EXCISE

VALUATION

☛ **(M.Imp)**

SKF LTD- 2009 - SC (Larger Bench)

Facts: **Assessee is engaged in the manufacture and sale of ball-bearings and textile machine parts. It sold goods manufactured by it on certain prices on payment of excise duty leviable on the price on which the goods were sold. Later on, there was a revision of prices with retrospective effect. Following the revision the assessee demanded from its customers the balance of the higher prices and issued to them supplementary invoices. At the same time it also paid the differential duty on the goods sold earlier. The Revenue took the view that the assessee was liable to pay interest on differential duty.**

Issue: When the differential duty is paid immediately upon the recovery of price difference through issuance of supplementary invoice, whether interest shall still be payable on such differential duty?

Held:

YES

"The assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of prices. It, therefore, follows that **at the time of sale of goods the goods carried a higher value and thoser were cleared on short payment of duty**. The differential duty was paid only when the assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short-payment of duty though indeed completely unintended and without any element of deceit etd. Thus, it will attract interest liability".

Tutorial Note: Regarding chargeability of interest, **Larger bench of Tribunal** also made an interesting observation in case of **LUCAS TVS-2009**. It noted that "*A manufacturer who, at the time of removal of excisable goods, forsees or anticipates price revision, normally resorts to provisional assessment at the time of removal of goods and, when the assessement is finalized on the basis of price increase at a later point of time, he pays differential duty alongwith interest vide* ***Rule 7(4) of CER, 2002****. In doing so, he accepts the fact that there is a short-levy or short-payment and deems that the differential duty is a duty which is ought to have been paid at the time of removal of goods.* ***Where, instead of following the normal statutory procedure, he ascertains the differential duty (payable on account of price enhancement), interest shall also be payable in that situation.***"

CLASSIFICATION OF GOODS

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FRITO LAY INDIA- 2009 - SC

Product	Possible Headings	Where	Judgment
"Cheetos Masala Balls"	**Heading 19 04:** 19 04: food preparations obtained by swelling /roasting of cereals in grain form (for example, Corn Flakes) **Heading 21 08:**	**21 08**	Subject products **neither** obtained by swelling/roasting of cereals **nor** made from cereals in grain form. The statutory illustration of product covered under Heading 19 04 is corn flakes. Now in the case of plane corn flakes which is obtained by swelling or roasting there is no frying or application of masala or choco, hence it will fall in the first category. However, in case of

	21 08: Edible preparations not included elsewhere		choco corn flakes besides process of swelling or roasting there is an element of choco which will bring the product out of that category. Facts of each case shall be considered independently.

☛ **(M.Imp & Expected)**

VIVEK JHANGIANI- 2009 - SC

Product	Possible Headings	Where	Judgment
"Scrabble"	**Heading XX XX:** XX.XX: Games of chance **Heading YY YY:** YY YY: Puzzle	**Games of Chance**	Scrabble is neither an educational toy nor a puzzle. It is not a toy to be played with, but it is a game which is played by one or more individuals. Chambers 20th Century Dictionary defines **Scrabble as a word-building game**. It is meant for two or three or four players; there can be one winner and one or more losers - the person who gets the highest points will be declared the winner. Scrabble is played in clubs, and tournaments are held regularly to award championships and prizes. It is understood as a word game. **On the other hand**, **a puzzle** involves only one individual who solves a puzzle. There is, therefore, no question of gain or loss as only one individual is involved. Further, **there is only one solution to a puzzle while in the case of Scrabble there is no single solution as different words can be formed on the Scrabble board** depending upon the lettered tiles drawn by each player. Additionally, in a puzzle the outcome is predetermined and fixed. It is not so in case of 'scrabble". Thus, **scrabble cannot be said to be a 'puzzle"—rather it is a GAME.**

Tutorial Note:

1. **What is 'Scrabble'?:** "Scrabble" in general consists of a box, board, tiles, racks, instructional booklet, bag and pad. The booklet describes it as a "word game" for 2, 3 or 4 players and consists of forming interlocking words, crossword fashion on the Scrabble playing board using letter files with various letter values. *Each player competes for high score by using its letters in combination and location that takes best advantage of letter values and premium squares on the board. The objective is to score as many points as possible and at the end of the game, the player with the highest score is the winner.*
2. **Scrabble is different from "Crossword".** Crossword is puzzle as in crossword, words are written according to clues, therefore the outcome is pre-determined. However, in scrabble, there are no clues—there is just pure element of chance and skill. In scrabble, you don't know what tiles are on your opponent rack or which you will draw next. So, aided by artful strategy, there is a good chance of beating someone with a better vocabulary.

☛ **(M.M. Imp)**

CHAMPDANY INDUSTRIES LTD- 2009 -SC

Facts: **Assessee is manufacturing carpets. In such carpets, jute predominates by weight (around 75%). However, the upper surface (the exposed surface) is entirely of polyproplyne fibre (which is also a textile material).**

Issue: What shall be classification of such carpets:

Heading XX. XX: Jute Carpets

Heading XX. YY: Other Carpets

Related Section/Chapter Note: *Goods falling under Chapter 57 (Carpets) and consisting of more than two or more textile materials and hence, to be classified based on textile material which predominates by weight over other single textile material.*

Assessee Arguments: It shall be classifiable as 'jute carpet' in view of clear wordings of associated Chapter Note (as Rule 1 of GIR provides that classification of goods shall be determined by wordings of Heading and related Section/Chapter Notes).

Dept Arguments: It shall be classifiable as other carpet due to following reasons:

(a) The exposed surface of the carpet is polypropylene fiber and not jute, these goods cannot be classified as jute carpets. It was also argued if these goods are to be classified as jute carpets, then the exposed surface of the carpets must be of jute.

(b) The common parlance test should be applied for classifying the carpets as the carpets to the common man would not appear to be jute carpet but polypropylene carpet.

Held:

Classifiable as "Jute Carpet"

"GIR framed under Central Excise Tariff Act, 1985 are statutory in nature. **In terms of Rule 1, for the purposes of classification primacy should be attached to the Section and Chapter notes along with terms of the headings. If on application of Section and Chapter Notes, 'no clear picture emerges' then only can one resort to those rules.**

In the instant case, **it is clear from a perusal of the Chapter and Section Note, that the goods can be classified as jute carpets**. Thus, arguments of Revenue cannot be accepted."

Tutorial Notes:

1. SC made following **important observations** in this decision:
   * *Common parlance test is helpful in classification but primacy shall be given to Statutory Principles (GIR).*
   * *Even essential character test is not applicable to the case as essential character test has been provided in Rule 3 (b) of GIR and Rule 3 is applicable only when classification cannot be decided by Rule 1 (i.e., in terms of terminology of Heading and the related Section/Chapter Notes.*
2. SC reaffirmed its aforesaid decision in case of **UNI PRODUCTS (I) LTD-2009.**

CENVAT CREDIT RULES, 2004

☛ **(M.Imp)**

Rule 2(k) of CCR, 2004 – [Inputs – goods used for generation of electricity within the factory]

MARUTI SUZUKI LTD LTD- 2009– SC

Facts: Assessee was having a captive power generating plant within its factory. It produced goods, received them into its factory and used them in captive power generating plant for generation of electricity and used the cenvat credit of excise duty paid on goods so used. The electricity so generated was used for production of goods and for other purposes (say, general lighetening within the factory). However, surplus electricity so generated was sold to third parties at contractual rates. Department sought to recover the credit on inputs to the extent it had been used in generation of electricity which was sold to third parties.

Issue: Whether action of department is valid in law?

Held: YES

"the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. **Thus, assessee is entitled to cenvat credit to on eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (i.e., for captive consumption).** They are not entitled to cenvat credit to the extent of excess electricity cleared at the contractual rates in favour of joint ventures, vendors, etc. which is sold at a price"

☛ **(M.Imp)**

Rule 2(l) of CCR, 2004 – [Input Service – service used in relation to business]

COCA COLD INDIA LTD- 2009– BOMBAY HC

Facts: **Coca Cola India (Pvt) Ltd (the assessee) was manufacturing alcoholic beverage base (i.e., Concentrates). It had entered into franchise agreement with some other persons (referred as Bottlers) under which it sold concentrate to bottlers. The bottlers were diluting them and then selling the same after filling them into the bottles with the brand name of Coca Cola India (Pvt) Ltd.**

Assessee took advertisement services from advertisement agency advertising the soft-drinks (bottled drinks). It booked cenvat credit of same after making payment of such service. Department sought to recover cenvat credit on the ground that such service is not eligible service as advertisement was of SOFT-DRINKS (final product of bottlers) and not that of CONCENTRATES (final product of Coca Cola India (Pvt) ltd).

Issue: **Whether action of Department is valid in law?**

Held: No

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(a) The **inclusive part of the definition** which follows 'means' part has the effect of **enlarging the scope of input services** in respect of which the credit can be availed by the manufacturer, notwithstanding that such input services may not be covered by 'means' part.

➔ The expression '**INCLUDES"** enhances the scope of definition of input services.

➔ Similarly expression **'SUCH AS'** is illustrative and not exhaustive.

➔ The word **"BUSINESS"** is to be understood as s continuous activity and **not confined or restricted to mere manufacture of the product. Activities in relation to the business cover all activities that are related to the FUNCTIONING OF THE BUSINESS**.

In a case like the present, **business** of assessee being an integrated activity **comprising** of **manufacture of concentrate,** entering into franchise agreement with bottlers permitting use of brand name by bottlers **promotion of brand name, etc**. the expression will have to be seen in that context.

➔ Words **'RELATING'** further widens the scope of expression '**ACTIVITIES RELATING TO BUSINESS'**.

➔ Similarly, the use of the word **'ACTIVITIES'** in the phrase 'activities relating to business' further signifies the wide import of the phrase "activities relating to business. The Rule making authority has not employed any qualifying words before the word activities, like main activities or essential activities etc. Therefore, it must follow that all and **any activity relating to business falls within the definition of input service** provided there is a relation between the manufacturer of concentrate and the activity. Therefore, the phrase "activities relating to business" are words of wide import.

(b) The advertisement of soft drink enhances the marketability of Concentrate. Thus, it definitely is an activity relating to business of assessee. Thus, the advertisement or sales promotion of AERATED WATERS (soft-drinks) undertaken by manufacturer of CONCENTRATE is covered by the inclusive part of the definition of "input service" contained in Rule 2(l) of the CCR, 2004."

☛ **(Imp)**

Rule 6 of CCR, 2004 – [Admissibility of CCR on Export of EXEMPTED GOODS]

JYOTI OVERSEAS (P) LTD- 2009– TRIBUNAL

Facts: **Assessee was engaged in manufacturing of goods, which were exempted from duty. Assessee had exported the goods, which were exempted from payment of duty. The duty paid inputs (and tax paid input services) were used in manufacture of exported goods. The assessee had booked cenvat credit of inputs and claimed refund of that in terms of Rule 5 of CCR, 2004. CEO denied refund taking a stand that goods which were exported were already exempted so assessee not entitled to any credit at all. However, assessee counter-argued that in view of Rule 6(6) [which lifts bar on availment of cenvat credit on input in relation to certain clearances (including export clearances)] he is entitled to credit and thus, entitled to refund thereof.**

Issue: Whether assessee contention is valid in law?

Held: YES

"No doubt, Rule 6(1) of CCR, 2004 provides that input credit is not available in respect of input used in manufacture of exempted goods. However, this provision is not applicable for goods cleared for export [Rule 6(6) specifically provides so]. Thus, **manufacturer is entitled to credit on inputs used in export goods, whether dutiable or exempted.**"

*Tutorial Note: **Bombay HC** in case of **REPRO INDIA LTD-2009**, has also held that **"even exempted final product can be exported under Bond in terms of Rule 19 of CER, 2002.** And in respect of inputs used in manufacture of such exempted final products, input credit is admissible (in terms of Rule 6(1) read with Rule 6(6) of CCR, 2004).*

☛ **(V.Imp)**

Rule 14 of CCR, 2004 – [Recovery of Cenvat credit wrongly taken and utilized – Interest thereon]

INDO SWIFT LABORATORIES LTD- 2009– MADRAS HC

Facts: Cenvat credit booked wrongly (say, on LDD)**– Rs 10,00,000 – Date: 1st Jan, 2009**

Cenvat credit utilized– Rs 10,00,000 – Date: 5th Feb, 2009

On 30th July, 2009, on coming to know that he has taken credit wrongly and utilized too, he reversed equivalent amount from fresh cenvat credit.

Since the assessee has taken and utilized cenvat credit taken wrongly, recovery action is valid. The issue is connected with the interest liability.

Issue: The interest period shall be computed with reference to the

-- the date on which Credit was TAKEN

-- the date on which Credit was UTILIZED?

Held: "In our view, **Rule 14 of CCR, 2004 has to be read down to mean** that where **Cenvat credit has been Taken AND Utilized wrongly**, interest should be payable on the **Cenvat credit taken and utilized wrongly**.

➔ Interest cannot be claimed simply for the reason that the Cenvat credit has been wrongly taken *since* **availment by itself does not create any liability of payment**

Interest cannot be claimed from the date of wrong availment of CENVAT credit. **The interest shall be payable from the date CENVAT credit is wrongly utilized.**

*Tutorial Note: Earlier, Hon'ble SC in case of **MARUTI UDYOG LTD-2007** has held that wrong availment of credit and then its reversal before actual utilization is as goods as 'non-availment of credit" and thus, mere wrong availment will not attract any action if such wrongly booked credit has* *not been utilized.*

Following the ration of that decision, it can be safely concluded that where credit has been taken and also utilized wrongly, such credit is recoverable but interest shall be payable only with reference to the date of utilization of credit as default took place only with utilization of credit (and not merely on wrong availment of credit.

ADVANCE RULING [AAR= Authority for Advance Ruling]

PARADISE INTERNATIONAL - 2009 - AAR

Facts: A resident setting up a joint venture with non-resident in India. Memorandum of Understanding (MOU) has been entered into between the parties. But as such no formal contract has been entered into to undertake a particular activity in India.

Issue: Whether "MoU" can be said to be "A CONTRACTUAL ARRANGEMENT" between the parties so as to entitle the resident assessee to obtain advance ruling from the Advance Ruling Authority?

Held: YES –

"A resident assessee setting up a Joint Venture in India in collaboration with a non-resident in India is entitled to obtain advance ruling in relation to certain questions. The term "Joint Venture in India" has been defined to mean "a **CONTRACTUAL ARRANGEMENT** whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement**". It shall be noted that legislature had deliberately used the expression "CONTRACTUAL ARRANGMENT" instead of "CONTRACT"** (Refer tuotorial note below). Contract means an agreement enforceable by law. On the other hand, "contractual arrangement" is definitely wider in scope. Even "Memorandum of Understanding (MoU)" can properly be considered as "contractual arrangement" within the meaning of definition of "Joint Venture in India", provided it spells out the basic terms of understanding or agreement in definite terms. MoU may not be enforceable by law as a contract, but it can very well answer the description of "contractual arrangement".

Tutorial Note: *That the expression "contractual arrangement" occuring in the definition of joint venture is not synonymous with "contract" is re-inforced by the fact that the advance ruling can only be obtained at the stage of proposed activity. At this stage, very often, there will be no concluded contract in the sense in which it is understood under the Indian Contract Act. This is the reason to conclude that the phrase "contractual arrangement" is intended to carry a wider meaning than the expression "contract".*

ZUARI CEMENT LTD - 2009 - AAR

Facts: Assessee, a 100% subsidiary of a foreign company, was manufacturing cement in its registered factory. It proposed to expand its capacity by installing another plant. It sought advance ruling on the question whether cenvat credit of excise duty paid on cement and steel used in building foundation for plant and machinery will be eligible in either capacity (i.e., either as inputs or as capital goods.

Issue: Whether application for advance ruling is maintainable?

Held: NO –

"In order to be eligible for a ruling, the activity of production or manufacture of goods for which advance ruling is sought, has to be a "proposed activity" and not an ongoing one. In this case, creation of additional capacity for manufacture of cement by expanding the plant cannot be considered to be a "proposed activity" eligible for procurement of a ruling. Production of the same goods, namely cement, in the expanded plant is only a repletion or continuation of a past activity."

CUSTOMS

TYPES OF CUSTOMS DUTIES

CVD (counterbalancing ED on domestic article)

☛ (M.Imp)

MALWA INDUSTRIES LTD- 2009 - SC

Facts: **Imported Article: "X" for use in manufacture of textile article**

Excise Exemption on DOMESTIC ARTICLES:--> "X shall be wholly exempt from ED *if **used in same factory for manufacture of textile articles***"

Computation of CVD:--> CVD counterbalances ED on like domestic articles. While computing excise exemption shall be considered. Not only unconditional excise exemption but conditional excise exemption shall also be considered if imported goods fulfill the condition of the notification. In the instant case, the excise exemption was conditional. The requisite condition was that goods shall be manufactured in the same factory. Obviously, imported goods cannot satisfy that condition. So, literally imported goods are not entitled to the benefit of this exemption. But whether logically exemption benefit shall be allowed to the imported goods?

Held: YES

"when the goods are imported, it evidently cannot satisfy the condition of being manufactured in the same factory. It would be absurd to insist that the goods should be manufactured in the same factory in such cases".

☛ (M.M.Imp)

LEVY OF EXPORT DUTY ON SUPPLY TO SEZ

ESSAR STEEL LTD - 2010 - GUJ HC

Facts: **Essar Steel Ltd, a DTA Unit, supplied iron ore pallets to SEZ unit. Department demanded export duty on such supplies contending that 'supply to SEZ shall be treated as Export". Assessee contended that "supply to SEZ" is deemed to be export for the purposes of grant of benefits to the supplier unit. Such deeming fiction shall not be read into charging section, Sec 12. In other words, this deeming fiction shall not operate for the purposes of levy of export duty.**

Issue: Whether export duty can be levied

a) **Under provisions of Customs Act, 1962**
b) **Under provisions of SEZ Act, 2005?**

Held: Export Duty not leviable

(a) Export duty liability under provisions of CA, 1962

'Export' has been defined u/s 2 of Customs Act, 1962 to mean taking goods out of India to a place outside India. Sec 2 defines 'india' to include 'territorial waters of India. Therefore, taxable event contemplated under Customs Act, 1962 [Sec 12: Charging Section] for the purposes of levy of Export Duty is taking the goods out of territorial waters of India to a place outside India, in which case only goods will attract export duty under customs Act, 1962.

In the absence of

- ➔ any amendment in the definition of terms 'Export' and 'India' in Customs Act, 1962 or any amendment in charging section (Sec 12) or
- ➔ insertion of a charging provision contemplating movement of goods from DTA to SEZ as a taxable event for levy of export duty as in the case of export,

the levy of export duty cannot be justified under provisions of Customs Act, 1962.

Tutorial Note: Earlier, there was Chapter-XA [Sec 76-A to 76-N] in Customs Act, 1962 which contained provisions relating to SEZ. That Chapter used to specifically provide for levy of export duty on supply to SEZ. But that chapter had been omitted now and therefore, the aforesaid movement is no longer a taxable event under the Customs Act.

(b) Export duty liability under provisions of SEZ Act, 2005

The Statement of Objects and Reasons of the SEZ Act, 2005 indicates that the policy for setting up of Special Economic Zones had been adopted by the Government with a view to provide an internationally competitive environment for export. The objectives of the Special Economic Zones include making available (to the unit) goods and services free of taxes and duties for export production which is supported by integrated infrastructure.

In line with the aforesaid objective of providing goods and services free of taxes and duties to SEZ Unit or to a developer of the SEZ for the purpose of establishing an integrated infrastructure for export production, provisions have been made in the SEZ Act, 2005 granting exemption from taxes and duties, which would otherwise have been leviable in the absence of any provision for exemption from such duties. Sec 7 of the SEZ Act expressly provides for making the goods and services available to the Developer/Unit situated in the SEZ, free of taxes and duties.

A levy of export duty is neither expressly nor impliedly contemplated under the SEZ Act and cannot be read in by the purported intendment.

SERVICE TAX

ADVANCE RULING

PRINT TOP RUBBER INDUSTRIES - 2009 - AAR

Facts: **Applicant proposed to undertake the activity of re-rubberisation of used rollers of printing machines. The activity involved removal of old rubbers and affixation of new rubbers by way of vulcanizing and grinding process.**

Issue: **Whether such activity would be liable to service tax under "Management, Maintenance or Repair Service" and thus, a taxable service within the meaning of Sec 65(105) of FA, 1994?**

Held: YES –

"The activity of re-rubberisation as per the agreement with the client amounted to 'maintenance or repair' as applicant with the client is for maintenance or repair of the machines and as a part and parcel of that service activity only new rubbers have been used in re-rubberisation process.".

Tutorial Note: *In case of reconditioned rollers are stocked and sold out at a price (which may include price of reconditioning also) as and when buyer approaches, then, since such a transaction would be that of outright sale, it will be outside the scope of levy of service tax; there being no service-provider and service-recipient relationship.*