

BASIC CONCEPTS

1. Does the addition of stabilizing agent, masking agent etc. amount to manufacture within the meaning of section 2(f) of the Central Excise Act, 1944?

CCEx. v. Karam Chand 2009 (236) E.L.T. 647 (H.P.)

The respondent was engaged in the manufacture of liquid mosquitoes' destroyer. It used to obtain concentrated alletherin and convert it into diluted alletherin by adding solvent deodorized kerosene oil, perfume (as a masking agent) and DHT (as a stabilising agent). The question which came for the consideration before the High Court was whether the addition of stabilizing agent, masking agent etc. amounted to manufacture within the meaning of section 2(f) of the Central Excise Act, 1944.

The High Court held that mere processing of the goods was not manufacture and to fall within the definition of manufacture a new substance should be formed. In the present case, no new substance was formed and only a diluted form of original substance was packaged under a different brand name. Alletherin in its concentrated form was an insecticide. The final product manufactured by the respondent was a diluted form of insecticide-allethrins which would only kill small insects like mosquitoes. Hence, only the potency of the insecticide was being reduced. Therefore, it could not be termed as manufacture.

2. Whether the assessee is required to pay duty on the activity of assembling and installing furniture at its customers' premises out of the components of Office Furniture System/Work Stations (OFS/WS) purchased from the supplier?

CCEx., Delhi v. Blow Plast Ltd. 2009 (236) E.L.T. 631 (Del.)

The assessee manufactured OFS/WS from the various parts of furniture purchased from the supplier (K&C). The assessee contended that they were only marketing OFS/WS and the entire system already stood duty paid at the hands of the manufacturer i.e. K&C. Thus, the question under consideration was whether assembling and installing furniture at customer's premises out of components of Office Furniture System/Work Stations (OFS/WS) purchased from the supplier (K&C) amounted to manufacture.

The Tribunal arrived at the conclusion that since K&C had cleared the complete set of elements required for the work station in a knocked down condition for the purpose of facilitating transportation, it could not be said that K&C had manufactured the parts and not the complete system.

The High Court, upholding the Tribunal's decision, held that the same product as known to the trade could not be manufactured twice over. Consequently, nothing new had come into existence so as to bring the activities of the assessee within the parameters specified in section 2(f) of the Central Excise Act, 1944. What the assessee received was complete OFS/WS and what it left on its clients' sites was also complete OFS/WS. Nothing new had come into existence. Hence, no duty was payable by the assessee.

3. Whether the assessee can be considered as manufacturer if it gets its products manufactured through its sister concern which is also situated in same premises?

Lamina International v. CCEx., Bangalore 2009 (239) E.L.T. 232 (Kar.)

M/s Lamina International (LI), engaged in export of goods, got manufactured the products from M/s. Lamina Suspension Products Limited (LSPL) on job work basis. Revenue contended that since the documents furnished by the appellant clearly showed that the goods in question were manufactured by the assessee through LSPL; appellant could not be considered as a manufacturer. In this regard, the appellant replied that both the appellant and LSPL were housed in one premise and both the units were under the control and supervision of the appellant (assessee).

The High Court noted that the assessee was apparently a creation of LSPL and both the units were one and the same i.e. they were sister concerns. Considering the word 'manufacturer' (as defined under section 2(f) of the Act) which includes any person engaged in the production or manufacture on his own account, the Court observed that the manufacturer-LSPL was manufacturing the goods on behalf of the appellant and the appellant was having a full control and supervision over the activities of LSPL.

High Court also referred to the cases of Commissioner of Sales Tax v. Sukh Deo AIR 1969 SC 499 and Modi Rubber Ltd. v. Union of India 1997 (19) RLT 479 (Del.), wherein it was held that manufacturer is a person by whom or at whose direction and control the articles or materials are made.

Considering the definition under section 2(f) and the case laws referred above, the High Court answered the question of law framed in the appeal in favour of the assessee. Hence, the appellant was held as the manufacturer of the goods.

4. Whether production of mustard oil and oil cake from mustard seeds amounts to manufacture?

Jai Bhagwan Oil and Flour Mills v. UOI 2009 (239) E.L.T. 401 (S.C.)

The Apex Court held that the true test to ascertain whether a process is a manufacturing process producing a new and distinct article is whether the article produced is regarded in the trade, by those who deal in it, as a marketable product distinct in identity from the commodity/raw material involved in the manufacture.

When mustard seeds were subjected to the process of extraction whereby mustard oil

and oil cake were produced, the process involved manufacture of mustard oil as also the manufacture of oil cake. It was certainly not a mere process of cleaning, repairing, reconditioning, recycling or assembling. Oil cake was a distinct and different entity from mustard seeds and it had a separate name, character and use different from mustard seed. Oil cake was not a waste to be thrown away, but was a valuable product with a distinct name, character, use and marketability. So, oil cake was a finished product and not a by-product and the said process amounted to manufacture.

CLASSIFICATION OF EXCISABLE GOODS

1. When entries in Harmonised System of Nomenclature (HSN) and the Excise Tariff are not aligned, can reliance be placed upon HSN for the purpose of classification of goods?

Camlin Ltd. v. CCEx., Mumbai 2008 (230) E.L.T. 193 (SC)

The Supreme Court ruled that when the entries in the Harmonised System of Nomenclature (HSN) and the Excise Tariff are not aligned, reliance cannot be placed upon HSN for the purpose of classification of goods under the said Tariff. It further added that in the instant case, the Tribunal erred in relying upon the HSN for the purpose of classification of the impugned product. The Tribunal failed to appreciate that since the entries under the HSN and the entries under the said Tariff were completely different, the Tribunal could not base its decision on the entries in the HSN.

2. Whether the rules of interpretation applicable to the cases of classification under the Excise Tariff are also applicable to interpretation of exemption notification?

CCEx., Jaipur v. Mewar Bartan Nirman Udyog 2008 (231) ELT 27 (SC)

The Apex Court clarified that it is well settled position in law that exemption notification has to be read strictly. A notification of exemption has to be interpreted in terms of its language. Where the language is plain and clear, effect must be given to it.

While interpreting the exemption notification, one cannot go by rules of interpretation applicable to cases of classification under the Excise Tariff. Tariff items in certain cases are required to be interpreted in cases of classification disputes in terms of HSN, which is the basis of the Tariff. The rules of interpretation applicable to the cases of classification under the Tariff cannot be applied to interpretation of exemption notification.

3. How to determine whether a product is covered by 'cosmetics' or 'medicaments'?

CCEx., Nagpur v. Shree Baidyanath Ayurved Bhawan Ltd. 2009 (237) E.L.T. 225 (S.C.)

The question that arose for consideration before the Apex Court was in relation to classification of "Dant Manjan Lal" (DML) manufactured by M/s. Baidyanath Ayurved Bhawan Limited. While Baidyanath contended that the product DML was a medicament

under Chapter sub-heading 3003.31 of the Central Excise Tariff Act, 1985, the stand of the Department was that the said product was a cosmetic/toiletry preparation/tooth powder classifiable under Chapter heading 33.06.

The Apex Court observed that in order to determine whether a product is covered by 'cosmetics' or 'medicaments' or in other words whether a product falls under Chapter 30 or Chapter 33, common parlance test continues to be relevant. One should resort to the popular meaning and understanding attached to such products by those using the product and not to the scientific and technical meaning of the terms and expressions used. Hence, it is important to note how the consumer looks at a product and what is his perception in respect of such product.

The Supreme Court further ruled that merely because there is some change in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same. Therefore, since there was no change in the nature, character and uses of DML, it had to be classified as a tooth powder as held earlier in case of the assessee itself in *Shree Baidyanath Ayurved Bhavan Ltd. v. Collector* 1996 (83) E.L.T. 492 (S.C.). The Apex Court clarified that although, this case related to old Tariff period i.e. prior to enactment of new Tariff Act but since the product in its composition, character and uses continued to be the same, even after insertion of new sub-heading 3301.30, change in classification was not justified as common parlance test continued to be relevant for classification.

4. Whether the carpet, in which jute is predominant by weight, but the surface is entirely of polypropylene, should be classified as jute carpet or polypropylene carpet?

CCEx., Bhubneshwar v. Champdany Industries Limited 2009 (241) E.L.T. 481 (S.C.)

The assessee was engaged in the manufacture of the carpets in which jute predominated by weight over every other single textile material. However, Revenue contended that the same should be classified as polypropylene carpet.

In this regard, the Apex Court considered the following points:-

- (i) Relying on Note 1 to Chapter 57¹, Revenue argued that the surface of the carpet being entirely of polypropylene, the same should be classified as polypropylene carpet. The Supreme Court viewed that role of Chapter Note is limited to decide whether the goods in question are "carpets and other textile floor coverings" for the purposes of Chapter 57 or not. Once the goods are carpets and falling under Chapter 57, the role of Chapter Note 1 comes to an end.

Further referring to the relevant statutory provisions laid down in Section Notes 2(A) and 14(A) of Section XI², the Apex Court held since the impugned goods admittedly fell under Chapter 57 and consisted of more than two textile materials, it had to be classified on the basis of that textile material which predominated by

weight over any other single textile material. As, in the goods in question, jute admittedly predominated by weight over each other single textile material, the said carpet could only be classified as jute carpets and nothing else. The contrary interpretation given by the Revenue was incorrect.

- (ii) Relying on the concept of essentiality test, Revenue argued that as the exposed surface of the carpet was polypropylene fiber and not jute, these goods could not be classified as jute carpets. The Court held the said argument of the Revenue to be erroneous because it was against the principle of predominance test.
- (iii) Learned counsel for the Revenue further argued that the common parlance test should be applied for classifying the carpets and the carpets, to the common man, would not appear to be jute carpet but polypropylene carpet. The Supreme Court observed that it is already established principle that while interpreting statutes like the Excise Tax Acts or Sales Tax Acts, the common parlance test can be accepted only if any term or expression is not properly defined in the Act. Therefore, going by the aforesaid principle, the Court held that common parlance test did not have any application here.
- (iv) Learned counsel for the Revenue argued that for the purpose of classification in this case, rule 3 of the 'Rules for the Interpretation of the First Schedule to the Central Excise Tariff Act, 1985' should be applied. Applying the said rule, Revenue wanted to classify the carpets under the residuary sub-heading 5702.90 of Heading 57.02 - "others". In this regard, the Apex Court observed that Revenue's stand in this case was contrary to the decision of Supreme Court in HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh (2006) 5 SCC 208, wherein it was held that rule 3(a) of the Interpretative Rules provides that if the goods are covered by a specific heading, the same cannot be classified under the residuary heading at all.

Apart from that, the Court noted that the point of rule 3, which had been argued by the learned counsel for the Revenue, was not part of its case in the show-cause notice. It is well settled that in Court, Revenue cannot argue a case not made out in its show-cause notice.

In the light of the above discussion, the Apex Court pronounced that the said carpets shall be classified as jute carpets and not as polypropylene carpet.

*Note :

1. The Note 1 to Chapter 57 of the Excise Tariff is reproduced as below:-

"For the purposes of this Chapter, the term 'carpets and other textile floor coverings' means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes article having the

characteristics of textile floor coverings but intended for use for other purposes.”

2. Section Notes 2(A) and 14(A) of Section XI of the Central Excise Tariff Act, 1985 is set out as follows:-

“2(A) Goods classifiable in Chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over any other single textile material.”

“14(A) Products of Chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under Note 2 to this section for the classification of a product of Chapters 50 to 55 or of heading 5809 consisting of the same textile materials.

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

VALUATION OF EXCISABLE GOODS

1. Students may note that the Apex Court, in case of CCEx., Pondicherry v. Acer India Ltd. 2004 (172) E.L.T. 289 (S.C.) (reported in Select Cases-2005), had held that the valuation of goods would be subject to the charging provisions contained in section 3 of the Act and also sub-section (1) of section 4. The definition of 'transaction value' must be read in the text and context of section 3. Section 4 is a machinery provision and that the said machinery provision as well as the definition of "transaction value" contained therein can not override the charging provision of section 3.

The Supreme Court, in case of CCEx., Indore v. Grasim Industries Ltd. 2009 (241) E.L.T. 321 (S.C.), has differed with its decision in case of Acer's case and held that the interpretation by the Supreme Court of sections 3 and 4 of the Central Excise Act, 1944 after the substitution of section 4, with effect from 01.07.2000, by the Finance Act, 2000 is not in conformity with the scheme of the Act prima facie, for the reasons that:-

(i) section 3 is a charging section providing for levy of excise duty on excisable goods, whereas section 4 provides for the measure for valuation of excisable goods with reference to which the charge of excise duty is to be levied,

(ii) both operate in their independent fields even though there may be a link between the two and

(iii) in the case of UOI v. Bombay Tyre International Ltd. 1983 (14) ELT 1896 (SC), the contention of the assessee that "the measure was to be found by reading section 3 with section 4, thus drawing the ingredients of section 3 into the exercise" was specifically rejected.

Besides, the Supreme Court also had reservation with the observation in Acer's case that the definition of "transaction value" must be read in the text and context of section 3 of the Act. The Court held that this would amount to diluting the width of "transaction value" as defined in the substituted provision.

1. In case of transfer of factory to another site, is the assessee entitled to transfer the CENVAT credit corresponding only to the quantum of inputs and capital goods transferred to the new site?

CCEx., Pondicherry v. CESTAT 2008 (230) ELT 209 (Mad.)

The assessee, a manufacturer of polypropylene bags and tubing, shifted its factory from one site to another. The assessee transferred the entire quantity of inputs and capital goods, available with it at the time of transfer, to the new site. On conducting physical verification, the Range Officer of the new premises reported that the capital goods, the inputs and unutilised CENVAT credit balance had been duly received and accounted for by the assessee in the respective registers of the new factory. The balance of unutilized CENVAT credit lying with the assessee exceeded the amount of CENVAT credit corresponding to the quantum of inputs and capital goods transferred to the new site. Revenue claimed that the assessee was entitled to transfer the CENVAT credit corresponding only to the quantum of inputs and capital goods transferred to the new site and not the entire balance of unutilized credit.

Madras High Court pronounced that rule 8 of the erstwhile CENVAT Credit Rules, 2002 [now rule 10 of the CENVAT Credit Rules, 2004*] does not provide that the assessee could transfer the CENVAT credit corresponding only to the quantum of inputs transferred to the new factory, but permits the assessee to transfer the entire balance of unutilised CENVAT credit along with inputs and capital goods in stock at the factory to the new site. Thus, requirement of erstwhile rule 8 of the CENVAT Credit Rules, 2002 [now rule 10 of the CENVAT Credit Rules, 2004*] had been complied with by the assessee. Hence, he could avail the entire CENVAT credit transferred by him.

Note:

- *1. Relevant portion of rule 10 of the CENVAT Credit Rules, 2004 reads as follows:-

If a manufacturer of the final products shifts his factory to another site, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilised in his accounts to such transferred factory.

Such transfer of the CENVAT credit shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or

business premises to the new site and the inputs, or capital goods, on which credit has been availed of, are duly accounted for to the satisfaction of the Deputy Commissioner/the Assistant Commissioner of Central Excise, as the case may be.

2. Supreme Court, in an appeal filed by the Department, has maintained the decision taken by the High Court in above mentioned case [Commissioner v. CESTAT 2009 (237) E.L.T. A48 (S.C.)].
2. Whether inputs can be confiscated under rule 15 of the CENVAT Credit Rules, 2004 on the ground of non-accountal of inputs in the records maintained in computer?

Green Alloys Pvt. Ltd. v. UOI 2009 (235) ELT 405 (P & H)

The High Court held that the procedure for seizure had to be reasonable and fair. There had to be some basis for continuing to detain the goods. In the instant case, it could not be held that there was a clear case for confiscation only on the ground that the seized goods had been found to be entered in the stock register, but not in the excel sheet in the computer.

There was nothing to show that in respect of such goods, there had been wrongful availment of CENVAT credit. Revenue sought to draw the presumption of wrongful availment of CENVAT credit on the ground that there was little value addition to the finished product over and above the value of the raw material. However, the High Court held it to be a debatable issue. Therefore, the Court held that there was not a strong prima facie case for confiscation of goods which would justify continued detention of goods.

3. Is Department justified in levying 10% on the sale price of the printed books in terms of rule 6(3)(b) of the CENVAT Credit Rules, 2004 even though the final product is exported?

Repro India Ltd. v. UOI 2009 (235) ELT 614 (Bom.)

The petitioner manufactured both dutiable (packaged software and stationery books) and exempted final product (printed books). The printed books were entirely exported by the petitioners. The petitioner had taken the credit on inputs used in the manufacture of dutiable as well as exempted final products by virtue of rule 6(6)(v) of the CENVAT Credit Rules, 2004. Department directed the assessee to pay the 10% of the sale price of the printed books even though they were exported. According to the Revenue, since the printed books were exempted goods/goods chargeable to nil rate of duty, they could not be allowed to be cleared by giving bond under rule 19 of the Central Excise Rules, 2002 and the petitioner has to follow the ARE-2 procedure for claiming refund of the duty on the exempted goods.

However, the High Court observed that if the exempted goods are exported outside India, the provisions of rule 6(6)(v) of the CENVAT Credit Rules, 2004 are applicable. Therefore, the bar provided under rule 6(1) and the liability created under rule 6(3)(b) are not attracted. The Department was not justified in levying 10% on the sale price of the printed books in terms of rule 6(3)(b). It was only in the event that the petitioner did not export the printed books and did not maintain the account as contemplated by rule 6(2), the petitioner would be required to pay 10% on the sale price of the printed books not so exported.

The High Court held that considering the language of rule 6(6)(v) of the said rules, the petitioner was entitled to avail CENVAT credit in respect of the inputs used in the manufacture of the final products being exported irrespective of the fact that the final product was otherwise exempt.

The Court clarified that the intent behind the Government enacting special scheme was to ensure that the duty was not levied even on inputs going into the export products. The intention was to ensure that only goods were exported and not the taxes. If the inputs of an export commodity were subject to excise duty, the Indian manufacturer would have become internationally uncompetitive. Therefore, rule 6(6) has been consciously and expressly enacted with the specific objective to ensure that duty is not levied on the inputs going to the export products.

Hence, levy of 10% on the value of the exported goods under rule 6(3)(b) on the footing that the printed books were exempt was completely incorrect.

Note:

(1) Rule 6(6)(v) of the CENVAT Credit Rules, 2004 reads as follows:-

The provisions of sub-rules (1), (2), (3) and (4) of rule 6 of the aforesaid rules shall not be applicable in case the excisable goods removed without payment of duty are cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002.

(2) Notification No. 16/2009 - CE (NT) dated 07.07.2009 has amended rule 6(3)(i) so as to prescribe that a 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%. The principle enunciated in above decision still holds good.

4. Whether CENVAT credit is admissible on plastic crates as inputs/capital goods?

Banco Products (India) Ltd. v. CCEx., Vadodara-I 2009 (235) ELT 636 (Tri-LB)

The appellant was using plastic crates as a material handling device within their factory premises. Such plastic crates were used for internal transportation of the raw material

from stores to processing machine, semi-finished goods from one machine to other machine and finished goods to their storage area. The appellant contended that the plastic crates were eligible capital goods for the purposes of CENVAT credit and alternatively as input.

The Tribunal first analyzed the definition of “accessories to the main machine” in order to decide whether plastic crates got covered in the definition of the capital goods as per rule 2(b) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(a)(A)(iii) of the CENVAT Credit Rules, 2004]. After meticulous consideration of various relevant judgments, the Tribunal observed that the only criteria for an object to be held as an accessory is that that a particular item should be capable of being used with a machine and should advance the effectiveness of working of that machine.

The plastic crates in question were used for transportation of the raw material to the processing machine and all the finished goods from the machine to storage area. If instead of using plastic crates manual transportation of the inputs or semi-finished goods had been opted for, practically, it would have hampered the continuous working of the machine on account of delays in the delivery of the raw material/semi-finished goods etc. Hence, viewed and judged in the light of the interpretation of the term “accessory” by various Courts, the Tribunal concluded that the plastic crates could be held as accessory. Hence, plastic crates would be eligible for CENVAT credit as capital goods.

While dealing with the expression “in the manufacture of the goods” in the definition of inputs under rule 2(g) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) of the CENVAT Credit Rules, 2004], the Apex Court, in the case of Collr. of C.E. v. M/s. Rajasthan State Chemical Works 1991 (55) E.L.T. 444, had observed that the said expression encompassed all processes which were directly related to the actual production. The process of handling/lifting/pumping/transfer/transportation of the raw material was also a process in relation to manufacture, if integrally connected with further operation leading to manufacture of the goods.

By applying the ratio as enacted by the Supreme Court to the issue in dispute, the Tribunal held that process started with the issuance of the inputs from the stores and their further transportation to the production platform was only a part of the process of manufacture integrally related to the final production. In absence of the delivery of the raw material to the manufacturing platform, the process could not start. Such delivery of the goods included transportation of the goods by plastic crates. Similarly, finished products were required to be stored in a bonded store room. The plastic crates were again used for such transportation. Hence, the Tribunal opined that the plastic crates would also be eligible for CENVAT credit as input.

In the light of aforesaid discussion, the large bench of the Tribunal held that CENVAT credit was admissible on the plastic crates used as material handling equipment in the factory premises as capital goods as also as input.

5. Whether Tribunal is empowered to reduce penalty imposable under rule 57-I(4) of the erstwhile Central Excise Rules, 1944 [now rule 15(2) of the CENVAT Credit Rules, 2004]?

CCus & Ex., Raigad v. Fibre Foils Ltd. 2009 (241) E.L.T. 201 (Bom.)

The Bombay High Court noted that from the plain or literal reading of the said sub-rule, it would be clear that the language used is "shall". Hence, the Court pronounced that undoubtedly, the language is mandatory and there is no discretion vested in the authorities in the matter of imposition of penalty. The penalty had to be imposed by the A.O. based on the material available and not on the defence which the assessee might have taken. Hence, the Court held that the penalty has to be equal to the amount of duty which is payable and not less than that.

6. Can the plastic dropper supplied along with pediatric drops be considered as an input used in or in relation to manufacture of final product (pediatric drops)?

CCEx., Mumbai v. Okasa Ltd. 2009 (241) E.L.T. 359 (Bom.)

The assessee were engaged in the manufacture of pharmaceutical product-pediatric drops. They contended that the plastic droppers supplied with the bottle containing drops were inputs used in or in relation to manufacture of final product namely Novamox pediatric drops. However, the Revenue argued that these droppers were separately kept in the cartons along with the sealed bottle of the pediatric drop. These droppers were neither used in the manufacture of pediatric drop nor used in relation to its manufacture.

The High Court agreed with the contention of the assessee that for purpose of dispensation or administration of the drugs in proper quantity as per the medical prescription, dropper had to be affixed on the bottle containing the drug. Further, as the droppers were necessary packaging material for marketing of the drug (as per the directions given by the Controller of Drugs for India), they would be covered by the words "packaging material". The Tribunal, while allowing the appeal in the instant case, had relied upon the decision taken in Heal Well Pharmaceutical v. Collector 1994 (72) E.L.T. 446 (Tribunal) wherein it was held that where dropper was provided in the carton along with bottle containing the drug, it amounted to manufacture and the manufacturer was entitled to credit of duty paid on such product being input of the firm product.

Considering all the facts, circumstances and the legal position, the High Court, upholding the Tribunal's decision, held that the plastic dropper packed in the pediatric drops and marketed at the factory gate should be construed to be an input used in or in relation to the manufacture of the final product.

DEMAND, ADJUDICATION AND OFFENCES

1. Whether there is any discretion under section 11AC of the Central Excise Act, 1944 to impose penalty less than the amount equal to duty evaded?

UOI v. Dharamendra Textile Processors 2008 (231) E.L.T. 3 (S.C.)

The Apex Court pronounced that under section 11AC, there is no discretion vested with the authority to impose any penalty different than the one prescribed by the said provision. The Court observed that section 11AC of the Act was introduced in Union Budget of 1996-97. In para 136 of the Union Budget, reference had been made to the said provision stating that the levy of penalty was a mandatory penalty. In the Notes on Clauses also, the similar indication had been given.

The Court noted that if the contention of learned counsel for the assessee was accepted that the use of the expression "assessee shall be liable" proved the existence of discretion, it would lead to a very absurd result. In the same provision, there was an expression used i.e. "liability to pay duty". It could by no stretch of imagination be said that the adjudicating authority had even discretion to levy duty less than what was legally and statutorily leviable.

Note - Relevant portion of section 11AC of the Central Excise Act, 1944 reads as under:

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

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

2. Whether Government dues have a priority of claim over the dues of secured creditors?

Tata Metaliks Limited v. UOI 2009 (234) E.L.T. 596 (Bom.)

The Bombay High Court has reaffirmed that Government dues do not have priority of claim over that of secured creditors. However, if the Legislature makes those dues as having priority of claims, the State dues will rank higher in priority than dues of a secured creditor.

3. Is the interest under section 11AB of the Central Excise Act, 1944 recoverable when differential duty is paid on account of price escalation?

CCEx. & C v. Chloritech Industries 2009 (235) E.L.T. 17 (Guj.)

The High Court held that interest under section 11AB of the Central Excise Act, 1944 was not recoverable when differential duty was paid on account of price variation. In the instant case, at the time of undertaking the transaction, the additional price was not fixed. Hence, the liability of buyer to pay additional amount was not known to buyer himself. The Gujarat High Court observed that mere existence of an escalation clause in contract between parties could not bring the subsequent escalation within the definition of the term “transaction value” for the purposes of levying interest.

The High Court further provided that if neither side to transaction was aware as to the amount which was to be charged and which was to be paid under the escalation clause on the date when the transaction was entered into, no liability to pay interest could arise under the provisions of section 11AB. Section 11AB of the Act itself says that interest is to be paid on the amount short paid from the first date of the month succeeding the month in which the duty ought to have been paid under the Act.

4. What are the conditions and the circumstances that would attract the imposition of penalty under section 11AC of the Central Excise Act, 1944?

UOI v. Rajasthan Spinning & Weaving Mills 2009 (238) ELT 3 (SC)

The Apex Court, overruling the decision of the Tribunal, held that mandatory penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty. In order to levy the penalty under section 11AC, conditions mentioned in the said section should exist. Supreme Court ruled that the Tribunal was not justified in striking down the levy of penalty against the assessee on the ground that the assessee had deposited the balance amount of excise duty (that was short paid at the first instance) before the show cause notice was issued. The Apex Court elaborated that the payment of the differential duty whether before/after the show cause notice is issued cannot alter the liability for penalty. The conditions for penalty to be imposed are clearly spelt out in section 11AC of the Act.

Supreme Court clarified that both section 11AC as well as proviso to sub-section (1) of section 11A use the same expressions : “....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...”. Hence, it drew the inference that the penalty provision of section 11AC would come into play only if the notice under section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under section 11A(2), there is a legally tenable finding to that effect.

5. Whether the payment of differential duty by the assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices is liable to interest under section 11AB and penalty thereof?

CCE v. SKF India Ltd. 2009 (239) E.L.T. 385 (S.C.)

The respondent-assessee, manufacturing ball-bearings and textile machine parts, paid the differential duty to the Department as the prices of the said goods were revised with retrospective effect. The Revenue took the view that the assessee was liable to pay interest on differential duty under section 11AB of the Central Excise Act and penalty thereof. The assessee replied that there was no question of charging interest and penalty as the payment of differential duty was made by it at the time of issuing supplementary invoices to the customers.

The Tribunal held that no interest was chargeable where there was no time-gap between the payment of the differential duty and issuance of supplementary invoices to the customers on the basis of upward revision of prices in respect of the goods sold earlier.

The Apex Court noted that section 11A relating to recovery of duties can be divided in two parts:-

- (i) Where the non-payment or short payment etc. of duty is not intentional and for a reason other than deceit; the default is due to oversight or some mistake. Such cases are dealt with under sub-section (2B) of section 11A. It provides that the assessee in default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty and inform the Central Excise Officer in writing about the payment made by him. In that event, he would not be given the demand notice. However, from the combined reading of explanation 2 to section 11A(2B) and section 11AB, it can be concluded that the person who has paid the duty under sub-section (2B) of section 11A, shall, in addition to the duty, be liable to pay interest. No penalty is attracted.
- (ii) Where the non-payment or short payment etc. of duty is intentional, deliberate and/or by deceitful means; “by reason of fraud, collusion or any wilful

mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty". Such cases are dealt with under sub-section (1A) of section 11A. Both interest and penalty are attracted.

The Apex Court, overruling the Tribunal's decision, held that the payment of differential duty by the assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of sub-section (2B) of section 11A of the Act. Consequently, no penalty would be leviable on the assessee.

1. Discuss the interpretation of phrase “a mistake apparent from record”.

Asst Commr, IT, Rajkot v. Saurashtra Kutch Stock Exchange Ltd. 2008 (230) ELT 385 (SC)

Supreme Court, while interpreting the phrase “any mistake apparent from record” under section 254(2) of the Income Tax Act, 1961, stated that a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error apparent on the face of the record means an error which strikes on mere looking and does not need long drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness.

The Apex Court further clarified that an error cannot be said to be apparent on the face of the record if one has to travel beyond the records to see whether the judgment is correct or not. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

The Court held that the error should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record.

Note - The interpretation of phrase “mistake apparent from record” enunciated in above mentioned case may be applied to section 35C(2) of the Central Excise Act, 1944 and section 129B(2) of the Customs Act, 1962- sections corresponding to section 254(2) of the Income Tax Act, 1961.

2. Can there be a difference in the Final Order issued by Tribunal and the Handwritten Order in Order Sheet?

Dinkar Khindria v. UOI 2008 (231) ELT 47 (Del.)

The High Court held that a difference in the Final Order issued by the Tribunal and the Handwritten Order in Order Sheet i.e. a change of order by Members of the Tribunal

amounts to tampering with the judicial records. Once an order is passed and it is signed by the members, the same cannot be altered unless law provides for a review of the same and that too only after hearing the parties. The Tribunal should ensure that such unsavory incidents should not occur in the course of their conduct of judicial proceedings.

3. Whether the appeal filed by Commissioner himself and not by subordinate officer based on authorization under the erstwhile section 35B, is maintainable?

Commr. Of C.Ex. & Cus. v. Shree Ganesh Dyeing & Ptng. Works 2008 (232) ELT 775 (Guj.)

In the instant case, the assessee raised objection as to maintainability of the appeal on the ground that the appeal had been filed by Commissioner himself, instead of by the Central Excise Officer authorised by the Commissioner as required by the erstwhile section 35B(2) of the Central Excise Act, 1944.

The Court, while analyzing section 35B(2), held that section 35B(2) of the Act is made up of two parts or two stages:-

First stage is formation of an opinion by Commissioner that the order made by the appellate authority is not legal or proper.

Second stage is filing of an appeal against order of appellate authority by directing any Central Excise Officer authorised by the Commissioner in this behalf to file an appeal on behalf of the Commissioner.

Accordingly, the Commissioner is vested with a discretion, in the first instance to form an opinion as to whether appellate order is legal or proper and then exercise the discretion to decide whether an appeal should be preferred or not, having come to the conclusion that the order is not proper or legal.

The High Court further clarified that when a person is statutorily entitled to delegate powers to another person to file an appeal on behalf of the first named person, it goes without saying that the power which can be delegated is the power which the first named person would be entitled to exercise. Hence, until and unless the Commissioner himself is entitled to file an appeal, there is no question of the Commissioner authorising another officer to file appeal on his behalf. The language of the latter part of sub-section (2) of section 35B of the Act itself makes this more than abundantly clear when the provision uses the phrase 'to appeal on his behalf'.

Note - Section 35B(2) was amended vide the Finance Act, 2005 to provide that instead of Commissioner of Central Excise, a Committee of Commissioners of Central Excise shall review the orders of Commissioner of Central Excise (Appeals) and direct any Central Excise Officer authorized by him to appeal on its behalf to the Appellate

Tribunal. However, the principle enunciated in this judgment will hold good in respect of amended section 35B(2) as well.

4. Can the judgments of the courts be construed as statutes?

CCEx., Bangalore v. Srikumar Agencies 2008 (232) ELT 577 (SC)

The Apex Court held that judgments of Courts are not to be construed as statutes. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

5. Whether non-filing of appeal for some assessment years is a bar in filing appeal for other assessment years?

CIT v. J. K. Charitable Trust 2008 (232) ELT 769 (SC)

The Supreme Court pronounced that there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions may be taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of the decision is revenue neutral, there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure.

In the case of C.K. Gangadharan's v. CIT 2008 (228) ELT 497 (SC), it was held that merely because in some cases revenue has not preferred an appeal, that does not operate as a bar for the Revenue to prefer an appeal in another case where there is just cause for doing so, or it is in public interest to do so, or for a pronouncement by the higher court when divergent views are expressed by the different High Courts. The Court further provided that if the assessee takes the stand that the Revenue acted mala fide in not preferring appeal in one case and filing the appeal in other case, it has to establish mala fides.

However, in the given case, the Apex Court noted that it was accepted by the learned counsel for the appellant (Revenue) that the fact situation in all the assessment years was same. Under the circumstances, the Court concluded that since the fact situation had not changed, Revenue could not prefer an appeal and thus, the court dismissed the appeal filed by the Department.

6. Can a writ petition be filed against the order of waiver of pre-deposit (under first proviso to section 35F of the Central Excise Act, 1944) or refusal thereof?

Cisco Systems India Pvt. Limited v. UOI 2009 (234) E.L.T. 618 (Del.)

The High Court held that power to waive pre-deposit to avoid hardship to party against whom demand is raised is discretionary. As long as discretion is not exercised in an arbitrary and unusual fashion, a writ court would not interfere with order of waiver of pre-deposit or refusal thereof. Mere fact that issues that arise for consideration of appellate authority were arguable is not in itself sufficient for a complete waiver of pre-deposit.

Writ court would be slow in interfering with discretionary order, especially so where appellant has not pleaded any financial hardship as such before appellate authority. The Delhi High Court ruled that recovery of taxes cannot be stayed under Article 226 of the Constitution except under exceptional circumstances.

Note : First proviso to section 35F of the Central Excise Act, 1944 reads as follows:-

Where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded/penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

7. Whether the Department is not required to state any reason while filing an application for condonation of delay in filing the appeal to CESTAT?

CCEx., Chennai v. CEGAT 2009 (236) E.L.T. 21 (Mad.)

The Department filed the appeal to the Tribunal 100 days after the expiry of the period prescribed for filing an appeal. However, the delay had not been supported by sufficient reasons.

Learned counsel for the petitioner submitted that in the case of the Department, the Court had always been lenient in condoning the delay. So, there could not be any exception to the procedure followed by this Court as well as the Supreme Court in respect of the fiscal matters.

The High Court observed that the power to condone the delay in filing the appeal had been vested with the Tribunal only on being satisfied with the reasonable cause shown for the delay. Since the Department had not substantiated any reason for causing the delay, it could not expect the Tribunal to condone the delay in a routine manner. Even before the High Court the petitioner had not stated the reason. If minimum pain or effort had been taken by the authorities, some reason would have been stated for the delay. However, in the absence of any sufficient cause, the Tribunal could not by itself invent reason and grant the relief as sought for by the petitioner.

REMISSION OF DUTY AND DESTRUCTION OF GOODS

1. Can goods lost by 'theft' or 'dacoity' be considered to be "goods lost or destroyed by natural causes or by unavoidable accident" under rule 49 of the erstwhile Central Excise Rules, 1944 (now rule 21 of the Central Excise Rules, 2002)?

Gupta Metal Sheets v. CCE 2008 (232) ELT 796 (Tri. - LB)

The Large Bench of the Tribunal ruled that as per rule 49 of the erstwhile Central Excise Rules, 1944 (now rule 21 of the Central Excise Rules, 2002); loss must be attributable to any natural cause or unavoidable accident. It clarified that the term 'loss' cannot be understood in the limited sense of 'loss to the manufacturer', but it has to be understood as being unavailable for consumption in the market. However, in case of theft or dacoity, the goods are not 'lost' or 'destroyed'; they rather enter the market for consumption, although illegally, after being removed from the approved premises or the place of storage.

'Natural cause' refers to some natural phenomenon i.e. vagary of nature or some act of nature like fire, flood or a similar natural calamity. The act of forcibly removing the goods by any means - non-violent or violent - amounting to theft or dacoity under the Indian Penal Code cannot be said to be a natural cause.

Considering the definitions of 'theft' and 'robbery' in the Indian Penal Code, the Tribunal inferred that 'theft' or 'dacoity' involves forcible removal of goods by non-violent or violent means, as the case may be, and this cannot be said to be a natural cause. The Tribunal opined that theft and dacoity are committed by a design and they cannot be said to be accident by any logic. By taking due care and caution, they can be avoided and, therefore, it cannot be said that theft or dacoity is 'unavoidable accident'.

In view of the above, the Tribunal held that 'theft' or 'dacoity' cannot be called unavoidable accident within the meaning of the rule 49 of the erstwhile Central Excise Rules, 1944 (now rule 21 of the Central Excise Rules, 2002) and the goods lost in theft or dacoity would not be eligible for remission. The issue was thus answered in the negative i.e. in favour of the Revenue and against the assessee.

Note : Rule 21 of the Central Excise Rules, 2002 containing the provisions regarding the remission of duty reads as follows:-

Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing.

2. Is remission of duty possible in case of loss occurring due to de-bagging, shifting of concentrates, seepage of rain water, storage and loading on trucks, accounting method adopted?

UOI v. Hindustan Zinc Limited 2009 (233) E.L.T. 61 (Raj.)

The assessee was engaged in the manufacture of lead and zinc concentrates. At the time of carrying out the physical stock taking, some difference was found between the physically verified stock and the stock as per the books. According to the assessee, this difference was due to de-bagging, shifting of concentrates, seepage of rain water, storage and loading on trucks, accounting method adopted. The assessee applied for the remission of the duty under rule 21 of the Central Excise Rules, 2002. Revenue contended that the shortage could have been avoided or minimized by the assessee, as these were neither due to natural causes, nor due to unavoidable accident. Thus, the prayer for remission was declined.

The Rajasthan High Court held that the expressions “natural causes” and “unavoidable accident” were required to be given, reasonable and liberal meaning, lest the provisions of rule 21, so far as they relate to admissibility of remission, on these two grounds, would be rendered altogether ineffective. The Court noted that if the contention of Revenue was accepted, no loss or destruction would fall in either of these clauses because in either case, grounds may be projected, on the anvil of requirement of appropriate storage, or safety measures, and so on and so forth. Even in cases of “unavoidable accident”, it could always be contended that the accident could have been avoided by taking recourse of one or more measures. Thus, a bit liberal rather more practical approach was required to be taken in the matter.

The aspect of satisfaction under rule 21 was essentially a subjective satisfaction of authority concerned and in the instant case; the Tribunal independently recorded its satisfaction about the loss, or destruction having been sustained by the assessee under the circumstances as covered by rule 21. Therefore, merely on the basis of method of accounting of physical stock, the remission of duty could not be denied.

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

1. Whether circulars can be given primacy over the decisions of the Court?

CCEx., Bolpur v. Ratan Melting and Wire Industries 2008 (231) ELT 22 (SC)

The assessee's contention was that once a circular had been issued, it was binding on the Revenue authorities and even if it ran counter to the decision of this Court, the Revenue authorities could not say that they were not bound by it. The circulars issued by the Board were not binding on the assessee but were binding on Revenue authorities. It had been submitted by the assessee that once the Board issued a circular, the Revenue authorities could not take advantage of a decision of the Supreme Court. The consequences of issuing a circular were that the authorities could not act contrary to the circular. Once the circular was brought to the notice of the Court, the challenge by the Revenue should be turned out and the Revenue could not lodge an appeal taking the ground which was contrary to the circular.

Revenue pleaded that the law declared by this Court was supreme law of the land under Article 141 of the Constitution of India. Supreme Court observed that in *Kalyani Packaging Industry v. Union of India* and Anr. 2004 (6) SCC 719, it was noted that law laid down by this Court was the law of the land. The law so laid down was binding on all courts/tribunals and bodies. It was clear that circulars of the Board could not prevail over the law laid down by this Court.

Supreme Court decided that circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

1. Can a writ petition be invoked against advance rulings?

UAE Exchange Centre Ltd. v. UOI 2009 (236) E.L.T. 223 (Del.)

The Delhi High Court held that the ruling by Advance Rulings Authority is binding on the applicant, the transaction on which ruling is sought and the Departmental officers concerned. It does not exclude the jurisdiction of the Courts either expressly or by implication. There is no provision which gives finality to the decision of the Authority. The Court viewed that the Courts would have jurisdiction to entertain actions under Article 226 of the Constitution (writ petition) impugning the ruling given by the Authority i.e. writ jurisdiction is invocable against advance rulings.

1. Is Settlement Commission entitled to reject the 'rectification of mistake' application, filed on the basis of a Supreme Court judgment, holding the issue debatable?

CIT v. Settlement Commission 2009 (234) E.L.T. 584 (Ker.)

The Kerala High Court held that when an application for rectification is filed before Settlement Commission, within the permitted time limit, based on a subsequent decision of the Apex Court, directly on the point, normally, it has to be entertained. However, in this case, the Settlement Commission had rejected the application on the ground that the issue raised was a debatable issue.

The Court observed that when there is a decision of the Apex Court on a particular issue, no inferior court or Tribunal can say that the issue is a debatable issue for the reason that a bench of two judges of the Apex Court has doubted the correctness of the decision of the Constitution Bench. The inferior courts and Tribunals are bound to follow the decision of the Constitution Bench. So, the rejection of application was unjustified.

2. In a case where the Settlement Commission has sent the case back to the adjudicating authority under section 32L(1), can the order of adjudication passed by the Settlement Commission be considered to be final ?

Vishwa Traders Pvt. Ltd. v. UOI 2009 (241) E.L.T. 164 (Guj.)

The appellant filed an application with the Settlement Commission under section 32E of the Central Excise Act, 1944. However, as the applicant was not willing to accept the duty liability settled by the Commission, it sent the case back to the adjudicating authority in terms of section 32L(1) of the Act. It directed the adjudicating officer to dispose the case in accordance with the provisions of the Act as if no application had been made to Settlement Commission.

When case came up before Revenue for adjudication, it decided that since as per section 32M, any order made by the Settlement Commission was conclusive; the figure of duty liability fixed by the Settlement Commission had attained finality. Hence, the petitioner was required to make payment of the said amount along with penalty and interest.

The High Court held that under section 32L(1), once the Settlement Commission forms

an opinion that any person who made an application for settlement under section 32E of the Act has not cooperated in the proceedings before the Commission, the Settlement Commission may send the case back to the adjudicating authority to dispose of the case in accordance with provisions of the Act, as if, no application under section 32E had been made. If there is no application before Settlement Commission, there can be no question of any final order of adjudication. Consequently, the order passed by the Settlement Commission under section 32L(1) cannot be considered to be the final order of adjudication.

The High Court, while interpreting section 32L(3), held that for working out the time limit prescribed under section 11A for recovery of duties, the period commencing from the date of application to the Settlement Commission to the date of receipt of the order under section 32L by the adjudicating authority, shall be excluded. Therefore, the balance period available from the date of making of application before Settlement Commission shall be available to the adjudicating authority for making an order assessing duty liability of an assessee.

Hence, the High Court pronounced that Revenue shall continue the adjudication proceedings from the stage at which the proceedings before Settlement Commission commenced.

CLASSIFICATION OF GOODS

1. Where the importer clears the imported goods on the basis of classification which was upheld by Commissioner of Customs (A), is the seizure of such goods and collecting any amount in excess of what is assessed by the custom authorities justified?

Vodafone Essar South Ltd. v. UOI 2009 (237) E.L.T. 35 (Bom.)

The Commissioner of Customs (Appeals) in petitioner's own case, on 25-3-2008, had held that Optic Fibre Cables (OFC) imported by petitioners were classifiable under Heading 85.44 of the Central Excise Tariff, 1985. The Revenue filed an appeal before CESTAT against the said order claiming the classification of the goods under Heading 90.01. However, on 18-12-2008, the customs authorities (DRI officers) threatened the petitioner to arrest the directors of the petitioner-company and other staff unless differential duty between Headings 85.44 and 90.01 was paid.

The Bombay High Court held that the action of the Director of Revenue Intelligence (D.R.I. officers) in the Customs Department in seizing the goods and collecting money from the petitioners was wholly unjustified and uncalled for, because of following five reasons:-

- (i) When the Commissioner of Customs (Appeals) in petitioner's own case on 25-3-2008 had held that OFC imported by petitioners were classifiable under Heading 85.44 of the Central Excise Tariff, the petitioners were not wrong in classifying the goods imported after 25-3-2008 under Heading 85.44 *ibid*.
- (ii) Decision of Commissioner (Appeals) was neither stayed by CESTAT nor by any other competent authority. Hence, mere fact that appeal filed by Revenue against the decision of Commissioner (Appeals) was pending could not be a ground to hold the petitioner guilty of misclassification of goods.
- (iii) D.R.I. officers were bound by the decision given by Commissioner of Customs (Appeals).
- (iv) The Bills of Entry filed by the petitioners by classifying the goods under Heading 85.44 had been assessed under Heading 85.44 and the goods had been cleared only on payment of duty as assessed. Therefore, till the assessment was set aside, the customs authorities could not have seized the goods assessed and cleared under Heading 85.44, on the ground that the goods were liable to be assessed under Heading 90.01.
- (v) In the absence of any reassessment order passed determining the duty liability, there would be no question of recovering differential duty.

IMPORTATION, EXPORTATION, AND TRANSPORTATION OF GOODS

1. Is the Port Trust liable to pay duty on goods pilfered while in their possession?

Board of Trustees of the Port of Bombay v. UOI 2009 (241) E.L.T. 513 (Bom.)

In the instant case, goods were pilfered before clearance while in possession of the Port Trust as custodian. The Department raised the demand of custom duty on the Port Trust because goods were pilfered whilst in their custody.

The High Court viewed that considering the language of section 45(3) of the Customs Act, the liability to pay duty is of the person, in whose custody the goods remain, as an approved person under section 45 of the Customs Act. Considering that the possession of the goods by the Port Trust is by virtue of powers conferred on the Port Trust under the Port Trust Act, the Court found it impossible to hold that the Port Trust is an approved person or can be notified as an approved person. It implies that section 45(3) of the Customs Act refers to the persons who have approved warehouses in terms of sections 9 and 10 of the Customs Act.

The High Court further opined that under section 45 of the Customs Act, the person referred to in sub-section (1) thereof can only be the person approved by the Commissioner of Customs. It excludes a body of persons, who by virtue of a law for the time being in force, is entrusted with the custody of goods by incorporation of law under another enactment, (for example, the Port Trust Act in the given case).

The Court interpreted that the intention of the law might have been to check the pilferage taken place from a private warehouse or a customs warehouse run by a private party. The negligence on such private parties should not cause loss to the exchequer.

Thus, the Court held that under section 45(1) of the Customs Act, the recovery of duty in respect of pilfered goods could only from the approved person and the Port Trust is not liable to pay duty on goods pilfered while in their possession.

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

1. In case the Department fails to provide some contemporaneous evidence that the price declared in the invoice is not the correct price, how would the transaction value be determined? Would the goods be liable to confiscation in such a case?

Commissioner of Customs, Mumbai v. Mahalaxmi Gems 2008 (231) ELT 198 (SC)

The assessee imported three lots of rough diamonds supplied at different CIF prices per carat in the same shipment. Department opined that the goods were over-invoiced. As per the Appraisers' Valuation report as well as the Trade Panel report submitted through the Gems and Jewellery Export Promotion Council, the ascertained fair value of the goods was found to be lower than the invoiced value. Therefore, the Department proposed the confiscation of goods under section 111(m) of the Customs Act, 1962.

The assessee while explaining the reason for the same stated that the shipper had before hand informed that if after assortment, the assessee did not find the value of the goods to be satisfactory, it should reship the goods back.

The Tribunal held that the value of the goods that was declared was the transaction value. The genuineness of the invoice that the assessee produced has not been questioned. It has not been alleged that it was fabricated or fake or that any relationship existed between the importer and the exporter. It was also held that there was no contemporaneous evidence to prove that the goods imported were over invoiced.

Thus, Supreme Court, upholding the Tribunal's view, pronounced that the transaction value had to be accepted until and unless it was shown by some contemporaneous evidence that the price declared in the invoice was not the correct price. Hence, there was no over invoicing by the importer of the goods.

2. Whether the action of the custom authorities in selling the confiscated goods during the period of pendency of appeal is justified?

Shabir Ahmed Abdul Rehman v. UOI 2009 (235) ELT 402 (Bom.)

Revenue confiscated the gold carried by the petitioner from Muscat. The petitioner informed the custom authorities that he was filing an appeal against the order of confiscation. Revenue informed the petitioner that the confiscated goods had been handed over to the warehouse of the Custom House for disposal and consequently, auctioned the confiscated goods.

The High Court held that handing over the confiscated gold immediately after serving the order of confiscation itself was improper. In any event, after receiving letter from the petitioner, the custom authorities ought to have stopped the auction sale of the confiscated gold. The action of the custom authorities in selling the gold during the pendency of the appeal was not justified.

3. Can Custom Authorities take the petitioner into custody for custodial interrogation?

Arun Kumar Gupta v. DRI, Delhi 2009 (235) E.L.T. 457 (Del.)

The High Court held that there was no question of any custodial interrogation since in case of detention; the petitioner had to be sent to judicial remand. The Custom Authorities unlike the police authorities could not take the petitioner into custody for custodial interrogation.

4. Can a burden be cast on assessee to prove that the import is permissible even if imported goods are neither prohibited goods nor restricted goods?

Commissioner of Customs v. Filco Trade Centre (P) Ltd. 2009 (239) E.L.T. 19 (Guj.)

On a search conducted in the premises of the assessee, different varieties of ball bearings of foreign make were recovered. As per Revenue, the said goods were not imported under valid import documents. Hence, it seized the goods. Thereafter, confiscation of seized goods was ordered under section 111(d) of the Customs Act, 1962, redemption fine was fixed and penalties were levied.

The High Court observed that undoubtedly, goods, import of which is prohibited, either by the provisions of the Act or any other law in force, can be confiscated and consequential actions initiated under the provisions of the Act. However, in the present case, as noted by the Tribunal, there was no restriction on the goods in question and hence, it could not be stated that respondent assessee had committed any act of illegal import of prohibited goods.

Resultantly, the Court ruled that a negative burden could not be cast on respondent-assessee that although ball bearings were neither prohibited goods nor restricted goods, the respondent-assessee should show that import was permissible.

5. Is an exporter, who has been held guilty of exporting 'prohibited goods', entitled to an option to pay fine in lieu of confiscation under section 125?

CCus. (Preventive), West Bengal v. India Sales International 2009 (241) E.L.T. 182 (Cal.)

Learned Counsel for Revenue submitted that the Tribunal was not justified in granting an exporter, who had been held guilty of exporting 'prohibited goods', an option to pay fine in lieu of confiscation under section 125 of the Customs Act. He argued that word

which had been used by the legislators under section 125 as 'prohibited' had to be read as 'prohibited absolutely'.

The High Court opined that the Court cannot insert any word in the statute since it is within the domain of legislators. However, the Court has power to interpret the same without inserting anything. Whatever the legislators think fit and proper, can be legislated.

The High Court rejected the Revenue's contention that word 'prohibited' as used by legislators under section 125 of the Customs Act, 1962 could be read as 'prohibited absolutely'. It held that the Court cannot insert the word which has not been used in section 125 by legislators. Further, the option given under section 125 in respect of the prohibited goods and the right given to the authorities for redemption of the confiscated goods in question cannot be taken away by the Court by inserting a particular word therein.

Hence, the Court viewed that the Tribunal had the right to pass an order by giving an option to pay fine in lieu of confiscation of goods.

MISCELLANEOUS PROVISIONS

1. Can the Court grant anticipatory bail for an arrest under section 104 of the Customs Act, 1962?

Union of India v. Padam Narain Aggarwal 2008 (231) ELT 397 (SC)

The respondent - Padam Narain Aggarwal filed an anticipatory bail in the sessions court which dismissed it, but he later moved to the High Court which granted him anticipatory bail with a direction to the authorities that he should not be arrested without giving a ten days' prior notice to him. Revenue contended that the order passed by the High Court was illegal and erroneous.

Supreme Court observed that power to arrest a person by a Custom Officer under section 104 of the Customs Act, 1962 is statutory in character and cannot be interfered with. Supreme Court further noted that the law, on one hand, allows a Custom Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. 'Blanket' order of bail may amount to an invitation to commit an offence or a passport to carry on criminal activities.

Supreme Court pronounced that on the facts and in the circumstances of the present case, above directions could not be said to be legal or in consonance with law. Firstly, the order passed by the High Court was a blanket one and granted protection to respondents in respect of any non-bailable offence. Secondly, it illegally obstructed, interfered and curtailed the authority of Custom Officers from exercising statutory power of arresting a person said to have committed a non-bailable offence by imposing a condition of giving ten days prior notice, a condition not warranted by law. Hence, the order granting the anticipatory bail to the accused was set aside.

Note – Section 104 of the Customs Act, 1962 reads as under:-

If an officer of Customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest [Sub-section 1]

Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a magistrate [Sub-section 2].

Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898) [Sub-section 3].

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable [Sub-section 4].

PRELIMINARY LEGAL PROVISIONS

1. In case of service provided in relation to “commercial or industrial construction service”, whether the value of materials supplied free of cost by service recipient shall be included in the value of taxable service, while exemption under Notification No. 1/2006-S.T. is being availed?

Era Infra Engineering Ltd. v. UOI 2008 (11) S.T.R. 3 (Del.)

The petitioner entered into a construction contract with NTPC. The petitioner contended that materials that were supplied free of cost by NTPC to him for the purposes of completing the contract could not be included in the “gross amount charged”. Therefore, it could not be included in the value of taxable service.

The High Court held that prima facie it appears that any material that is supplied free of charge by NTPC or by any other party in respect of a contract of service cannot be included in the gross amount charged. It further referred to a decision of Madras High Court in M/s. Larsen and Toubro Ltd. v. Union of India 2007 (7) STR 123 wherein the High Court had come to the view that value of goods supplied and provided free by the client of an assessee cannot be included for the purposes of calculating the value of taxable service.

In view of the above discussion, the High Court opined that for the purposes of determining the value of taxable service, the value of materials supplied free of cost by NTPC shall not be included and to this extent the Explanation* to Serial No. 7 in the Notification No. 1/2006 dated 01.03.2006 will not be applied to the detriment of the petitioner.

Note: Notification No. 1/2006 ST dated 01.03.2006 provides that in case of commercial or industrial construction services [taxable under section 65(105)(zzq) of the Finance Act, 1994], service tax shall be levied only on 33% of the gross charges. This exemption shall not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure. Further, this exemption shall also not apply in such cases where:

- (i) the CENVAT credit of duty paid on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or

- (ii) the service provider has availed the benefit under the Notification No. 12/2003-S.T., dated 20.06.2003.

*Explanation - The “gross amount charged” shall include the value of goods and materials supplied or provided or used for providing the said taxable service by the service provider.

GAMUT AND COVERAGE OF TAXABLE SERVICES

1. Whether petitioner, engaged in construction of premises/flats for sale to prospective buyers, is liable to get registered under the category “commercial or industrial construction service”/“construction of complex service”?

Magus Constructions Private Limited v. UOI 2008 (11) S.T.R. 225 (Gau.)

The petitioner-company entered into agreements and constructed flats for the purpose of sale to those with whom such agreements are entered into. The High Court observed that petitioner-company was not shown to have undertaken any construction work for and on behalf of proposed customer/allottees and the title in the flat/apartments so constructed, passed to the customer only on execution of sale deeds and registration thereof. Until the time the sale deed was executed, the title and interest, including the ownership and possession in the construction, remained with the petitioner-company. The construction activities, which the petitioners had been undertaking, were in respect of the petitioners' own work and it was only the completed construction work, which was sold by the petitioner-company to the buyers, who might have made agreements for sale before the construction had actually started or during the progress of the construction activity or at the end or completion of the construction activity. Any advance, made by a prospective buyer, or deposit received by the petitioner-company, was against consideration of sale of the flat/building to such prospective buyer and not for the purpose of obtaining “service” from the petitioner-company. From the condition so incorporated in the relevant agreement for sale, it could not be inferred that the petitioner-company was making construction for and on behalf of the probable allottees or purchasers.

The High Court further clarified that the burden of registration and payment of “service tax” is on the person, who provides “taxable service” to any person. The Court drew the attention to Circular No. 332/35/2006-TRU, dated 1-8-2006 [now CBEC Circular No. 96/7/2007-S.T. dated 23-8-2007] which clarifies that if no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise.

In the light of above discussion, it was held that the activities of the petitioner-company did not fall within the purview of “taxable service” so as to attract levy of “service tax”. Hence, the petitioner was not liable to get registered under the service tax.

2. Whether foreign architect firms, not registered under section 23 of the Architects Act, 1972, are taxable under the category “architect’s services”?

Unitech Limited v. Commissioner of Service Tax, Delhi 2008 (12) S.T.R. 752 (Tri. - Del.)

The Tribunal while analyzing the definition of ‘architect’ under section 65(6) held that there are two parts of the definition of architect.

First part covers any person whose name is entered in the register of architects maintained under section 23 of the Architects Act, 1972.

Second part i.e. the inclusive part, covers any commercial concern engaged in any manner, whether directly or indirectly in rendering the service in the field of architecture.

The Tribunal noted that while there is a requirement of registration in the register of architects maintained under section 23 of the Architects Act, 1972 for individual persons covered by the first part of the definition, there is no such registration requirement for the second part of the definition, which covers the commercial concern engaged in any manner, whether directly or indirectly in rendering the services in the field of architecture. Hence, it held that the foreign architect firms in question were commercial concern engaged in rendering services in the field of architecture and therefore they were covered by the second part of the definition of architect. Consequently, such firms were covered by the definition of “architect”, the service provided by them to the appellants was a taxable service under section 65(105)(p) of the Finance Act, 1994 as amended.

Note : The appellant challenged the order of the Tribunal before the Delhi High Court, wherein the High Court, in case of Unitech Limited v. Commissioner of Service Tax, Delhi 2009 (15) S.T.R. 385, held that appellant was not liable to pay service tax prior to 18.04.2006. However, the High Court did not go into the issue as to whether foreign architect firms are covered under service tax. Therefore, the principle enunciated in above mentioned judgment that the foreign firms are taxable under the category “architect’s services” still holds good.

3. Whether the service tax is leviable on hire purchase finance?

CCEx. v. Bajaj Auto Finance Ltd. 2008 (10) S.T.R. 433 (S.C.)

The Apex Court, affirming the decision of the Tribunal, held that service tax is not leviable on hire purchase finance agreement. The Tribunal, in the light of the Apex Court’s decision in Sundaram Finance Ltd. v. State of Kerala & another (1966) 17 STC 489, had accepted the contention of appellant that there is a fundamental difference between a hire purchase agreement and hire purchase finance agreement. In the case of the hire purchase agreement, the title to the goods remains with the hire purchase

company which bails the goods to the hirer in return for periodical payments and the title to the goods is transferred to the customer/hirer only if he exercises the option to purchase the same on full payment to the hire purchase company. While in the case of the hire purchase finance agreement, the title to the goods vests in the purchaser right from the beginning and the hire purchase finance company that has only a right to seize the goods for non-payment of the loan, is not the owner of the goods.

4. Can the assessee holding the Stevedoring license issued by the port, be made liable to pay service tax under the category “port service”?

CCEx., Mangalore v. Konkan Marine Agencies 2009 (13) S.T.R. 7 (Kar.)

The question raised before the High Court for consideration was whether the services rendered by assessee could be classified under the category “port service” or “cargo handling service”. The assessee contended that it should be entitled to the refund of the service tax paid under the category “port service” because it had only handled export cargo and handling of export cargo had been exempted from the payment of service tax under the category of “cargo handling service” and that they had erroneously paid service tax on such export cargo handled by it. However, the Revenue contended that the assessee had been rendering the services exclusively within the port premises and the services rendered by the assessee were rightly classifiable under the category of “port service” and there was no exemption of payment of service tax under the said category in respect of export cargo.

After a bare reading of the definition of the “cargo handling service” under section 65(23) of the Finance Act, 1994 as amended, High Court elucidated that it was amply clear that handling of export cargo shall not attract service tax at all¹. Therefore, the service tax could not have been levied on the assessee who was handling loading of cargo meant for the export purpose. Further, the High Court rejected the Revenue’s contention that since the Port has issued a Stevedoring license in favour of the assessee, he would be the person authorized² within the definition of “port service” under section 65(82) of the Finance Act, 1994. The High Court held that undisputedly, assessee was engaged in the business of cargo handling, especially for loading of cargo for export and the definition of “cargo handling service” under section 65(23) clearly puts a bar with regard to the imposition of tax meant for export which also includes handling of the export cargo. Hence, assessee was not liable to pay service tax.

Notes :

1. Section 65(23) of the Finance Act, 1994, inter alia, provides that “cargo handling service” does not include, handling of export cargo or passenger baggage or mere transportation of goods.

2. Section 65(82) of the Finance Act, 1994 provides that “port service” means any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods.
5. Whether the chit fund activity falls within the expression “cash management” under “banking and other financial services”?

A.P. Federation OF Chit Funds v. UOI 2009 (13) S.T.R. 350 (A.P.)

The petitioner was doing the business of chit funds. The petitioner questioned the correctness of C.B.E. & C. Master Circular No. 96/7/2007-S.T., dated 23-8-2007. Considering the definition of “chit fund” and Supreme Court decision in case of M/s. Shriram Chits & Investment (P) Ltd. v. Union of India - AIR 1993 SC 2063, the High Court held that in the absence of a specific statutory definition of ‘cash management’ or even ‘asset management’, the question of its wider interpretation either by seeking to include or exclude any other transactions or business is not permissible. Therefore, it is amply clear that in the absence of any such inclusive definition available in the statute, it cannot be said that the petitioners would fall within the mischief of banking and other financial services. The entire action of the respondents of levying the service tax for the first time by way of a circular is merely an executive fiat, which is not permissible under the law. In the light of the foregoing reasons, High Court set aside the impugned C.B.E. & C. Master Circular No. 96/7/2007-S.T., dated 23-8-2007. As a result, the High Court held that the chit fund activity did not fall within the expression “cash management” under “banking and other financial services”.

*Note : Section 65(12), inter alia, provided that banking and other financial services means asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management. However, Finance Act, 2007 omitted the expression “but does not include cash management” thereby bringing the cash management within the service tax net. Hence, in the above mentioned case, the Revenue contended that chit transaction and business of the petitioners falls within the mischief of ‘cash management’, hence it attracted levy of service tax. Further, it called upon the petitioners to pay the service tax on the basis of C.B.E. & C. Master Circular No. 96/7/2007-S.T., dated 23-8-2007 which, inter alia, provides as follows:-

Issue: Whether services provided in relation to chit fund is leviable to service tax under “banking and other financial services” or not?

Clarification: Reserve Bank of India has clarified that the business of a chit fund is to mobilize cash from the subscribers and effectively cause movement of such cash to keep it working and, therefore, the activity of chit funds is in the nature of cash management.

- (a) In the case of Simple Chit Funds, no consideration is paid or received for the services provided and, therefore, the question of levy of service tax does not arise.

- (b) In the case of Business Chit Funds, cash management service is provided for a consideration and, therefore, leviable to service tax under “banking and other financial services”.

6. Elaborate the function of a Custom House Agent (CHA) with the help of a decided case law.

Lee & Muir Head Pvt. Ltd. v. CST 2009 (14) S.T.R. 348 (Tri. - Bang.)

The Tribunal elucidated that the function of a CHA mainly relates to the documentation part for the clearance of goods from the customs for import/export. The fees collected by the CHA for transportation of goods from foreign country to India before import of goods or transportation of goods from the warehouse or from the godown after clearance from the Customs House do not come under the category of CHA.

7. Whether the explanation inserted by Finance Act, 2008 to the definition of ‘business auxiliary service’ is clarificatory or declaratory in nature so as to be construed having retrospective effect and retroactive operation?

Union of India & Ors v. M/s Martin Lottery Agencies 2009 (14) S.T.R. 593 (S.C.)

The Apex Court ruled that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. Subject to the constitutionality of the Finance Act, 1994 in view of the explanation appended to this, the Supreme Court opined that the service tax, if any, would be payable only with a prospective effect and not with retrospective effect.

It further opined that in a case of this nature, the Court must be satisfied that the Parliament did not intend to introduce a substantive change in the law. For the aforementioned purpose, the expressions like ‘for the removal of doubts’ are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. It held that the explanation is not clarificatory or declaratory in nature. Hence, it could not be construed having retrospective effect and retroactive operation.

8. Is it necessary that in order to levy the service tax under the category “clearing & forwarding agent's services”, the agent must be rendering both clearing and forwarding services?

CCEx., Panchkula v. Kulcip Medicines (P) Ltd. 2009 (14) S.T.R. 608 (P & H)

The assessee-respondent entered into an agreement with M/s. Cipla for handling and distribution of their products and was entrusted with the job of receiving, storing and distributing Cipla products to their authorised stockists and distributing centres. For the services so rendered, the assessee-respondent was entitled to commission based on

agreed percentage of sales figures and also to reimbursement of recurring expenses. Revenue contended that the services provided by the assessee attracted service tax under the category "clearing & forwarding agent's services". On the other hand, the assessee pleaded that service tax could be levied under the said category only when clearing and forwarding agent would have carried out both clearing and forwarding operations.

The Tribunal held that as per the facts of the case, there was no clearing activity being undertaken by the dealer. Therefore, the services rendered by him would not satisfy the requirement of clearing and forwarding agent and consequently, no service tax liability would arise. The High Court, affirming the decision taken by the Tribunal, held that since no clearing activity was directly undertaken by the agent from the manufacturer's (Principal) premises, he was not liable to pay the service tax under the category "clearing and forwarding services". Service tax is leviable under the category "clearing and forwarding" only if an agent renders both clearing and forwarding services.

The High Court further elaborated the question - whether word 'and' used after the word 'clearing' but before the word 'forwarding' in section 65(105)(j) can be considered in a conjunctive (combined) sense or disjunctive (separating) sense. It elucidated that if one person who has rendered service only as 'forwarding agent' without rendering any service as 'clearing agent' would be deemed to have rendered both services, it would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. Besides, the learned counsel for the Revenue failed to bring on record any material to show the word 'and' should be construed as disjunctive. Further, Revenue had also not shown any 'trade practice' which might lead to a necessary inference that service of one kind rendered was invariably considered to comprise both. Therefore the word 'and' should be understood in a conjunctive sense.

Note : Students may note that in the above case, the High Court has overruled the decision in case of Medpro Pharma Pvt. Ltd. v. Commissioner 2006 (3) S.T.R. 355 (Tribunal-LB) [reported in Select Cases-2006]. In Medpro Pharma, the large bench of the Tribunal had held that the "clearing and forwarding operations" cannot be dissected into "clearing" and "forwarding". Both fall in the common category and any service provided in that category will attract service tax. Even if one segment of activities is not performed, the appellants can be said to be engaged in the taxable service.

9. Whether a sales agent or independent dealer can be regarded as a clearing and forwarding agent?

Valli Inc. v. CCEx., Triuchirappali 2009 (14) S.T.R. 528 (Tri. - Chennai)

The appellant, Valli, entered into an agreement with ITC. As per the agreement, the appellant has to maintain a showroom, display the products of ITC and remit the proceeds promptly to ITC. Revenue contended that that Valli had rendered clearing and forwarding agent's service to ITC.

The Tribunal held that the appellant did not satisfy the definition of a consignment agent as clarified in the C.B.E. & C. Circular No. 59/8/2003-S.T., dated 20-6-2003. The Board had clarified that a consignment agent receives and dispatches goods on behalf of the principal. However, in the instant case, Valli received the goods and sold them on its own as a dealer. The appellant was not an agent of ITC, but an independent dealer in ITC's branded goods. Merely receiving the goods in order to sell them from its own premises will not amount to clearing of the goods as a clearing and forwarding agent. In the instant case, the appellants received goods from ITC and disposed them on sale from its own outlet. The appellant was not engaged in clearing and forwarding of the branded goods of ITC.

The Tribunal affirmed the contention of Revenue that three agents are normally involved when clearing and forwarding agent's service is rendered, i.e., the principal, the ultimate recipient of goods in business and the clearing and forwarding agent that forwards the goods after taking delivery to dealers. In the given case, the dealer received the goods and sold them in retail to consumers. He had Sales Tax registration and issued bills for sales. No third agency was involved.

In the light of aforesaid discussion, it held that Valli could not be regarded as a clearing and forwarding agent.

10. Whether the services provided by colour photo laboratories are liable to pay service tax under the category "photography services"?

Colorway Photo Lab v. UOI 2009 (15) S.T.R. 17 (M.P.)

In this case, the assessee's firm was engaged in the activity of developing of exposed negatives, film processing, and printing of photographs. According to the assessee, the services rendered by a colour photo laboratory did not fall within the mischief of "photography" and/or "photography studio or agency". Hence, they were not liable to pay the service tax.

The High Court pronounced that the colour photo laboratory is an extended design of a studio. In a photography studio, the photographer shoots the photos, develops the negatives in his dark room and, thereafter prints the desired size of the photographs. The work of the colour laboratory is to receive the exposed negatives/rolls, develop the same and print the photographs of the desired size as per the orders placed by the original consumer through the photographer who had taken the photographs either in the studio or anywhere else. When the word "photography" includes still photography, motion picture photography, lazer photography, arial photography, fluorescent photography etc., then any negative used for taking photograph would come under the inclusive definition of photography. The work of the photographer is not only to shoot the person or the scene but is also to develop the negatives and bring the prints. When a part of the work is done by the photographer and part of the work is assigned to others, such person i.e colour laboratory would in fact be a "photography studio or agency".

In the light of the above discussion, the High Court concluded that the colour laboratories would be a part of the “photography studio or agency” involved in providing the service to the consumer and were amenable to the service tax.

11. Whether packaging and bottling of liquor amounts to manufacture and whether it is liable to service tax under “packaging activity services”?

Maa Sharda Wine Traders v. UOI 2009 (15) S.T.R. 3 (M.P.)

The High Court pronounced that the decision rendered in Vindhyachal Distilleries Pvt. Ltd. v. State of M.P. 2006 (3) S.T.R. 723 (M.P.)* did not state the law correctly in as much as it had expressed the opinion that packaging and bottling of liquor were not the part of manufacturing process and hence, liable to service tax. Further, the Court upheld the view taken in Som Distilleries and Breweries Pvt. Ltd. v. State of M.P. and Another 1997 (1) J.L.J. 319 and, hence, ruled that packaging and bottling of liquor comes within the ambit and sweep of “manufacture” within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 in view of the definition contained in section 65(76b) of the Finance Act, 1994 as amended especially keeping in view the exclusionary facet. Hence, packaging and bottling of liquor was not liable to service tax under “packaging activity services”.

*Note : Students may kindly note that the case of Vindhyachal Distilleries Pvt. Ltd. v. State of M.P. 2006 (3) S.T.R. 723 (M.P.) was reported in Select Cases-2006.

SERVICE TAX PROCEDURES

1. Whether the Tribunal could reduce the penalty imposable under section 76 of the Finance Act, 1994 as amended below the minimum limit prescribed under that section?

UOI v. Aakar Advertising 2008 (11) S.T.R. 5 (Raj.)

The Rajasthan High Court held that if the assessee proves that there is reasonable cause for failure to pay service tax, the penalty shall not be imposed. However, if reasonable cause is not shown, and penalty is required to be levied, then, the minimum penalty prescribed cannot be further reduced, under the garb of any existing discretion, assumed to be vesting, with the authority, including the Tribunal. Where the two limits have been prescribed, being the minimum and maximum limit, then obviously the free play is available between the two limits only, and the discretion can be exercised, within those limits. However, that does not mean, that the authorities have any power to impose penalty less than the minimum prescribed by the section. Accordingly, the question was answered in favour of the Revenue, and against the assessee.

Note: Amount of penalty under section 76 of the Finance Act, 1994 as amended is as follows:-

(a) Minimum Penalty

- (i) a penalty which shall not be less than two hundred rupees for every day during which such failure continues

or

- (ii) at the rate of two per cent of such tax, per month,
whichever is higher

starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax :

(b) Maximum Penalty

The total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

2. Can the CENVAT credit of the service tax paid on mobile phone services in respect of mobile phones used by employees and officers be availed?

CCEx. v. Excel Crop Care Ltd. 2008 (12) S.T.R. 436 (Guj.)

The respondent - assessee availed CENVAT credit of service tax paid on mobile phone services in respect of mobile phones used by employees and officers of respondent assessee. According to the appellant, the assessee was not entitled to the credit on the ground that mobile phones are not the phones installed in the factory premises and the definition of "input service" under rule 2(l) of the CENVAT Credit Rules, 2004 would not bring such service within the scope of input service so as to be eligible for credit under rule 3 of the said rules.

The High Court ruled that there was nothing on record to indicate that the activities carried out by such staff members were not relatable to the business of manufacturing carried on by the respondent assessee. It further provided that the mobile service provider, who was liable to pay service tax, and recovered the same by adding such service tax in his bill, was the person providing taxable service and was rendering 'output service' so as to constitute 'input service' in the hands of respondent assessee. Hence, the assessee was entitled to CENVAT credit of the service tax paid on mobile phone services in respect of mobile phones used by employees and officers.

3. Whether the assessee is entitled to the credit of the service tax paid on the freight up to the door steps of the customer i.e. the destination point?

Ambuja Cements Ltd. v. UOI 2009 (14) S.T.R. 3 (P & H)

The assessee was engaged in the business of manufacturing and selling of cement and had been duly paying the excise duty in respect of cement produced by it. The assessee claimed that it supplied cement to its customers "FOR destination" and bore the freight up to the door steps of the customer i.e. the destination point. The assessee had taken the CENVAT credit of the service tax paid on the aforementioned freight by it.

The Department contended that the payment of service tax on the freight incurred by the assessee was not input service as per rule 2(l) of the CENVAT Credit Rules, 2004 and hence the CENVAT credit was not admissible on it under the said rules.

The High Court observed that the 'input service' has been defined under rule 2(l) to mean any service used by the manufacturer whether directly or indirectly and also includes, inter alia, services used in relation to inward transportation of inputs or export goods and outward transportation up to the place of removal.

Further, the Board's Circular No. 97/6/2007 (sic) 97/8/2007-ST, dated 23-8-2007 contemplates compliance of certain conditions where the sale has taken place at the destination point. These conditions are as follows:-

- (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step;
- (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and
- (iii) the freight charges were an integral part of the price of goods.

The circular provides that if aforesaid conditions are satisfied, the credit of the service tax paid on the transportation up to such place of sale would be admissible.

The first requirement was fulfilled because:-

- (i) the supply of cement by appellant to its customer was 'FOR destination',
- (ii) the freight up to the door step of the customer was borne by the appellant, and
- (iii) the service tax on the freight charges was paid by the appellant.

Moreover, for transportation purposes insurance cover has also been taken by the appellant which further shows that the ownership of the goods and the property in the goods has not been transferred to the seller till the delivery of the goods in acceptable condition to the purchaser at his door step. Accordingly, the second condition also stood fulfilled.

Since, the delivery of the goods is "FOR destination" price, the third condition that the freight charges were integral part of the excisable goods also stood fulfilled.

In view of above discussion, the High Court opined that the questions of law deserved to be answered in favour of the assessee-appellant and against the Revenue. Hence, it held that the assessee was entitled to the credit of the service tax paid on the freight up to the door steps of the customer.

4. Whether the services availed by a manufacturer for outward transportation of final products from the place of removal up to the customer's premises should be treated as an 'input service'?

ABB Ltd. v. CCEx. 2009 (15) S.T.R. 23 (Tri. - LB)

In the instant case, Revenue contended that in the inclusive clause of the definition of "input service" under rule 2(l) of the CENVAT Credit Rules, 2004, it is specifically mentioned that only outward transportation up to the place of removal shall be included. Therefore, credit for outward transportation from the place of removal to the customer's place should not be allowed with reference to any other limb or category of the definition of input service which is general in nature. However, the large Bench of the Tribunal rejected the contention of the Revenue.

The Tribunal held that each of the limbs of the definition of "input services" is an independent benefit/concession. If an assessee can satisfy any one of the above, then credit on input service would be admissible even if the assessee does not satisfy the

other limbs. The expression “activities relating to business” admittedly covers transportation upto the customers place and, therefore, credit cannot be denied by relying on specific coverage of outward transportation upto the place of removal in the inclusive clause.

Revenue further alleged that since the cost of outward transportation did not form part of the transaction value of the manufactured goods, any service tax paid for the outward transportation of goods from place of removal could not be allowed as credit to the manufacturer. In this regard the Tribunal clarified that for admissibility of credit for outward transportation, there is no requirement that the cost of freight should enter into the transaction value of the manufactured goods. The two issues, namely, ‘valuation’ and ‘CENVAT credit’ are independent of each other and have no relevance to each other.

Hence, it inferred that the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service and thereby enabling the manufacturer to take credit of the service tax paid on the value of such services.