.2) Act, 2009 has inserted second proviso to section 3(2) after first proviso. It reads as under:-

In the case of an article imported into India, where the Central Government has fixed a tariff value for the like article produced or manufactured in India under section 3(2) of the Central Excise Act, 1944, the value of the imported article shall be deemed to be such tariff value. (Effective from 19.08.2009)

2. Machinery provisions of the Customs Act, 1962 made applicable to certain duties imposed under the CETA, 1975

An amendment has been made with retrospective effect that the provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the following mentioned duties as they apply in relation to duties leviable under that Act:-

- (a) Safeguard duty imposed under section 8B
- (b) Specific Safeguard Duty on imports from China imposed under section 8C
- (c) Countervailing duty on subsidized articles imposed under section 9
- (d) Anti-Dumping Duty imposed under section 9A

(a) Safeguard duty – Sub-section (4A) inserted to section 8B

Finance (No.2) Act, 2009 has inserted sub-section (4A) after sub-section (4), **with effect from 14.05.1997**, which reads as follows:-

The provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

(b) Power of Central Government to impose Transitional Product Specific Safeguard Duty on imports from China – Sub-section (5A) inserted to section 8C

Finance (No.2) Act, 2009 has inserted sub-section (5A) after sub-section (5), **w.e.f 11.05.2002**, which reads as follows:-

The provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

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(c) **Countervailing duty on subsidized articles - Sub-section (7A) inserted to section 9** Finance (No.2) Act, 2009 has inserted sub-section (7A) after sub-section (7), **w.e.f effect from 01.01.1995**, which reads as follows:-

The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

(d) **Anti-Dumping Duty - Sub-section (8) substituted with the new sub-section (8) to section 9A**

Finance (No.2) Act, 2009 has substituted sub-section (8) with the new sub-section, **w.e.f 01.01.1995**, which reads as follows:-

The provisions of the Customs Act, 1962 and the rules and regulations made there under, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

3. Section 9A amended - Anti-Dumping Duty

A. Sub-section (1) amended

Sub-section (1) provides that where **any article is exported** from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Finance (No.2) Act, 2009 has substituted the words “**any article is exported by an exporter or producer**” for the words “any article is exported” in sub-section (1). **(Effective from 19.08.2009)**

B. Sub-section (6A) inserted after sub-section (6)

The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer.

However, where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available. **(Effective from 19.08.2009)**

4. Custom duty rate: There is no change in the overall rate structure of customs duties. As such, the peak rate for industrial goods has been retained at 10% and the major **ad valorem** rates of 5% and 7.5% have also been retained.

III. SERVICE TAX**Amendments in Chapter V and VA of the Finance Act, 1994****1. 3 new services brought under the service tax net - Section 65**

With effect from September 1, 2009, service tax has been levied on the following three new categories of services:-

A. Service provided in relation to transport of coastal goods and goods transported through inland water including National Waterways.

B. Cosmetic and plastic surgery service.

C. Legal consultancy service.

Note: As per ICAI Notification these services are not relevant for May 2010 exam therefore details is not provided.

2. Amendment in the scope of existing taxable services - Section 65**(i) Business auxiliary service Prior to amendment**

Prior to amendment, the service/process that amounts to **manufacture as defined under section 2(f) of the Central Excise Act, 1944** was excluded under the category of 'business auxiliary services'.

Amendment made by Finance (No.2) Act, 2009

The definition of business auxiliary service under section 65(19) of the Finance Act, 1994 has been amended to exclude any activity that amounts to **manufacture of excisable goods**. Therefore, manufacture of non-excisable goods for or on behalf of the client shall attract service tax. Besides, clause (b) and (c) have been inserted in the Explanation to section 65(19) so as to define the terms – 'manufacture' and 'excisable goods'.

Now, the **clause (vii) of section 65(19) of the Finance Act, 1994** reads as follows:-

"Business auxiliary service" means any service in relation to a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, **but does not include any activity that amounts to manufacture of excisable goods**.

Clause (b) and (c) of Explanation to section 65(19)(vii) reads as follows:-

(b) "**excisable goods**" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944;

(c) "**manufacture**" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944.

(ii) Stock broker services:

Prior to amendment: The definition of a stock broker included the sub-broker as well.

After Amendment: The definition of stock-broker (in stock-broker service) under section 65(101) has been amended to exclude sub-broker from its ambit. Consequently, sub-brokers would be outside the purview of service tax.

(iii) Information technology software services

Prior to amendment: In item (v) and (vi) of section 65(105)(zzzzz), under the information technology software service, "**acquiring** the right to use the information technology software" is taxable.

After Amendment: The same has been amended to "**providing** the right to use the information technology software" This service is amended **with retrospective effect from 16.05.2008**.

Now, **item (v) and (vi) of Section 65(105)(zzzzz)** reads as under:-

(v) *providing* the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,

(vi) *providing* the right to use information technology software supplied electronically.

KS: The Tax-Age**(iv) Transport of goods in containers by rail services**

Prior to amendment; Any service provided or to be provided to any person, by any other person, other than Government railway, in relation to transport of goods in containers by rail is taxable under section 65(105)(zzzp).

After Amendment: Finance (No.2) Act, 2009 has imposed service tax on goods transported by railways **including Government railways, whether in containers or otherwise.**

Now, the amended **section 65(105)(zzzp)** reads as under:-

Any service provided or to be provided to any person, by any other person, **in relation to transport of goods by rail, in any manner.** (Effective from 01.09.2009)

3. Revision of orders by the Commissioner abolished - Section 84 substituted by new section 84

Section 84 has been amended, to abolish the power of revision by the Commissioner of Central Excise prescribed under section 84. Revision of orders by the Commissioner has been replaced, with filing of departmental appeals before Commissioner of Central Excise (Appeals), with a view to align the appeal procedure of service tax with that of Central Excise.

New section 84 reads as follows:-

(1) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (1) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.

Explanation — For the removal of doubts, it is hereby declared that above mentioned provision would come into effect from 19.08.2009. All cases decided before this date would continue to be governed by the existing provisions only.
(Effective from 19.08.2009)

4. Appeal to Appellate Tribunal u/s. 86 cannot be filed against the order passed by Commissioner of Central Excise u/s. 84 – Section 86 (Effective from 19.08.2009)

Prior to amendment: Earlier, revision order passed by a Commissioner of Central Excise under section 84 could be appealed against to the Appellate Tribunal under section 86 either by:-

- (i) the aggrieved assessee or
- (ii) Commissioner of Central Excise at the directions of Committee of Chief Commissioners of Central Excise.

After Amendment: W.e.f 19.08.2009, appeal to Appellate Tribunal under section 86 cannot be filed against the order passed by Commissioner of Central Excise under section 84. Therefore, sub-section (1) and (2) of section 86 have been consequentially amended and read as under:-

Sub-section (1): Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order.

Sub-section (2): The Committee of Chief Commissioners of Central Excise may, if it objects to any order passed by the Commissioner of Central Excise under section 73 or section 83A, direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

5. Central Government empowered to frame rules in relation to the date for determination of rate of service tax and the place of provision of taxable service – Section 94(2) (Effective from 19.08.2009)

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Finance (No.2) Act, 2009 has empowered Central Government under section 94 to make rules with respect to the place of supply of taxable services, and the relevant date for determination of service tax. Clause (hhh) has been inserted after clause (hh) to section 94(2) for the said pupose.

6. Central Government empowered to remove difficulty by making an order – Section 95(1F) (Effective from 19.08.2009)

Sub-section (1F) inserted after sub-section (1E) in section 95 provides that:-

If any difficulty arises in respect of implementing, classifying or assessing the value of any taxable service incorporated in this Chapter by the Finance (No.2) Act, 2009, the Central Government may, by order published in the Official Gazette, not inconsistent with the provisions of this Chapter, remove the difficulty. However, no such order shall be made after the expiry of a period of one year from 19.08.2009.

7. Amendment in the definition of “authority” under section 96A(d) (Effective from 19.08.2009)

Prior to amendment: "Authority" means the Authority for Advance Rulings (Central Excise, Customs and Service Tax) constituted under section 28F of the Customs Act, 1962.

After Amendment: “Authority” means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962 (52 of 1962).

B: NOTIFICATION – 2008/2009

[It may be carefully noted that for the students appearing in May 2010 exams, the amendments made by the notifications, circulars and other legislations up to 31.10.2009 are relevant.]

NOTIFICATIONS – 2008

The various notifications contain amendment relating to CENVAT Credit Rules, 2004 and Central Excise Rules, 2002. These are already updated in your study material and so not given again.

NOTIFICATION -2009**I. Excise****1. Changes under Central Excise Rules, 2002****(a) RULE 24A: RETURN OF RECORDS**

[Newly inserted vide Notification No. 17/2009, dated 7-7-2009]

The books of accounts or other documents, seized by the Central Excise Officer or produced by an assessee or any other person, which have not been relied on for the issue of notice under the Act or the rules made thereunder, shall be returned within 30 days of the issue of said notice or the date of expiry of the period for issue of said notice:

However, the Commissioner of Central Excise may order for the retention of such books of accounts or documents, for reasons to be recorded in writing and the Central Excise Officer shall intimate to the assessee or such person about such retention.

2. Changes under Cenvat Credit Rules, 2004**(a) Rule 2(k) - Amendment in the definition of “inputs” [Notification No. 16/2009 - CE (NT) dated 07.07.2009]**

Explanation 2 to rule 2(k) has been amended so as to exclude cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods from the definition of ‘inputs’.

Now, Explanation 2 to rule 2(k) reads as follows:- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods.

(b) Rule 3(5B): Write off of the inputs and capital goods [Substituted by Notification No. 16/2009, 7-7-2009]

If the value of any,

- *input, or*
- *capital goods before being put to use,*

on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods:

Provided that if the said input or capital goods is subsequently used in the manufacture of final products or the provision of taxable services, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules.”.

Note: By Virtue of amendments, now a service provider shall also liable to pay back the amounts of credit taken on inputs/ capital goods fully written off. Earlier it was restricted only to manufacturer.

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(c)Rule 3(7): Notwithstanding anything contained in sub-rule (1) and sub-rule (4),- **[Notification No. 22/2009 date, 7-09-09]**

CENVAT credit in respect of inputs and capital goods cleared on or after the 7 – 09- 2009 from an export-oriented undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park shall be the aggregate of –

I. the excise duty paid, as is equivalent to –

- the additional duty leviable u/s. 3(1) of the Customs Tariff Act., which is equal to the duty of excise;
- the additional duty leviable u/s. 3(5) of the Customs Tariff Act; and

II. the Education Cess and the Secondary and Higher Education Cess paid thereon.

For Example: Compute the duties payable by a 100% EOU from the following information in respect of excisable goods cleared by it to Domestic Tariff Area on 31-10-2009 :

(a) Assessable value under Excise Law = Rs. 1,80,000 (Assessable Value under Custom Law = Rs. 2 lakh);

(b) Basic Custom Duty (net) = 10% ;

(c) Excise duty on like goods manufactured in India = 14% ;

(d) Additional duty of customs u/s 3(5) of Customs Tariff Act 1975 on similar goods = 4% :

(e) Education cess = 2% and Secondary and Higher Education Cess = 1%.

Assume that the goods are not liable to VAT in India. Also determine the quantum of CENVAT credit available to the buyer under proviso to Rule 3(7)(a) of the CENVAT Credit Rules, 2004 ?

Solution: Proviso to section 3(1) of the Central Excise Act, 1944 provides that excise duty leviable on DTA sales by 100% EOU would be equal to customs duties leviable on like goods imported into India.

It was held in **Sarla Polyester Ltd. v. CCE.** [2008] 226 ELT 238 (Tri.-Ahmd.) that, for this purpose, first of all, excise duty equal to customs duties will be computed, and such amount of excise duty will be liable to further addition of Education Cess and Secondary and Higher Education Cess.

After providing 50% exemption from basic customs duties and 100% exemption from section 3(5) duty, the customs duties leviable on like goods imported into India will be computed as follows –

Assessable value		2,00,000
Add: Basic customs duty @ 5% (after 50% exemption)	[1]	10,000
Total for levy of section 3(1) duty		2,10,000
Add: Additional duty of customs u/s 3(1) equal to excise duty @ 14%	[2]	29,400
Add: Education cess on excisable goods @ 2% of [2]	[3]	588
Add: Secondary & Higher education cess on excisable goods @1% of[2]	[4]	294
Add: Education cess and SHEC on imported goods @ 3% on [1+2+3+4]	[5]	1208.46
Total for levy of additional duty of customs u/s 3(5)		2,41,490.46
Additional duty of customs u/s 3(5) @ 4% (since goods are not liable to VAT in India, therefore, this duty will not be exempt)	[6]	9659.62
Total customs duties (1+2+3+4+5+6)		51,150.08
Excise duty under proviso to section 3(1) =Customs duties, as computed above		51,150.08
Add: Education cess on excisable goods @ 2%	[7]	1,023.00
Add: SHEC on excisable goods @ 1%	[8]	511.50
Total excise duty payable by 100% EOU (rounded off) [1+2+3+4+5+6+7+8]		52,685

CENVAT credit available to the buyer of these goods: As per proviso to Rule3(7)(a), the quantum of CENVAT credit available to the buyer shall be the aggregate of the following –

Additional customs duty u/s 3(1) of CTA equal to excise duty (i.e. item [2])	29,400.00
Additional customs duty u/s 3(5) of CTA (i.e. item [6])	9,659.62
Education cess on excisable goods [i.e. item [3] + item [7]]	1,611.00
Secondary and Higher Education Cess on excisable goods [i.e. item [4] + item [8]]	805.55
TOTAL CENVAT CREDIT AVAILABLE	41,476

Note : In short, the credit of basic customs duty and 'EC & SHEC on imported goods' shall not be available Therefore, the credit can be computed by deducting items [1] and [5] from the total excise duty.

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(d) Rule 6(3)(i): Earlier, rule 6(3)(i) provided that the provider of both taxable and exempted output services, opting not to maintain separate accounts, shall pay an amount equal to 8% of value of the exempted services and the manufacturer of both dutiable and exempted goods, opting not to maintain separate accounts, shall pay an amount equal to 10% of the value of the exempted goods.

Notification No. 16/2009 - CE (NT) dated 07.07.2009 has amended rule 6(3)(i) so as to prescribe that a provider of both taxable and exempted services, who does not maintain separate accounts of inputs, shall pay an amount equal to 6% of the value of exempted services instead of 8% and the manufacturer of both dutiable and exempted goods, opting not to maintain separate accounts, shall pay an amount equal to 5% of the value of the exempted goods instead of 10%.

(3) Notification No. 15/2009 CE (NT) dated 10.06.2009 has amended *Notification No. 32/2006 CE (NT) dated 30.12.2006*, which prescribes withdrawal of facilities or imposition of restrictions on a manufacturer, first stage or second stage dealer, or an exporter involved in any of the prescribed contraventions, in the following manner:

(i) Facilities may be withdrawn or restrictions may be imposed on a manufacturer, first stage or second stage dealer, or an exporter involved in removal of inputs as such on which CENVAT credit has been taken, without paying an amount equal to credit availed on such inputs in terms of sub-rule (5) of rule 3 of the CENVAT Credit Rules, 2004. This has been done by inserting clause (g) after clause (f) in paragraph 1 of the notification.

(ii) Two more restrictions have been imposed if a manufacturer is prima facie found to be knowingly involved in committing the prescribed offences, namely:

(a) the assessee may be required to maintain records of receipt, disposal, consumption and inventory of the principal inputs on which CENVAT credit has not been taken.

(b) the assessee may be required to intimate the Superintendent of Central Excise regarding the receipt of principal inputs in the factory on which CENVAT credit has or has not been taken, within a period specified in the order and the said inputs shall be made available for verification upto the period specified in the order. This has been done by inserting clause (iii) and clause (iv) after clause (ii) in paragraph 2, in sub paragraph (1).

(iii) After explanation II, Explanation III has been inserted, which provides that “principal inputs”, means any input which is used in the manufacture of final products where the cost of such input constitutes not less than 10% of the total cost of raw materials for the manufacture of unit quantity of a given final products.

4. Provisions Relating to SSI Unit

SSI exemption extended to SSIs producing specified packing materials bearing the brand name of another person

Notification No. 47/2008 CE dated 01.09.2008 (as amended by Notification No. 02/2009 dated 11.02.2009 and Notification No. 9/2009 dated 07.07.2009) has amended *Notification No. 8/2003 CE dated 01.03.2003* to extend the benefit of small scale exemption of excise duty to SSIs producing goods bearing the brand name or trade name of another person if these goods are in the nature of packing materials, namely, printed cartons of paper or paper board, metal containers, HDPE woven sacks, adhesive tapes, stickers, PP caps, crown corks, metal labels, plastic bags and printed laminated rolls.

5. Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008.
[Notification No.5/2009 Dated 5-03-2009]

Rule 14A: Export without payment of duty (Newly Inserted): Notwithstanding anything contained in these rules or in Central Excise Rules, 2002 that no notified goods shall be exported without payment of duty; and no material shall be removed without payment of duty from a factory or warehouse or any other premises for use in the manufacture or processing of notified goods which are exported out of India.

6. Notification No. 14/2009-Dated 10-06-2009

CENTRAL EXCISE (REMOVAL OF GOODS AT CONCESSIONAL RATE OF DUTY FOR MANUFACTURE OF EXCISABLE GOODS) RULES, 2001

In Rule 6, for the words “Where the subject goods are not used”, the bold italic portion shall be substituted;

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Rule 6: Recovery of the duty in certain cases. – *The said Assistant Commissioner or Deputy Commissioner shall ensure that the goods received are used by the manufacturer for the intended purpose and where the subject goods are not used by the manufacturer for the intended purpose, the manufacturer shall be liable to pay the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid, if any, at the time of removal from the factory of the manufacturer of the subject goods, along with interest and the provisions of section 11A and section 11AB of the Central Excise Act, 1944 shall apply mutatis mutandis for effecting such recoveries.*

Provided that if the subject goods on receipt are found to be defective or damaged or unsuitable or surplus to the needs of the manufacturer, he may return the subject goods to the original manufacturer of the goods from whom he had obtained these and every such returned goods shall be added to the non-duty paid stock of the manufacturer of the subject goods and dealt with accordingly.

Explanation –For the removal of doubts, it is hereby clarified that subject goods shall be deemed not to have been used for the intended purpose even if any of the quantity of the subject goods is lost or destroyed by natural causes or by unavoidable accidents during transport from the place of procurement to the manufacturer's premises or from the manufacturer's premises to the place of procurement or during handling or storage in the manufacturer's premises.

Note: For other provisions of the above Rules Refer Page No. 194 of Volume 2.

7. Condition of paying excise duty from Personal Ledger Account, done away with, in the following cases:

(a) Notification No. 39/2004 CE (NT) dated 25.11.2004 *inter alia* exempts class of manufacturers, who manufacture certain specified excisable goods prescribed therein and have paid excise duty of less than Rs.100 lakh from account current during the preceding financial year, from filing the annual information relating to principal inputs and monthly return of receipt and consumption of each of the principal inputs.

Notification No. 41/2008 CE (NT) dated 29.09.2008 has amended the said notification so as to remove the condition of paying the stipulated amount of duty from Personal Ledger Account only. Hence, the duty paid by utilizing the CENVAT credit shall now be included while computing the limit of Rs. 100 lakh.

Consequently, now the manufacturers of the prescribed excisable goods shall be exempted from filing the annual information relating to principal inputs and monthly return of receipt and consumption of each of the principal inputs if they have paid the duty of less than Rs.100 lakh during the financial year, by any mode – either through Personal Ledger Account or by utilizing CENVAT credit or both.

(b) Notification No. 17/2006 CE (NT) dated 01.08.2006 *inter alia* exempts the assessee who have paid excise duty of less than Rs.100 lakh from account current during the financial year, from filing of the Annual Financial Information Statement.

Notification No. 42/2008 CE (NT) dated 29.09.2008 has amended the said notification so as to remove the condition of paying the stipulated amount of duty from account current. Hence, the duty paid by utilizing the CENVAT credit shall now be included while computing the limit of Rs. 100 lakh.

Consequently, now the assessee shall be exempted from filing the Annual Financial Information Statement if they have paid the duty of less than Rs.100 lakh during the financial year, by any mode - either through Personal Ledger Account or by utilizing CENVAT credit or both.

8. Advance Ruling: Public sector companies and project imports – Eligible for filing an application for advance ruling

Section 23A(c) / (section 28E(c) Customs):

Under Excise: Notification No. 21/2009 CE (NT) dated 20.08.2009 has notified a public sector company as class of persons for the purpose of the sub-clause (iii) of section 23A(c) of the Central Excise Act, 1944.

Under customs: Notification No. 124/2009 Cus. (NT) dated 20.08.2009 has notified

- (i) a public sector company
- (ii) a resident who proposes to import goods claiming for assessment under heading 9801 (i.e, items eligible for project import) of the First Schedule to the Customs Tariff Act, 1975.

as class of persons for the purpose of the sub-clause (iii) of section 28E(c) of the Customs Act, 1962.

9. Notification No. 22/2009 CE dated 07.07.2009- Packaged or canned software exempt from countervailing duty

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On packaged or canned software falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1985, countervailing duty exemption has been provided on the portion of the value which represents the consideration for transfer of the right to use such software, subject to following conditions:-

- (1) The transfer of the right to use shall be for commercial exploitation including the right to reproduce, distribute and sell such software and the right to use the software components for the creation of and inclusion in other information technology software products.
- (2) The person providing the right to use shall make a declaration to this effect to the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, in respect of such transfer of the right to use for commercial exploitation.
- (3) The person providing the right to use shall be registered under section 69 of the Finance Act, 1994 read with rule 4 of the Service Tax Rules, 1994.

Explanation. - For the purposes of this exemption, “**packaged software or canned software**” means software developed to meet the needs of variety of users, and which is intended for sale or capable of being sold off the shelf. The reason behind such exemption is that the portion of the value which represents the consideration for transfer of the right to use such software is leviable to service tax as ‘information technology software service’.

II. Service Tax

(10) Notification No. 8/2009-S.T. dated 24-2-2009: Rate of service tax reduced from 12% to 10% w.e.f 24-2-2009

(11) Service Tax (Provisional Attachment of Property) Rules, 2008

These rules introduced by **Notification No.30/2008 ST dated 01.07.2008** with effect from 01.07.2008 provide as follows:-

Rule 3 - Procedure for provisional attachment of property

(a) The Assistant or the Deputy Commissioner of Central Excise, after due verification of the facts and circumstances of the case, for the purpose of protecting the interest of revenue, during the pendency of any proceeding under section 73/73A of the Finance Act, 1994, may forward a proposal for provisional attachment of property belonging to a person on whom a notice has been served under section 73(1)/73A(3) of the Act, to the Commissioner in the format prescribed in these Rules.

(b) The Commissioner may cause service of a notice on such person who can make a submission in this regard within 15 days of service of the notice.

(c) Upon consideration of submission, the Commissioner may pass an order to attach the property provisionally.

Rule 4 - The property that can be attached

(1) Value of property attached shall be of value as nearly as may be equivalent to that of the amount of pending revenue against such person.

(2) The movable property of such person shall be attached only if the immovable property available for attachment is not sufficient to protect the interest of revenue.

Rule 5 - Obligations of person whose property has been attached provisionally

The said person or his representative shall not mortgage, lease, transfer, deliver or deal with the attached property in any manner except with the previous approval of the Commissioner of Central Excise.

Rule 6 - Period for which order of provisional attachment of property remains in force

Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the service of the order passed.

However, Chief Commissioner of Central Excise may grant an extension for a maximum period of two years.

(12) Conditions specified for exemption to services provided to a developer or units of SEZ Notification No. 4/2004 dated 31.03.2004 superseded

Notification No.9/2009-ST dated 03.03.2009/ Notification No. 15/2009 ST dated 20.05.2009 has exempted service tax paid on the services provided in relation to the authorized operations in a SEZ, and received by a developer or units of a SEZ, whether or not the said taxable services are provided inside the SEZ.

Provided that

(a) Approval of list of services: The developer or units of SEZ shall get the services required in relation to the authorised operations in the SEZ approved from the Approval Committee (hereinafter referred to as the specified services);

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(b) Actual use of specified services; The developer or units of SEZ claiming the exemption actually uses the specified services in relation to the authorised operations in the SEZ;

(c) Exemption in the form of refund: The exemption claimed by the developer or units of special economic zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the special economic zone ***except for services consumed wholly within the special economic zone.***

(d) Actual payment of service tax: *The developer or units of special economic zone claiming the exemption, by way of refund in accordance with clause (c) above, has actually paid the service tax on the specified services;*

(e) No CENVAT credit of service tax paid on specified services: No CENVAT credit of service tax paid on the specified services used in relation to the authorised operations in the SEZ has been taken under the CENVAT Credit Rules, 2004;

(f) Exemption under no other notification claimed: Exemption or refund of service tax paid on the specified services used in relation to the authorised operations in the SEZ shall not be claimed except under this notification.

(g) the developer or unit of a special economic zone shall maintain proper account of receipt and utilisation of the taxable services for which exemption is claimed.

Procedure for claiming exemption:- The exemption except for services consumed wholly within the SEZ, shall be claimed in the following manner

(a) the exemption for specified services, as aforesaid, shall be available to the developer or units of SEZ only if it the person liable to pay service tax in respect of such service(s);

In other words, if the person liable to pay service in respect of such specified services is a person other than the developer or units of SEZ, then such other person shall not be eligible to claim exemption for the specified services.

(b) the developer or units of SEZ shall claim the exemption by filing a claim for refund of service tax paid on specified services;

(c) the developer or units of SEZ shall file the claim for refund to the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be;

(d) the developer or units of SEZ who is not registered as an assessee under the Central Excise Act, 1944 or the rules made thereunder, or the said Finance Act or the rules made thereunder, shall, prior to filing a claim for refund of service tax under this notification, file a declaration in the Form annexed hereto with the respective jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be;

(e) the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall, after due verification, allot a service tax code (STC) number to the developer or units of Special Economic Zone within seven days from the date of receipt of the said Form;

(f) the claim for refund shall be filed, within six months or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit, from the date of actual payment of service tax by such developer or unit to service provider;

(g) the refund claim shall be accompanied by the following documents, namely:-

(i) a copy of the list of specified services required in relation to the authorized operations in the SEZ, as approved by the Approval Committee;

(ii) documents for having paid service tax;

(iii) a declaration by the SEZ developer or unit, claiming such exemption, to the effect that such service is received by him in relation to authorised operation in SEZ.

(h) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall, after satisfying himself that the said services have been actually used in relation to the authorised operations in the SEZ, refund the service tax paid on the specified services used in relation to the authorised operations in the SEZ.

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(i) where any refund of service tax paid on specified services is erroneously refunded for any reasons whatsoever, such service tax refunded shall be recoverable under the provisions of the said Finance Act and the rules made thereunder, as if it is a recovery of service tax erroneously refunded.

Note: By virtue of amendments made by **Notification No. 15/2009 ST**, now unconditional exemption to services consumed within the SEZ without following the refund route thus dispensing with the requirement of first paying the tax by the service provider and then claiming the refund thereof by developer/unit. The exemption by way of refund would be limited to situations only when taxable services provided to SEZ are consumed partially or wholly outside SEZ.

13. Amendment in the “Taxation of Service (Provided from Outside India and Received in India) Rules, 2006

Territorial jurisdiction: **Notification No. 21/2009-ST dated 07.07.2009** has brought the services provided to or from installations, structures and vessels in the entire Continental Shelf of India and Exclusive Economic Zone of India within the ambit of the provisions relating to service tax.

Accordingly, the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 (containing the rules regarding the import of services) have been amended vide **Notification 22/2009-ST dated 07.07.2009** to extend the definition of India to include installations, structures and vessels in the entire Continental Shelf of India and Exclusive Economic Zone of India.

Definition of “India” prior to amendment: Rule 2(e) defined India as follows:- India includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India.

Definition as amended by Finance (No.2) Act, 2009: Rule 2(e) has been substituted by the new rule 2(e) which defines “India” as follows:-

India includes the installations, structures and vessels in the Continental Shelf and Exclusive Economic Zone of India.

14. Notification No.25/2009 Dated 19-08-2009

Export of Services Rules, 2005

Rule 3: "Explanation.-For the purposes of this rule “India” includes the installations, structures and vessels in the continental shelf of India and the exclusive economic zone of India.”;

15. Notification No. 17/2009dated 07.07.2009

Exemption to specified services used for export goods: The taxable services specified in the table given bellow, as are received by an exported of goods and used for export of goods, are exempt from service tax u/s. 66 and 66A subject to the condition specified in the corresponding entry in the table –

Taxable Services	Conditions
1. General Insurance service: Service provided to an exporter by an insurer, including a reinsurer carrying on general insurance business in relation to insurance of said goods.	Exporter shall submit document issued by the insurer, including reinsurer, for payment of insurance premium and the document shall be specific to export goods and shall be in the name of the exporter.
2. Port service: Service provided by a port or any person authorised by the port in respect of the export of said goods.	-
3. Technical testing and analysis service: Service provided by a technical testing and analysis agency, in relation to technical testing and analysis of said goods.	-
4. Technical inspection and certificate service: Service provided by a technical inspection and certification agency in relation to inspection and certification of export goods.	-
5. Other port service: Service provided by other port or any person authorised by that port in respect for export of said goods.	-
6. Transport of goods by road: (i) Service provided for transport of said goods from the inland container depot to the port of export; (ii) Service provided to an exporter in relation to transport of export goods directly from the place of removal, to inland container depot or port or airport, as the case may be, from where the goods are exported.	(i) Exporter shall certify that the benefit of exemption provided vide notification number 18/2009-S.T. has not been claimed; and (ii) details, those are specified in the invoice of exporter relating to export goods, are specifically mentioned in the lorry receipt and the corresponding shipping bill.
7. Transport of goods in container by rail:	Invoice issued by the exporter in relation to export goods shall

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(i) Service provided for transport of said goods from the inland container depot to the port of export, and (ii) services provided to an exporter in relation to transport of export goods directly from the place of removal to inland container depot or port or airport, as the case may be, from where the goods are exported.	indicate the inland container depot or port or airport from where the goods are exported.
8. Cleaning activity service: Specialised cleaning services namely disinfecting, exterminating, sterilising or fumigating of containers used for export of said goods provided to an exporter.	-
9. Storage and warehousing service: Service provided for storage and warehousing of said goods.	-
10. Courier Agency's Service: Service provided by a courier agency to an exporter in relation to transportation of time-sensitive documents, goods or articles relating to export, to a destination outside India.	(i) The receipt issued by the courier agency shall specify the importer-exporter code (IEC) number of the exporter, export invoice number, nature of courier, destination of the courier including name and address of the recipient of the courier; and (ii) exporter produces documents relating to the use of courier service to export goods.
11. Customs House Agent's service: Service provided by a custom house agent in relation to export goods exported by the exporter.	Exporter shall produce,- (i) invoice issued by custom house agent for providing services specified in column (1) specifying,- (a) number and date of shipping bill; (b) number and date of the invoice issued by the exporter relating to export goods; (c) details of all the charges, whether or not reimbursable, collected by the custom house agent from the exporter in relation to export goods; (ii) details of other taxable services provided by the said custom house agent and received by the exporter, whether or not relatable to export goods.
12. Banking and other Financial Services: (i) Service provided in relation to collection of export bills; (ii) Service provided in relation to advising export letters of credit such as advising commission, confirmation charges; amendment, (iii) Service of purchase or sale of foreign currency, including money changing provided to an exporter in relation to export goods.	-
13. Foreign Exchange broking by Individuals: Service of purchase or sale of foreign currency including money changing provided to an exporter in relation to export goods.	-
14. Supply of tangible goods for use service: Service of supply of tangible goods for use, without transferring right of possession and effective control of tangible goods, provided to an exporter in relation to goods exported by the exporter.	-
15. Clearing and forwarding agent: Service provided by a clearing and forwarding agent in relation to export goods exported by the exporter.	Exporter shall produce,- (i) invoice issued by clearing and forwarding agent for providing services specified in column (2) specifying,- (a) number and date of shipping bill; (b) description of export goods; (c) number and date of the invoice issued by the exporter relating to export goods; (d) details of all the charges, whether or not reimbursable, collected by the clearing and forwarding agent from the exporter in relation to export goods; (ii) details of other taxable services provided by the said clearing and forwarding agent and received by the exporter, whether or not relatable to export goods.
16. Taxable under any category of service: Payment of service tax paid on services commonly known as terminal handling charges.	

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17. Transport of coastal goods or goods through national/inland waterway: Service provided for transport of export goods through national waterway, inland water and coastal shipping. [Notification No. 40/2009 ST dated 30.09.2009]	i. The exporter shall- 1. produce the Bill of Lading or a Consignment Note or a similar document by whatever name called, issued in his name; 2. produce evidence to the effect that the said transport is provided for export of relevant goods.
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A. Points to be noted in this regard:-

1. The exemption shall be claimed by the exporter for the specified service received and used by him for export of the said goods.
2. The exemption claimed by the exporter shall be provided by way of refund of service tax paid.
3. The exporter claiming the exemption should have actually paid the service tax on the specified service to its provider.
4. No CENVAT credit of service tax paid shall be taken under the CENVAT Credit Rules, 2004.
5. The person liable to pay service tax under section 68 of the Finance Act, 1994 shall not be eligible to claim exemption for the specified service.
6. The manufacturer-exporter, who is registered as an assessee under the Central Excise Act, 1944 or the rules made thereunder, shall claim the exemption by filing a claim for refund of service tax paid on specified service to the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of manufacture, in Form A-1.
7. The exporter who is not so registered under the provisions referred to in point (6) above, shall before filing a claim for refund of service tax, file a declaration in Form A-2 with the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, having the jurisdiction over the registered office or the head office, as the case may be, of such exporter.
8. The Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, shall, after due verification, allot a service tax code (STC) number to the exporter [referred to in point (7) above] within seven days from the date of receipt of the said Form A-2.
9. The exporter, referred to in point (6) or (7), shall file the claim for refund of service tax to the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of manufacture, registered office or the head office, as the case may be, of such exporter in Form A-1.
10. The claim for refund shall be filed within one year from **the date of export** of the said goods.
Explanation.- For the purposes of this clause, **the date of export** shall be the date on which the proper officer of Customs makes an order permitting clearance and loading of the said goods for exportation under section 51 of the Customs Act, 1962 ;
11. For each taxable service specified in column (1) of the Schedule above, the exporter shall enclose all the documents specified in corresponding entry in column (2) of the said Schedule and the Form A-1 with the claim of refund.
12. No refund claim shall be allowed if the same is for an amount less than Rs. 500.
13. Where -
 - (a) the total amount of refund sought under a claim is upto 0.25% of the total declared free on board value of export;
 - (b) the exporter is registered with Export Promotion Council sponsored by the Ministry of Commerce or the Ministry of Textiles;
 - (c) subject to the provisions of (a) and (b) above, each document specified in clause (b) and in column (2) of the said Table shall be enclosed with the claim;
 - (d) invoice, bill or challan, or any other document issued in the name of the exporter, showing payment for such service availed and the service tax payable shall be submitted in original after being certified in the manner specified in sub-clauses (e) and (f);
 - (e) the exporter is a proprietorship concern or partnership firm, the documents enclosed with the claim shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the claim shall be certified by the person authorised by the Board of Directors;

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(f) the documents enclosed with the claim shall contain a certificate from the exporter or the authorised person to the effect that specified service, to which the document pertains, has been received, the service tax payable thereon has been paid and the specified service has been used for export of goods under the shipping bill number;

14. Where the amount of refund sought under a claim is more than 0.25% of the declared free on board value of export, such certification, shall be done by the Chartered Accountant who audits the annual accounts of the exporter for the purposes of the Companies Act, 1956 or the Income Tax Act, 1961, as the case may be.

B. Refund of service tax by Assistant Commissioner/Deputy Commissioner of Central Excise

The Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, shall, after satisfying himself, -

- (i) that the claim filed is complete in every respect;
- (ii) that all the documents requiring certification have been filed after due certification; and
- (iii) about the arithmetical accuracy of the claim, shall refund the service tax paid on the specified service within a period of one month from the receipt of said claim.

However, where the Assistant Commissioner/Deputy Commissioner of Central Excise has reason to believe that the claim, or the enclosed documents are not in order or that there is a reason to deny such refund, he may, after recording the reasons in writing, take action, in accordance with the provisions of the said Act and the rules made there under.

C. Recovery of service tax erroneously refunded

Where any refund of service tax paid on specified service utilised for export of said goods has been paid to an exporter but the sale proceeds in respect of the said goods have not been realised by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999, including any extension of such period, such service tax refunded shall be recoverable under the provisions of the said Act and the rules made there under, as if it is a recovery of service tax erroneously refunded.

16. Notification No. 18/2009 – ST dated 07.07.2009 – Services in relation to ‘transport of goods by road’ and ‘commission paid to foreign agents’ exempted from service tax subject to certain conditions

The aforesaid notification exempts the taxable services specified in column (1) of the Schedule below (hereinafter referred to as specified services) received by an exporter and used for export of goods (hereinafter referred to as said goods), from the whole of the service tax leviable thereon under section 66 and section 66A subject to the conditions specified in the corresponding entry in column (2) of the Schedule.

Description of the taxable service	Conditions
1. Transport of goods by road: Service provided to an exporter for transport of the said goods by road from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of said goods by road directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported.	The exporter shall have to produce the consignment note, by whatever name called, issued in his name.
2. Business Auxiliary service: Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him.	(1) The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be. (2) The exemption shall be limited to one per cent of the free on board value of export goods for which the said service has been used. (3) The exemption shall not be available on the export of canalised item, project export, or export financed under lines of credit extended by Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary. (4) The exporter shall submit with the half yearly return after certification of the same as specified in clause (g) of the proviso - (i) the original documents showing actual payment of

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	commission to the commission agent; and (ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India :
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General conditions to be satisfied:-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner/Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP1, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with sub-clause (iv) or sub-clause (v) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document issued by the service provider to the exporter, on which the exporter intend to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item (v) of clause (a);

(c) the exporter availing the exemption shall file the return in Form EXP2 every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (2) of the said Schedule;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;

(g) where the amount of service tax in respect of the service specified against serial No. 2 of the Schedule exceeds one per cent of the free on board value of the export then, the amount in excess of the said one per cent shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994.

(c) Exemption from service tax leviable on taxable services provided to GTA for use in transportation of goods by road

Notification No. 1/2009 ST dated 05.01.2009 has exempted from the whole of the service tax, the following taxable service provided to a goods transport agency for transportation of goods by road in the said goods carriage,

(a) clearing and forwarding agent; (b) manpower recruitment or supply agency; (c) cargo handling agency; (d) storage or warehousing; (e) business auxiliary service; (f) packaging activity; (g) Business support services; and (h) supply of tangible goods for use service.

subject to the condition that the invoice issued by such service provider, providing services should mention the name and address of the goods transport agency and also the name and date of the consignment note, by whatever name called, issued in his behalf.

17. Notification No. 31/2009 ST dated 01.09.2009 has exempted the taxable service provided by a sub-broker, to a stock-broker as defined in clause (101) of Section 65 of the Finance Act, 1994, in relation to sale or purchase of securities listed on a registered stock exchange from the whole of the service tax leviable thereon.

18. Notification No. 32/2009 ST dated 01.09.2009 has exempted the taxable service provided by any person, to a client as defined under business auxiliary service in relation to the manufacture of pharmaceutical products, medicines, perfumery, cosmetics or toilet preparations containing alcohol, which are charged to excise duty under Medicinal and Toilet Preparations (Excise Duties) Act, 1955 from the whole of the service tax leviable thereon.

19. Notification No. 33/2009 ST dated 01.09.2009 has exempted the taxable service provided to any person in relation to transport of goods by rail from the whole of the service tax leviable thereon provided, nothing contained in this notification shall apply to any service provided or to be provided, by any person other than government railway, in relation to transport of goods in containers by rail. In other words, the exemption has been granted to service provided or to be provided, by government railway, in relation to transport of goods in containers by rail.

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20. Notification No. 39/2009 ST dated 23.09.2009 exempts the taxable service under the category of business auxiliary service provided by a person (service provider) to any other person (service receiver) during the course of manufacture or processing of alcoholic beverages by the service provider, for or on behalf of the service receiver, from so much of value which is equivalent to the value of inputs, excluding capital goods, used for providing the same service, subject to the following conditions, namely:-

- (a) that no Cenvat credit has been taken under the provisions of the Cenvat Credit Rules, 2004;
- (b) that there is documentary proof specifically indicating the value of such inputs; and
- (c) where the service provider also manufactures or processes alcoholic beverages, on his or her own account or in a manner or under an arrangement other than as mentioned aforesaid, he or she shall maintain separate accounts of receipt, production, inventory, despatches of goods as well as financial transactions relating thereto.

Here, 'input' and 'capital goods' shall have the meaning as is assigned to them under rule 2 of the CENVAT Credit Rules, 2004.

21. Notification No. 27/2009 ST dated 20.08.2009 has notified a public sector company as class of persons for the purpose of the sub-clause (iii) of section 96A(b) (i.e., filing to Advance ruling) of the Finance Act, 1994. A "public sector company" shall have the same meaning as is assigned to it in clause (36A) of section 2 of the Income-tax Act, 1961.

22. Notification No. 34/2009 ST dated 01.09.2009 has amended *Notification No. 1/2006 ST dated 01.03.2006* granting abatement of 70% to the service provided or to be provided, by any person other than government railway, in relation to transport of goods in containers by rail so as to **rename the service as transport of goods in containers by rail**.

23. Abatement of 30% from the gross amount charged in case of services in relation to chit: Notification No. 27/2008 ST dated 27.05.2008 has amended *Notification No. 1/2006 ST dated 01.03.2006* so as to provide an abatement of 30% in case of services provided in relation to chit from the gross amount charged for such service.

"Chit" has been defined to mean a transaction whether called chit, chit fund, chitty, kuri, or by any other name by or under which a person enters into an agreement with a specified number of persons that every one of them shall subscribe a certain sum of money (or a certain quantity of grain instead) by way of periodical installments over a definite period and that each subscriber shall, in his turn, as determined by lot or by auction or by tender or in such other manner as may be specified in the chit agreement, be entitled to the prize amount.

24. Amendment in 'tour operator services': Situation prior to amendment: Private bus operators, who operate buses on specific inter-state or intra-state routes, were required to pay service tax as they ply their buses having 'contract carriage permits'. Therefore, they were covered under the definition of tour operators. On the other hand, the State Undertakings run buses, which ran on the same route carrying passengers, were not liable to pay the service tax as these buses bear 'stage carriage permit'.

25. Amendment made by Notification No. 20/2009-ST, dated 07.07.2009: In order to bring parity between the two, the services provided by the tour operators having a contract carriage permit for inter-state/intra-state transportation of passengers have been fully exempted from service tax, provided such transportation is not in relation to tourism or conducted tours, charter or hire service.

26. Amendment in 'banking and other financial services': Situation prior to amendment: Money changer services provided in relation to sale and purchase of foreign currency was made liable to service tax with effect from 16.05.2008.

Amendment made by Notification no 19/2009 – ST dated 07.07.2009: In respect of such services, exemption has been granted when such services are provided by one Scheduled bank to another Scheduled bank.

27. Notification No.23/2009 Dated 7-07-2009

WORKS CONTRACT (COMPOSITION SCHEME FOR PAYMENT OF SERVICE TAX) RULES, 2007

Notification No. 32/2007 ST dated 22-05-2007 has notified works Contract (Composition Schemes for Payment of Service tax) Rules, 2007. These rules have come into effect from 01-06-2007.

Rule 2: "works contract service" means services provided in relation to the execution of a works contract;

Rule 3 (1): Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his

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service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to 4% of the gross amount charged for the works contract.

“Explanation.-For the purposes of this sub-rule, gross amount charged for the works contract shall be the sum,-

(a) including-

(i) the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and

(ii) the value of all the services that are required to be provided for the execution of the works contract;

(b) excluding-

(i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved; and

(ii) the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire;

Provided that nothing contained in this Explanation shall apply to a works contract, where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009.”;

[Substituted the earlier Explanation Vide Notification No. No.23/2009 – ST Dated, the 7th July, 2009]

Rule 3(2): The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

Rule 3(3): The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

Rule 4: The option under sub-rule (3) shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract.

[Newly Inserted Vide Notification No. No.23/2009 – ST Dated, the 7th July, 2009]

Notification No. 7/2008 ST dated 01-03-2008 has amended Rule 3(1) of “Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007” so as to increase the optional rate of service tax from “2%” of the gross amount charged for the works contract to “4%” of the gross amount charged for the works contract.

Reversionary Questions

Q1. Works contract service vs. Residential complex service

Ramakrishna Development Corporation (RDC) – a real estate developer – is engaged in construction of a residential complex (consisting of more than 20 houses) named Apple County for Almeco Builders. The particulars are as follows:-

Contracted Price (excluding VAT, if leviable)	Rs. 22,00,000
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Steel supplied by Almeco Builders to RDC	Rs.4,00,000
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Excise duty paid on :-

(a) capital goods used in providing construction service	Rs. 60,000
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(b) inputs used in relation to construction service	Rs. 30,000
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(c) Service tax paid on input services used in construction service	Rs. 40,000
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You are required to calculate the net service tax payable by Ramakrishna Development Corporation in the following two cases:-

(a) The aforesaid contract for construction of residential complex involves the transfer of property in goods and materials involved in the construction of residential complex of worth Rs. 2,00,000. VAT of Rs. 10,000 has been paid on the said goods and materials. RDC has opted to pay service tax under Composition Scheme.

(b) The aforesaid contract for construction of residential complex does not involve any transfer of property in goods and materials used in the construction of residential complex. It is to be noted that RDC has opted to avail the abatement of service tax equal to 67% under notification no. 1/2003 dated 1.03.2006. [ICAIRTP June 2009 modified]

Solution:

(a)

A contract can be classified as a work contract if following two conditions are cumulatively satisfied:-

(i) There is a transfer of property in goods involved in the execution of specified contract, and

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(ii) Such transfer is leviable to tax as sale of goods.

Thus, the contract in the instant case is a works contract. Now, since, the assessee has opted for Composition Scheme; valuation shall be made as per the provisions of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

Calculation of net service tax payable by RDC under Composition Scheme:

Gross amount charged (excluding VAT) – Note 1	22,00,000
Add: value of steel supplied by M/s. Almeco Bilders – Note 2	<u>4,00,000</u>
Total gross amount charged	<u>26,00,000</u>
Service tax @ 4.12% (including SC+ EC)	1,07,120
Less: Cenvat credit of excise duty/ service tax paid on –	
(i) Inputs not allowed as per composition rule	NIL
(ii) Capital goods – no bar in respect of credit eligibility, however only 50% credit allowed in current financial year, balance in next financial year	30,000
(iii) input services (no bar in respect of eligibility of credit)	<u>40,000</u>
Net service tax payable	37,120

Note 1: Under composition scheme, the value of transfer of property in goods and material involved in execution is not deducted from gross amount charged; it forms part of gross amount charged. However, VAT paid of Rs. 10000 is deductible from gross amount charged; since the gross amount charged is exclusive of VAT, no adjustment is required.

Note 2: After amendment of Works contract Rule, the gross amount charged is to include the value of material 'supplied' for taxable service.

(b) Since, the contract does not involve the transfer of property in goods and materials used in the construction of residential complex, the contract cannot be termed as a works contract. The services provided by RDC are taxable under the category of 'construction of complex service'. It is assumed that RDC is eligible for abatement, as the service provided by RDC are not merely completion and finishing service. Since the RDC opted for abatement @ 67%, therefore the value of taxable service and service tax thereon shall be calculated as follows –

Gross amount charged by RDC	22,00,000
Add: value of steel supplied by M/s. Almeco Bilders – Note 2	<u>4,00,000</u>
Total gross amount charged	26,00,000
Less: Abatements 67%	<u>17,42,000</u>
Taxable value	8,58,000
Service Tax @ 10.3%	88,374
Less: CENVAT credit on input/capital goods/ input service – not allowed	<u>NIL</u>
Net service tax payable	88,374

C: CBEC CIRCULAR -2008/2009**A: EXCISE****1. Circular No. 881/1/2009, dated 7-01-2009****SEZs liable to 'Additional duty of Excise and special Additional Duty of Excise on Motor Spirit and High Speed Diesel' and 'National Calamity Contingent Duty (NCCD)'**

While Section 3 of the Central Excise Act, 1944, doesn't provide for levy of Excise Duty on SEZ, however section 3 is applicable only in respect of Basic Excise Duty. The additional excise duties are levied under the respective enactment. The SEZ Act, 2005 lists 21 statutes whereunder no excise duty can be levied on SEZs. However, the levy of 'additional duty of excise and special additional duty of excise on motor spirit and high speed diesel' and 'national calamity contingent duty' has not been barred. Therefore, the said duties are leviable on goods manufactured by SEZs; and such goods may be –

- (a) exported on payment of the said duties under Rule 18; or
- (b) exported under Bond without payment of said duties under Rule 19.

2. Circular No. 882/3/2009-CX**Whether tea admixture containing rice flour, tapioca, vitamins, etc is classifiable under chapter 9 as flavoured tea or as a preparation with a basis of tea under chapter 21?**

The expression 'preparation' include products prepared by addition, mixing, or such other similar processes to the original commodity. Heading 2101 includes preparations with a basis of extracts, essences and concentrates of tea and preparations with basis of tea.

Therefore, it is opined that the tea admixture is a preparation with a basis of tea and is classifiable under chapter Heading 2101.

3. Circular No. 1/2009, dated 5-5-2009

Inputs services used in relation to 'capital goods' – Rule 6 applicable – Credit not available to the extent input services used in exempted goods/services : If a manufacturer of dutiable as well as exempted goods and a provider of taxable as well as exempted services avails of input services such as GTA, Erection & Commissioning, Maintenance, Insurance etc. in relation to the capital goods, which are, in turn, used in manufacture of final products or in providing the output service, then, CENVAT credit on such input services shall be subject to the restrictions provided in Rule 6.

Rule 6(4), which permits CENVAT credit on capital goods even if they are partly used for exempted goods/ services, cannot apply to input services used in relation to capital goods. Rule 6 restricts credit of duty paid on all inputs and credit of service tax paid on all input services irrespective of whether the input services are related to capital goods or otherwise. Therefore, CENVAT credit of such input services shall not be available to the extent they are used in exempted goods/services and shall be governed by conditions and restrictions imposed by Rule 6.

4. Circular No. 889/09/2009 CX dated 21.05.2009 provides that the judgements of Hon'ble Supreme Court in the case of *U.O.I Vs. Rajasthan Spinning & Weaving Mills and CC&EX Vs. Lanco Industries Ltd.* have clarified that when the conditions spelled out under section 11AC of the Central Excise Act, 1944 are fulfilled, there is no discretion to reduce the mandatory penalty equal to duty even though the duty is paid before the issue of show cause notice.

5. Coconut oil packed in containers upto 200 ml may be considered as generally used as hair oil and shall be classified under Heading 3305, even if used by some consumers for edible purpose:

Circular No. 890/10/2009 CX dated 03.06.2009 has been issued to settle the classification dispute relating to coconut oil sold in small packs say of 50 ml or 100 ml. The two contending classifications are: Chapter 15 covering various types of vegetable oil including coconut oil and Chapter 33 covering cosmetics including hair oil. When the coconut oil is sold in small containers, following indications have been found on containers or labels.

- A. 'hair oil'
- B. 'edible oil'
- C. 'pure coconut oil' or 'coconut oil'

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When 'hair oil' is printed on the container/label, there is no dispute and it is classified as 'hair oil' under chapter 33 (Excise duty 16%). Disputes arise in respect of other two categories ('edible oil', 'pure coconut oil' or 'coconut oil'). Department contends that coconut oil falling under these two categories are meant for sale as 'hair oil', therefore, it shall be classified as 'hair oil' under Chapter 33. The manufacturers plead that as they are not printing the specific use of such oil as 'hair oil' it should be classified as 'vegetable oil' under Chapter 15 (ED 8%), irrespective of the fact that consumer may use it as 'hair oil'.

The circular explains that the Chapter Note 2 of Chapter 33 prescribes a condition that Heading No.3305 (which covers hair oil also) applies to products **put up in packing of a kind sold by retail for such use**. Thus, if a particular packing of coconut oil is generally sold in retail as hair oil, in that case, the said product would be classified under heading 3305.

Further, the Section Note 2 to Section VI also provides that goods classifiable in Heading 3305 by reason of being put up for retail sales are to be classified in the said heading and in no other heading of the schedule. This Section Note further supports the interpretation that though a product is capable of being classified under more than one heading, even then because of the nature of its retail packing, which is indicative of its use as hair oil, the classification under heading 3305 would get priority.

However, if the same coconut oil is packed in say 1 litre or 2 litre packages, which are generally used by consumers for edible purposes (even though some customers may use it as hair oil), it would be classified under Chapter 15.

Hence, the classification of coconut oil would depend upon the fact as to how the majority of the customers use the said product. Therefore, if coconut oil is packed in packages which are generally meant for sale in retail as hair oil, in that case the said product would be classified as hair oil under Heading 3305, even though few consumers may use it as edible oil.

Thus, the circular settles that coconut oil packed in containers upto 200 ml may be considered as generally used as hair oil and shall be classified under Heading 3305.

6. Circular No. 897/17/2009-CX, dated 3-9-2009

Interest under Rule 14 impossible even if CENVAT credit wrongly 'taken' is reversed before 'utilization' : Rule 14 of the CENVAT Credit Rules, 2004, is clear and unambiguous in the position that interest would be recoverable when CENVAT Credit is taken "**or**" utilized wrongly. Hence, it is clarified that the interest shall be recoverable when the credit has been wrongly taken, even if it has not been utilized.

7. Benefit of reduce penalty of 25% under provisions to section 11AC- Not available at appeal stage: Circular No. 898/18/09 CX dated 15.09.2009 has clarified that the benefit of reduced penalty under provisos to section 11AC is not available at appeal stage, i.e. the reduced penalty cannot be paid *within 30 days of the communication of the order in Appeal*. The circular explains that in order to avail the benefit of 25% penalty, the duty, interest and penalty are required to be paid *within 30 days of communication of the order passed by the adjudicating authority*.

Further, the reading of proviso (4) would also support this interpretation because the said proviso stipulates that wherever duty amount is increased at any appellate stage, in that case in order to avail the benefit of 25 % penalty, the assessee is required to pay differential amount within 30 days of the passing of the order by the appellate authority. A combined reading of all the four provisos would, therefore, make it clear that the benefit of 25% penalty is applicable only when the assessee has paid duty, interest and the reduced penalty within 30 days of communication of the order passed by the adjudicating authority. However, if the penalty amount is increased at the appellate stage, in that case the 25% of differential amount of penalty can be paid within 30 days of communication of said appellate order.

8. Circular No. 900/20/2009 CX dated 06.10.2009 has been issued to permit bringing of duty-paid packing materials into export warehouse under Rule 20 of Central Excise Rules.

Para 7.2 of the Board's Circular No. 581/18/2001-CX dated 29.06.01 provides that duty paid goods are not permitted to be brought into the warehouse. However, it is a fact that number of times packing material in small quantity is required at a short notice and the supplier may not be interested to follow the detailed procedure of removal of goods without payment of duty. Therefore, it has been decided that duty paid packing material can be brought into the export warehouse, but exporter would not be allowed to claim export benefit like rebate for the duty paid on the said packing material.

In view of above, in the above referred Circular, after para 7.2, following is inserted,-

"However, an exporter desirous of bringing duty paid packing material required for packaging of other material in the warehouse, may submit a written request to the jurisdictional AC/DC of the Division, who may grant the permission for a period of one year at a time. The exporter will maintain proper account of such goods and shall not claim any export benefit like rebate of duty paid on the said material."

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9. Circular No. 902/22/2009 CX dated 20.10.2009 has been issued with regard to assessable value in respect of goods manufactured on job work basis. Some manufacturers of motor vehicles were getting complete motor vehicles manufactured by sending the chassis of the motor vehicles to independent body builders for building the body as per the design/specification of the manufacturer. The practice followed was that the chassis was transferred to the body builder on payment of appropriate central excise duty on stock transfer basis and was not sold to them. The body builder avails the CENVAT credit of the duty paid on the chassis and cleared the same on payment of duty to the Depot/Sales Office/Distributor of the motor vehicle manufacturer. The duty was discharged by the body builder on the assessable value comprising the value of chassis and the job charges. The Depot/Sales office of the motor vehicle manufacturer sold the vehicles at a higher price than the price on which duty had been paid.

As per rule 10A (ii) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 the assessable value for the purpose of charging central excise duty, in the cases where the job-worker transfer the excisable goods to the Depot/Sale office/Distributor and/or any other sale point of the principal manufacturer, shall be the transaction value on which goods are sold by the principal manufacturer from such a place. Accordingly, after the insertion of Rule 10A, the practice of discharging the duty on cost construction method by the body builder is not legally correct. Therefore, the circular clarifies that wherever goods are manufactured by a person on job work basis on behalf of a principal, then value for the purpose of payment of excise duty may be determined in terms of the provisions of Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 subject to fulfilment of the requirements of the said rule.

10. Aluminium /Zinc Dross & Bagasse & Other waste products – Excisability and Applicability of Rule 6 of the CENVAT Credit Rules, 2004

Circular No. 904/24/09 CX dated 28.10.2009 has clarified that in view of the amendment made by the Finance Act, 2008 in the definition of excisable goods, bagasse, aluminium/zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty.

It is further clarified that in case the rate of duty in respect of such products is Nil in the tariff or they are exempt from duty in terms of any exemption notification, and if CENVAT credit has been taken on the inputs which are used for manufacture of dutiable and exempted goods, then in terms of rule 6 of CENVAT Credit Rules, 2004, the assessee is required to reverse the proportionate credit or pay 5% amount.

Excisability of bagasse and similar waste products arising during the course of manufacture has been under dispute for a long period of time. There are number of Tribunal's judgments that being waste, these are not excisable products. Departmental appeal in respect of excisability of bagasse in one such case i.e Balrampur Chinni Mills Ltd. is reportedly still pending in the Supreme Court. Generally, the courts have been taking a view that the waste or refuse or residue arising during the course of manufacture cannot be treated as excisable goods even if such waste fetches some price in the market. However, all these matters pertain to the period prior to 2008.

In the budget of 2008, the definition of "excisable goods" in clause (d) of Section 2 of the Central Excise Act, 1944 was amended by adding an explanation that for the purposes of this clause, "goods" include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

11. Circular No. 903/23/2009 CX dated 20.10.2009 has clarified that textile quilted products like quilts, quilted bed spreads, etc. will be classified under heading 9404 and not under heading 5811 as heading 5811 covers quilted textile products which are further used in the manufacture of quilts, quilted bedspreads, etc. while it is heading 9404 which covers the final finished products like quilts and other articles of bedding and furnishing.

12. Circular No. 880/18/2008-CX, dtd.22-12-2008: Computation of duty when VAT remission available

It has been clarified by the Board that the sale tax/VAT is excluded from transaction value only if the same is actually paid or payable. Since the amount of VAT remitted by the State Government is not actually paid or payable, therefore, no deduction can be claimed in respect thereof in computing the transaction value.

For Example: M/s. ABC Ltd., a manufacture having operation in Jammu and Kashmir, sells its goods at Rs. 20,000 (inclusive of all taxes). The company is eligible for VAT-remission under the State-VAT laws, on account of which the amount of VAT payable as shown in the invoice is not actually paid to the State Government. Compute the amount of Central Excise Duty. Given that the rate of exercise duty is 10%, EC & SHEC is 3% and VAT-rate is 4%. What would be your answer if no VAT-remission had been available to the assessee?

Answer: The Central Excise Duty payable by ABC Ltd. per product is as computed below.

(in Rs.)

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VAT remission No vat remission

Sale price (inclusive of all taxes)	20,000	20,000
Less: VAT actually paid or payable (sale price X 4/104)	<u>Nil</u>	<u>769.23</u>
Value (inclusive of excise duty)	20,000	19230.77
Excise duty (value inclusive of excise X 10.3/110.3)	1867.63	1795.80

13. Circular No. 877/15/2008-CX., dated 17-11-2008:

It has been clarified that the entire amount of duty is paid by the manufacturer, as shown in the invoice would be available as credit irrespective of the facts that subsequent to clearance of the goods, the price is reduced by way of discount or otherwise. However, if the duty paid is also reduced, along with the reduction in price, the reduced excise duty would only be available as credit. It may however be confirmed that the supplier, who has paid duty, has not filed/claimed the refund on account of reduction in price.

14. Central Excise Law extends to “designated areas” in continental shelf and Exclusive Economic Zone of India:

The Central Government has extended the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985 (CETA) to the notified “designated areas” in the Continental Shelf and Exclusive Economic Zone of India. Accordingly, any goods produced or manufactured within –

- (a) the territorial waters of India, and
 - (b) the “designated areas” of the Continental Shelf or Exclusive Economic Zone,
- which are treated as part of ‘India’, shall be leviable to excise duty.

15. Few commodities specified u/s. 4A and there respective notified abatements are as under (updated up to 24-12-2008)

Description	Abatement as a percentage of retail sale price
Sharbat	25%
Clocks	40%
Electric Fans	35%
Mineral waters	45%

Computers parts/accessories, laptops and set top boxes, printer, monitor, modem have been brought under RSP based excise duty.

16. Clarification regarding reversal of CENVAT credit in case of trade discount

Sometimes, the supplier allows trade discount to the manufacturer. However, the manufacturer avails the CENVAT credit of the entire excise duty paid by the supplier as reflected in the invoice. The issue raised was whether proportionate credit should be reversed in such a case.

Circular No. 877/15/2008-CX dated 17.11.2008 has clarified that in such cases, the entire amount of duty paid by the manufacturer, as shown in the invoice, would be available as credit irrespective of the fact that subsequent to clearance of the goods, the price is reduced by way of discount or otherwise.

However, if the duty paid is also reduced, along with the reduction in price, the reduced excise duty would only be available as credit. It may however be confirmed that the supplier, who has paid duty, has not filed/claimed the refund on account of reduction in price.

17. LTUs to pay duty electronically only

The Large Taxpayer Units (LTUs) shall pay the central excise and service tax dues electronically only, through internet banking.

However, in case of difficulties in e-payment, a large taxpayer is permitted to pay the duty through banks (except in such cases where e-payment is mandatory) in the jurisdiction of the LTU Commissionerate only. **[Circular No.878/16 /2008-CX dated 21.11.2008]**

B: CUSTOMS**Warehousing**

18. CBEC Circular no. 15/2009-Cus., dated 12-5-2009 (CC v. Acalmar Oils and Fats Ltd. [2009] 240 ELT 440 (Tri. – Bang.) – No interest payable u/s 47(2))

Interest u/s 47(2) is payable if importer fails to pay import duty within 5 working days from the date on which Bill of Entry for home consumption is returned to him. The use of expression “home consumption” in section 47 makes it amply clear that section 47 applies only when goods are entered for home consumption by filing a bill of entry for home consumption.

Once the goods are deposited in warehouse, the ex-bond bill of entry for home consumption is filled u/s 68, which doesn't provide for any levy of interest. The only interest imposable in respect of warehoused goods is as provided in section 61 of the Act. Therefore, even if the duty is not paid within 5 days after return of ex-bond bill of entry duly assessed, there can't be any levy of interest u/s 47(2).

19. Warehousing – improper removal section 72

It is to be noted that the case of Raymond Synthetics Ltd. v. CC (2000) 119 ELT 205 (Tri. –LB) is not relevant now, the CBEC vide public notice no. 60/2009, dated 31-8-2009 provides that in view of Kesoram Rayon v. CC (1996) 86 ELT 464 (SC), it has been clarified that once the permitted warehousing period is expired, then the relevant date of determination of rate of duty shall remain ‘frozen’ at the date of deemed removal i.e. the date of expiry of the permitted period. If an application for extension is received after the expiry of permitted period, then even if such extension is allowed, the relevant date shall remain the same i.e. the date of deemed removal, not the date of payment of duty.

Therefore, the solution to point (b) of Question No. 2 in pg no. 94 of VOL-3 would be same as in case of point (a).

20. Circular No. 16/2009-Cus, dated 25-5-2009- Duty drawback to merchant exporter:

For example- The All Industry Rates of Drawback for Shoes are:

- (a) if CENVAT facility has not been availed of - 10.5% of FOB value
- (b) if CENVAT has been availed of - 2.2% of FOB value

A merchant exporter has purchased shoes from a trader and exported the same at a FOB value of Rs. 1 lakhs. He claims duty drawbacks of customs, Excise and Service Tax portion i.e. @ 10.5% amounting to Rs. 10,500; while the Customs Department allows drawback of customs portion only i.e. @2.2% amounting to Rs. 22,00. Compute the drawback, if any, available to the merchant exporter.

Solution : The CBEC has vide its **Circular No. 16/2009-Cus, dated 25-5-2009** clarified that the goods available in the market are deemed to be duty paid. Even if CENVAT credit facility was availed by the manufacturer of such goods (here, shoes), the said CENVAT credit was utilized to pay excise duty thereon.

Therefore, since the goods (here, shoes) purchased by the merchant exporter from the trader also suffer also excise duty, hence, merchant exporters purchasing goods from the local market for export shall be entitled to full rate of duty drawback (including excise portion). However, such drawback will be allowed only if such merchant exporters declare, at the time of export,-

- (a) the name and address of the trader from whom they have purchased the goods ; and
- (b) that no rebate of excise duty (input rebate and also the final product rebate) shall be taken against the Shipping bills under which they are exporting the goods.

In view of the above, the merchant exporter will be entitled to duty drawback @10.5% (for customs as well as excise/service tax portion). The total amount of drawback allowable to him being Rs. 10,500.

21. Inland Container Depots (ICDs) [Circular No. 18/2009-Cus., dated 8-6-2009] :

‘Inland Container Depot’ are at par with other customs port/airport/Land Customs Station appointed by Board u/s 7 of Customs Act, 1962. Accordingly, ICD is a place that acts as a ‘self contained customs station’ like a port or air cargo unit where filing of customs manifests, bills of entry, shipping bills and other declarations, assessment and all the activities related to clearance of goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export, transshipment, etc., take place.

22. Container Freight Stations (CFSs) [Circular No. 18/2009-Cus., dated 8-6-2009] : CFS are specified as customs areas u/s 8(b) by the Commissioner of Customs within his jurisdiction wherein imported goods or export goods are ordinarily kept before

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clearance by customs. Each CFS is linked to a customs station within the jurisdiction of the Commissioner of Customs; it is an extension of a custom station.

23. Circular No.7/2008-Cus dated 28.05.2008: Clarification in respect of procedure for sanctioning the custom duty refunds under section 27(2) of the Customs Act, 1962

It has been clarified that in terms of sub-section (2) of section 27, the concerned Assistant/Deputy Commissioner of Customs has to go through:-

(i) the facts of the case and the material placed before him in order to determine whether the amount claimed by an applicant is refundable to him or not, and

(ii) the details of audited Balance Sheet and other related financial records, certificate of the Chartered Accountant etc., submitted by the applicant in order to decide whether the applicant had not passed on the incidence of the duty and interest thereon, if any, to any other person.

The Order-in-Original passed by the Assistant/Deputy Commissioner of Customs in the adjudication process should be a speaking order providing specific details including the relevant financial records that are relied upon to arrive at a conclusion whether the burden of duty or interest, as the case may be, has been passed on or not. Refund orders issued in a routine and casual manner thereby sanctioning the amount but crediting the same to the Consumer Welfare Fund without going through the factual details of the case and the due process as provided in the first proviso cannot be considered as a complete and speaking order.

24. Circular No. 17/2008-Customs Dated. 21-10-2008

Additional duty of customs when goods liable to excise duty based on tariff value:

Section 3(1) of the Custom Tariff Act provides the basis for levy of additional duty of customs equal to the excise duty. In case of goods notified under section 4A of the excise Act, the retail sale piece *less* abatement is the basis for levy of additional duty of customs. However, in case of other goods, the basis for levy is assessable value (plus basic customs duty).

Section 3(1) of the Customs Tariff doesn't recognise the Tariff Value under Excise law as the basis for levy of additional duty of customs.

Therefore, In case the goods are liable to excise duty based on their tariff value such goods will be liable to additional duty of customs based on their assessable value under Customs law.

25. Circular No. 18/2008-cus.,dated 10-11-2008: For the purposes of calculation of export duty, the transaction value, that is to say the price actually paid or payable for the goods for delivery at the time and place of exportation under Section 14 of Customs Act, 1962, shall be FOB price of such goods at the time and place of exportation.

Concept capsule: M/s ABC Ltd. has exported certain steel items at a F.O.B. price of Rs. 10 lakhs payable by the foreign – importer. The said item are chargeable to export duty @ 8% ad valorem. The exporter has contended that since the foreign – importer will pay only Rs. 10 lakhs should be treated as ‘cum-duty-price’. Compute the amount of export duty taking into account this contention.

Ans: Since the FOB price is Rs. 10 lakhs, hence, the transaction value for the purposes of computation of export duty shall be Rs. 10 lakhs; the export duty whereon @ 8% shall amount to Rs. 80,000.

26. Customs law extended to maritime zones

Under the Maritime Zones Act, the Central Government has the power to extend any enactment/law for the time being in force in India to any area in the Continental Shelf or the Exclusive Economic Zone. Any enactment/law so extended shall have effect as if Continental Shelf or the Exclusive Economic Zone were a part of the territory of India.

In exercise of such powers, the Central Government has extended the Customs Act, 1962 and the Customs Tariff Act, 1975 to –

a) notified “designated areas” in the Continental Shelf or the Exclusive Economic Zone of India;

b) whole of the continental shelf of India or the Exclusive Economic Zone of India *for the limited purpose of –*

- (i) prospecting for extraction or production of material oils (including petroleum and natural gas)
- (ii) supply of any ‘goods’ defined in Customs Act *in connection with any activities referred in (i)*

C: SERVICE TAX**26. Clarification regarding levy of service tax on services provided by “commercial training or coaching centers”**
Circular No. 107/01/2009 – ST dated 28.01.2009

Section 65(26) provides that commercial training or coaching means any training or coaching provided by a commercial training or coaching centre;

Section 65(27) defines **commercial training or coaching centre** as-

- . any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons
- . on any subject or field other than the sports,
- . with or without issuance of a certificate and
- . **includes** coaching or tutorial classes but
- . **does not include**

- (i) preschool coaching and training centre or
- (ii) any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognised by law for the time being in force;

The aforesaid circular clarifies on the following mentioned issues:-

A. Commercial nature of the institute

The commercial training or coaching does not mean that such institute must have ‘commercial’ (i.e. profit making) intent or motive. It has to be interpreted in a wider sense.

B. Vocational Training Institutes - whether institutes offering general course on improving communication skills, how to be effective in group discussions or personal interviews, personality development, general grooming and finishing etc are covered

The circular clarifies that such institutes **are not covered** under the definition of vocational training institute because they only improve the chances of success for a candidate possessing required skill and do not impart training to enable the trainee to seek employment or self-employment.

C. Post school education**(a) Institutes falling under the category of institutes/establishments which issue diploma or certificate recognized by the law for the time being in force-hence not taxable under the category of “commercial coaching and training services”**

1. University as defined under section 2(f) of the UGC Act, 1956
2. Deemed University as defined under section 3 of the UGC Act, 1956
3. A college or institution, recognized by UGC, run by a trust/registered society/body corporate/body incorporated under Central or State Act as an institution affiliated to or form as constituent member with a university, providing education up to a bachelors degree, masters degree or diploma of a duration of minimum one academic year.
4. Autonomous colleges as per National Policy on Education, 1986.

(b) Institutes not falling under the category of institutes/establishments which issue diploma or certificate recognized by the law for the time being in force hence taxable under the category of “commercial coaching and training services”

An institution or establishment which is derecognized by the professional councils (such as All India Council for Technical Education-AICTE, Medical Council of India-MCI, Indian Council for Agricultural Research-ICAR, Bar Council of India-BCI) created through independent Union Acts.

(c) Deemed to be University not required to obtain the approval of AICTE to start any programme in technical or management education leading to an award, including degrees in disciplines covered under the AICTE Act, 1987

From the year 2005 onwards, a technical institution or establishment (which is otherwise recognized being a university, or affiliate college) has to obtain AICTE approval to fall under the category of institutes/establishments which issue diploma or certificate recognized by the law for the time being in force. However ‘Deemed to be University’ have been exempt from this requirement.

(d) Taxability of the courses conducted

In India, due to change in legal provisions, an institute/establishment may be recognized by the law at one time and not recognized at other. However, the taxability of the courses conducted would depend on the legal status of such institute or establishment **at the point of time when such service is provided** (i.e. course is conducted).

27. Circular No. 108/02/2009- ST dt. 29-01-2009

Construction of Residential Complex Service - Sale of flat and construction for personal use, not taxable

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a. If developer/ builder/ promoter builds up the flats/ dwelling units in a residential complex as per the agreement entered into with proposed buyers of flats, then, no service tax can be imposed, as the property in the flat/ unit belongs to the builder until the sale deed is executed in favour of the buyer. The construction carried out by builder until the execution of sale deed is on his personal account and is, therefore, in the nature of 'self service', not taxable.

b. Even if ultimate owner enters into a contract for construction of a residential complex with a builder, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity will not be liable to service tax, because this case is specifically excluded from taxable service.

c. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

28. Circular No. 109/03/2009 dated 23.02.2009: Whether the theatre owners are required to pay service tax on the rent received by them from distributors?

Screening of movie is not taxable except in the following case:-

Where the distributor leases out the hall for screening of the movie,

- (i) the theater owner gets a fixed rent from the distributor.
- (ii) the profit or loss from exhibiting the film is borne by the distributor.

In such a case, the theatre owner provides the taxable service of '**renting of immovable property**' for furtherance of business or commerce and is accordingly **liable to pay service tax on the rent received from the distributor**.

29. Circular No. 111/05/2009-ST, dated 24-02-2009

Applicability of the provisions of the Export of Services Rules, 2005 in certain situation:

A taxable service shall be treated as export of service if "*such service is provided from India*". The meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service. Accordingly,--

Category-I 'Services related to immovable property': If the property is located outside India, the service will be treated as 'used outside India'. *For example*, under Architect service, even if an Indian architect prepare a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residents in India, it would have to be presumed that service has been used outside India.

Category-II 'Services that can be performed outside India': If the services performed outside India, then they are to be treated as 'used outside India'. *For example*, if an Indian event manager arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India.

Category-III 'Other services provided to recipient located outside India': For remaining services, the relevant factor is location of the service receiver and not to the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, it is possible that export of service may be take place even when all relevant activities take place in India so long as benefits of these services accrue outside India.

For example,-

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

In all the illustration mentioned above, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Hence, they are 'used outside India'.

30. Circular No. 115/09/2009 ST dated 31.07.2009 has clarified the following two issues:

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Issue: Whether service tax is payable on commission paid to Managing Director/Directors (whole time, or Independent) by the company under business auxiliary service?

Clarification: Some Companies make payments to Managing Director/Directors (Whole-time or Independent), terming the same as 'commissions'. The said amount paid by a company to their Managing Director/Directors (Whole-time or Independent) even if termed as commission, is not the 'commission' that is within the scope of business auxiliary service and hence service tax would not be leviable on such amount.

Issue: Whether service tax is payable by Independent Directors who are part of the Board of Directors under management consultant's service?

Clarification: The Managing Director/Directors (Whole-time or Independent) being part of Board of Directors perform management function and they do not perform consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. The payments made by Companies, to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is clarified that the amount paid to Directors (Whole-time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. However, in case such directors provide any advice or consultancy to the company, for which they are being compensated separately, such service would become chargeable to service tax.

31. Circular No. 116/10/2009 ST dated 15.09.2009 has clarified the following issue:

Issue: Whether service tax is leviable on construction of canals for Government projects?

Clarification: As per section 65(25b) of the Finance Act, 1994 "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

32. Circular No. 117/11/2009 ST dated 31.10.2009 has clarified that service tax will not be leviable on services provided by a tour operator in connection with Haj & Umrah pilgrimage. The amount charged to the pilgrims in India undertaking Haj and Umrah pilgrimage, is for services provided by the Government of Saudi Arabia and the tour takes place outside India. As per Rule 3(1)(ii) of the Export of Services Rules, 2005, (Circular No. 111/05/2009 ST dated 24.02.2009), the service in respect of tour operator is export if such service is performed outside India. It is also provided therein that where such taxable service is partly performed outside India, it shall be treated as performed outside India. Therefore, it is clarified that service tax is not chargeable on the services provided in respect of tour undertaken for carrying out Haj and Umrah Pilgrimage in Saudi Arabia by Indian pilgrims considering these as export of service, provided they fulfill the other conditions of export as provided in Export of Service Rules.

33. Guidelines in respect of provisional attachment of property

Circular No. 103/06/2008 ST dated 01.07.2008 has issued the following guidelines in respect of provisional attachment of property for the purposes of protecting the interests of revenue during the pendency of any proceedings under section 73 or section 73A of the Act:

1. The following types of offences committed by a service provider or an exporter may be considered for provisional attachment of property:-

- (a) Provision of a taxable service without the cover of an invoice or any other document, as prescribed, and without payment of tax;
- (b) Provision of a taxable service without declaring the correct value for payment of service tax, where a portion of value of taxable service, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account.
- (c) Taking of CENVAT credit without the receipt of goods or services specified in the document based on which the said credit has been taken;
- (d) Taking of CENVAT credit on invoices or other documents which a person has reasons to believe as not genuine;
- (e) Issue of service tax invoice or any other document, without providing or to be providing a taxable service, as specified in the said invoice or other document;
- (f) Claiming of refund or rebate in a fraudulent manner such as on invoice or other documents which a person has reason to believe as not genuine.

2. The provisional attachment of property shall be resorted only in a case where the service tax or CENVAT credit alleged to be involved is more than Rs.25 lakh.

3. Personal property of a sole proprietor or partners shall not be attached. Personal property means any movable or immovable property which is in personal use of the sole proprietor or partner. However, immovable property/ properties which is/ are used

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for commercial purpose may be provisionally attached. Movable property should be attached only if the immovable property available for attachment is not sufficient to protect the interests of revenue. It should also be ensured that such attachment does not hamper the normal business of the assessee. This would mean that inputs required for provision of a service should not be attached by the department.

4. Provisional attachment of the property shall not be excessive, that is to say, the property provisionally attached shall be of value as nearly as may be equivalent to that of the amount demanded in the proceedings under section 73 or section 73A of the Act.

5. The provisional attachment of the property of the concerned person shall be made after sunrise and before sunset and not otherwise.

6. After provisional attachment of the property, the Central Excise Officer shall prepare an inventory of the property attached and specify in it the place where it is lodged or kept and shall hand over a copy of the same to defaulter or the person from whose charge the property is distrained.

7. All such property as is by the Code of Civil Procedure, 1908 exempted from attachment and sale for execution of a decree of a Civil Court shall be exempt from provisional attachment. The decision of the Commissioner of Central Excise in this regard shall be final.

34. Circular No. 105/08/2008 dated. 16-09-2008**SEZ units liable to pay service tax on non-exempt services**

Section 66 of the Finance Act 1994, (service tax law) doesn't exclude SEZs from the scope of its levy. Therefore service tax is applicable on taxable services which are provided by SEZ units, except such services which are exempt as aforesaid. Accordingly, SEZ units, providing taxable services to any person or consumption in Domestic Tariff Area (DTA) or providing any taxable service which is otherwise not exempt, are liable to pay service tax.

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1	Whether value of materials supplied free of charge by service recipient is includible in gross amount?	No, held that any material which is supplied free of charge by service recipient would not be includible in gross amount charged.
2	Whether value of spares and parts is includible to arrive at service tax liability in case of an Annual Maintenance Contract?	No, it was held that while computing the service tax liability in case of AMC, value of spares and parts would not be included in the gross amount charged and service tax was payable only on commission received in terms of AMC.
3	Whether parking charges includible in taxable value for 'mandap keeper service'?	Yes, because parking was provided as a part of 'mandap keeper service' and could not be used by any other person who had not booked mandap.
4	Is the activity of collecting human blood samples and separating serum from it covered within the ambit of business auxiliary service?	No, it was held that the drawing of test samples form part of testing and analysis service and it was not a separate service covered under business auxiliary service.
5	Whether 'retainer fee' is liable to service tax?	No, Since the basic requirement i.e., the transaction between a 'service provider' and a 'service recipient' must be on principal- to-principal basis, in this case was not satisfied the demand of service tax was liable to be vacated.
6	Whether the activity of powder coating on furniture supplied by the customer is covered under the scope of business auxiliary service?	No, the activity of powder coating was a process of manufacture in terms of section 2(f) the Central Excise Act, 1944. Therefore said activity did not fall within the definition of business auxiliary service.
7	Whether sale of lottery tickets is liable to service tax under the category of business auxiliary service?	No, lottery tickets were actionable claims and not goods within the meaning of Sale of Goods Act. Therefore, the petitioner could not be said to be rendering any service in relation to the promotion of their client's goods, or marketing of their client's goods, or sale of their client's goods.
8	Is the promotion of any service which is not taxable liable to service tax?	Held, that in respect of 'business auxiliary service', promotion of any service would be covered and it was not

		necessary that the service which was being promoted should be a taxable service only. The promotion of any service, whether taxable or non-taxable, would be taxable as a 'business auxiliary service'.
9	Whether loading and unloading in a mine is covered under 'cargo handling service'?	No, held that the activities under taken by the respondents were primarily in the nature of mining activities comprising of excavation, transportation and feeding of iron ores to the crusher plant and even though these activities might incidentally involve some loading and unloading, the same could not be covered under the category of 'cargo handling service' because the iron ore which was being carried could not be commercially called 'cargo'.
10	Does Management Consultant service cover marketing know-how?	No, know-how for marketing the products could not be considered to be in relation to the working system of the organization. It could never be considered as falling within the definition of 'Management Consultant'.
11	Is service tax leviable on hire purchase finance?	No, SC held that service tax was not leviable on hire purchase finance.
12	Whether clearances of two units, where there is no clear demarcation between the activities of two firms, should be clubbed?	Yes, if the activities show that in the actual running of the units there was no distinction and demarcation, the corporate veil needed to be lifted. In such as case, clearances were to be clubbed.
13	Can outdoor catering services provided to the employees within the factory premises be regarded as input service?	Yes, the canteen facility, although not specifically stated in the list of the activities mentioned in the definition, yet it was an activity relating to the business of the appellants and hence could be regarded as 'input service' within the ambit of rule 2(I) of the Cenvat Credit Rules, 2004.

36. Service Tax extends to "designated areas" in the continental shelf and exclusive Economic Zone

The Central Government has extended Service Tax Law to the notified "designated areas" in the Continental Shelf and the Exclusive Economic Zone of India. Accordingly, any services provided from any other country and used in territorial waters of India or the 'designated areas' of the continental Shelf or the Exclusive Economic Zone of 'India' shall be treated as 'import' of service and will be liable to service tax. Further, any services provided in such areas either from the mainland or from that area itself shall be liable to service tax and shall not be treated as export of service.