

1.1 CONSTITUTION OF INDIA

Power to levy and collect taxes whether direct or indirect emerges from the Constitution of India. Without a study of the basic provisions in the Constitution, no study would be complete. Article 246 of Constitution of India gives the respective authority to Union and State governments for levying tax. Seventh Schedule to the Constitution of India contains three lists setting out matters under which the State and Union have got the authority to make laws. List I known as Union List contains 97 entries. The Union Legislature has an exclusive power to make laws in respect of matters listed in List I. List II known as State list contains various matters like taxes on agricultural income, excise duty on alcoholic liquors, opium and narcotics, etc., in respect of which State legislatures have the exclusive powers to make laws. List III also known as Concurrent list lists out the matters like criminal law and procedure, trust and trustees, civil procedures, economic and social planning etc., in respect of which both the Central Government and the State Government has authority to make laws.

Part XII of the Constitution of India contains matters related to “Finance, Property, Contracts and Suits” in the Articles 264 to Article 300A. Article 265 states that “no tax shall be levied or collected except by authority of law”. It has been held by the Supreme Court in *Kunnathat v. State of Kerala* AIR 1961 SC 552 that the term “authority of law” means that tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax. The law must not be a colourable use of or a fraud upon the legislative power to tax. It must not also violate the fundamental rights such as Article 14, 19 etc. See *Express Newspapers v. U.O.I.* 1999 (110) E.L.T. 3 (S.C.).

Article 272 mentions “Union duties of excise other than such duties of excise on medicinal or toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India....”

Entry 84 of list I of the Seventh Schedule to the Constitution of India enumerates “duties of excise on tobacco and other goods manufactured or produced in India except

- (a) alcoholic liquors for human consumption;

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- (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

1.2 DIRECT AND INDIRECT TAXES

Taxes are broadly classified into Direct taxes and Indirect taxes. Direct Taxes are taxes which are levied on persons for the income earned or activities conducted, the incidence of which is to be borne by the person himself on whom it is levied. On the other hand, Indirect taxes are the taxes which are levied on a product or a service the incidence of which is borne by the consumers who ultimately consume the product or the service, while the immediate liability to pay the tax may fall upon another person such as a manufacturer or seller of goods.

1.3 WHAT IS EXCISE DUTY

Excise is derived from the Latin word "Excisum". Excise, according to the Federal Court and Privy Council is a tax attracted by the event of manufacture but collected at some convenient stage which may be after the said event, which is only for administrative convenience [*Province of Madras v. Boddu Paidanna & Sons* 1978 (2) E.L.T. J272]. It is a duty levied upon goods manufactured and not upon sales or the proceeds of sale of goods [*Council v. Province of Madras*, 1978 (2) E.L.T. J28]. Therefore the duty of excise is levied on a manufacturer or producer in respect of the commodities produced or manufactured by him. It is a tax upon manufacture of goods and not upon sales or proceeds of sale of goods.

'Duty of excise' has been renamed as Central Value Added Tax (CENVAT). CENVAT includes 'duty', 'duties' 'duty of excise' or 'duties of excise'.

Excise duties are of following types –

Duties under Central Excise Act, 1944

Basic excise duty: This duty is levied under section 3(1)(a) of Central Excise Act. As per section 2A of Central Excise Act, basic excise duty is termed as Cenvat with effect from 12-5-2000. It is levied at the rates specified in First Schedule to Central Excise Tariff Act, read with exemption notification, if any.

Special excise duty: This duty is levied under section 3(1)(b) of Central Excise Act. Special duty of excise is leviable on some commodities like pan masala, cars etc. These items are covered in Second Schedule to Central Excise Tariff.

Duty in case of 100% EOU and FTZ: Hundred percent Export Oriented Undertakings (EOU) and units in Free Trade Zone (FTZ) export all their production. However, when they clear their final products in Domestic tariff area (DTA), excise duty has to be paid. The duty amount is equal to the aggregate of the duties of customs leviable on like article if imported in India. Even if rate of customs duty is considered for payment of duty, actually the duty paid by them is central excise duty. The rate of customs duty is taken only as a measure.

Duties under Other Acts

Some duties and cesses are levied on manufactured products under other Acts like **Additional Duty on Goods of Special Importance [AED(GSI)]** and **Additional Duty on Textile Articles**. The administrative machinery of Central Excise is used to collect these taxes. Provisions of Central Excise Act and Rules have been made applicable for levy and collection of these duties/cesses.

A National Calamity Contingent Duty (NCCD) has been imposed vide section 136 of Finance Act, 2001. This duty is imposed on pan masala, chewing tobacco and cigarettes.

An **additional excise duty**, by way of surcharge on pan masala and certain specified tobacco products is levied to finance the National Rural Health Mission. This additional duty is charged at prescribed specific rates on cigarettes, and at a rate equal to 10% of the aggregate of normal rates of excise duties payable on pan masala and other tobacco products. This surcharge is not levied on biris. The additional duty of excise is in addition to any other duty of excise chargeable on such goods under the Central Excise Act or any other law for the time being in force.

The provisions of the Central Excise Act and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty apply in relation to the levy and collection of such additional duty of excise on the specified tobacco products as they apply in relation to the levy and collection of the duty of excise on such goods under the Central Excise Act or, as the case may be, the rules made thereunder.

An **education cess (EC)** has been levied on excisable goods manufactured in India with effect from 10.09.2004. It is levied @ 2% of the aggregate duties of excise levied on such goods. The education cess so collected is utilized for providing and financing universalised quality basic education.

A **secondary and higher education cess (SHEC)** @ 1% has been imposed on excisable goods manufactured in India with effect from 01.03.2007. The proceeds from this cess will be utilized to finance secondary and higher education. It shall be chargeable on the aggregate duties of excise (including special duty of excise or any other duty of excise but excluding education cess) leviable on such goods.

The education cess and secondary and higher education cess on excisable goods are in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 or any other law for the time being in force. The provisions of the Central Excise Act, 1944 and the rules including those relating to refunds and exemptions from duties and imposition of penalty shall apply in relation to the levy and collection of the education cess and secondary and higher education cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods.

1.4 HISTORY OF CENTRAL EXCISE LAW

Prior to 1944 there were 16 individual Acts which levied excise duty. Each such act dealt with one or same type of commodities. All these acts were consolidated and a consolidating Act was passed in 1944 called as Central Excises and Salt Act, 1944 which came into effect from 28th February 1944. In 1996 the Act was renamed as Central Excise Act, 1944.

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The Central Excise Act, 1944 (originally Central Excises and Salt Act, 1944) and Rules framed there under came into force on 28th February, 1944. The Act applies to the whole of India. India includes Indian territorial waters. Indian territorial waters extend upto 12 nautical miles from the Indian land mass. It also extends to areas designated in the Continental Shelf and Exclusive Economic Zone of India. The 'exclusive economic zone' extends upto 200 nautical miles inside the sea from base line. Though originally the Act did not apply to the State of Jammu and Kashmir, its application was extended to that State since the enactment of Taxation Laws (Extension to Jammu & Kashmir) Act, 1954.

1.5 BODY OF CENTRAL EXCISE LAW

Central Excise Law includes

- (a) Central Excise Act, 1944
- (b) Central Excise Rules, 2002
- (c) Cenvat Credit Rules, 2004
- (d) Central Excise (Appeal) Rules, 2001
- (e) Central Excise (Advance Rulings) Rules, 2002.
- (f) Central Excise (Settlement of Cases) Rules, 2001.
- (g) Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001
- (h) Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000
- (i) Central Excise Tariff Act, 1985

1.5.1 Central Excise Act, 1944 : This Act contains the basic provisions relating to the levy of excise duty. There are 10 chapters in the Central Excise Act. These are briefly as follows:

Chapter I	Short title, extent and commencement of the Act including definitions
Chapter II	Levy and collection of duty
Chapter IIA	Indicating amount of duty in the price of goods, etc., for purpose of refund and crediting certain amounts to the Consumer Welfare Fund
Chapter III	Powers and Duties of Officers and Land Holders
Chapter IIIA	Advance Rulings
Chapter V	Settlement of Cases
Chapter VI	Adjudication of Confiscations and Penalties
Chapter VIA	Appeals

Chapter VIB	Presumptions as to Documents
Chapter VII	Supplemental Provisions

1.5.2 Central Excise Rules, 2002: These Rules contain the procedure for the assessment and collection of duty including other procedures like manner of payment of duty, registration, maintenance of records, invoicing, rebate of duty, export without payment of duty etc.

1.5.3 Cenvat Credit Rules, 2004 : The provisions relating to Cenvat credit which were a part of Central Excise Rules, 1944 were given a separate identity from 1st July 2001 and were called Cenvat Credit Rules, 2001. These Rules were superseded by the Cenvat Credit Rules, 2002. However, with effect from 10.09.2004 Cenvat Credit Rules, 2002 have been replaced by a new set of rules, viz., Cenvat Credit Rules, 2004 which provide for extending credit across goods and services.

1.5.4 Central Excise (Appeals) Rules, 2001 : The procedure relating to appeals are covered in this rules which was earlier included in Central Excise Rules, 2001.

1.5.5 Central Excise (Settlement of Cases) Rules, 2001 : The procedural aspects relating to settlement commission are contained in these rules.

1.5.6 Central Excise (Advance Rulings) Rules, 2002: These rules contain the provisions relating to Advance Rulings.

1.5.7 Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 : These rules contains the provisions and procedure relating to the goods removed at concessional rate of duty for manufacture of excisable goods.

1.5.8 Central Excise Tariff Act, 1985 : The Central Excise Tariff which was originally a schedule to the Central Excise Act, 1944 was de-linked from it and the Central Excise Tariff, Act 1985 containing the Tariff schedule was enacted, based on the international product coding system called Harmonised System of Nomenclature(H.S.N.). However, w.e.f. 28.02.2005 the Central Excise Tariff (Amendment) Act, 2005 has been brought into

1.5.9 Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been framed to prescribe valuation methods where transaction value cannot be determined under Section 4.

1.6 EXEMPTION NOTIFICATIONS IN CENTRAL EXCISE

Central excise legislation is driven by exemption notifications. Under section 5A(1), the Central Government is empowered to grant exemption in public interest either absolutely or subject to conditions (either before or after removal) from the whole or any part of the duty of excise payable. Notifications issued under section 5A(1) are not applicable to FTZ/SEZ/100% EOU unless otherwise specified. This is because such units are exempted under other notifications issued specially for them.

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It is clarified that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

Sub section (2) of section 5A states that the Central Government can exempt excisable goods from the payment of duty by a special order if it is satisfied that it is necessary in the public interest to do so, under circumstances of an exceptional nature which are to be stated in such order. Under the Customs Act, 1962, a similar provision exists in section 25(2).

1.7 DEPARTMENTAL CIRCULARS AND TRADE NOTICES IN CENTRAL EXCISE

Departmental circulars and trade notices are a form of delegated legislation. Under section 37B, which is titled "Instructions to Central Excise Officers", the Central Board of Excise and Customs (CBEC or Board), which is constituted under the Central Boards of Revenue Act, 1963, shall issue instructions to officers who are bound to follow them. These instructions or orders can be for the purpose of ensuring uniformity in the classification of excisable goods or with respect to levy of duty of excise on goods. However, such orders cannot be passed to direct any officer to dispose of a case in a particular manner or interfere with the discretion of the Commissioner (Appeals). A separate chapter is devoted to notifications and trade notices and their legal effect thereof.

1.8 DEFINITIONS UNDER EXCISE LAW

Section 2 of the Act contains definitions of certain terms which are given below.

1.8.1 "Adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), Commissioner of Central Excise (Appeals) or Appellate Tribunal; (Sec 2(a))

1.8.2 "Appellate Tribunal" means the Customs, Excise and service tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962); (Sec 2(aa))

1.8.3 "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others; (Sec 2(aaa))

1.8.4 "Central Excise Officer" means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act; (Sec 2(b))

1.8.5 "Curing" includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture; (Sec 2(c))

1.8.6 "Excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt;

Explanation — For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. (Sec 2(d))

1.8.7 "Factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on; (Sec 2(e))

1.8.8 "Fund" means the Consumer Welfare Fund established under section 12C; (Sec 2(ee))

1.8.9 "Manufacture" includes any process,—

- (i) incidental or ancillary to the completion of a manufactured product; and
- (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture, or
- (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account; (Sec 2(f))

1.8.10 "Prescribed" means prescribed by rules made under this Act; (Sec 2(g))

1.8.11 "Sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration; (Sec 2(h))

1.8.12 "Wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale; (Sec 2(k)).

1.9 LEVY AND COLLECTION OF DUTY

Chapter II of the Central Excise Act, 1944 deals with levy and collection of the duty. This chapter contains sections 3, 4 & 4A. Section 3 is the charging section, section 4 provides

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for the method of valuation of excisable goods and section 4A deals with valuation based on maximum retail price (MRP).

Section 3(1) which is the charging section states :

There shall be levied and collected in such manner as may be prescribed:

- (a) a duty of excise on all excisable goods (excluding goods produced or manufactured in special economic zones [SEZ]) which are produced or manufactured in India as, and at the rates set forth in the First Schedule to the Central Excise Tariff Act, 1985;
- (b) a special duty of excise, in addition to duty of excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 which are produced or manufactured in India, as, and at the rates set forth in the Second Schedule.

However, the excise duty leviable on any excisable goods manufactured by a hundred percent export oriented undertaking (100% EOU) and brought to any other place in India shall be an amount equal to the aggregate of the customs duties which would be leviable under the Customs Act or any other law for the time being in force on like goods produced or manufactured outside India if imported into India. The value of such goods shall be determined in accordance with the provisions of the Customs Act, 1962 if the duty to be levied is based on the value of such goods (*ad valorem*).

Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, be deemed to be leviable at the highest of those rates.

Here, 100% EOU means an undertaking which has been approved as a 100% EOU by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 and the rules made under that Act.

SEZ has the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005.

Section 3(1A) provides that there is no distinction between excisable goods produced by the Government and those produced by others, with regard to payment of excise duty. Excise duty is payable on goods manufactured by or on behalf of the Government (both Central and State) also.

Section 3(1) speaks of levying two types of duty, firstly Basic Excise Duty (BED) at the rates specified in the First Schedule to the CETA, 1985; secondly Special Excise Duty (SED) at the rates specified in the Second Schedule to the CETA, 1985 in addition to BED.

An analysis of section 3 of the Central Excise Act, 1944 which is the charging section, throws out the following propositions :-

- (a) There must be a manufacture

- (b) Manufacture must be in India and
- (c) The manufacture must result in “goods”
- (d) The resultant goods must be “excisable goods”

Each of these propositions are discussed below.

1.10 GOODS & EXCISABLE GOODS

Before we examine the question of what amounts to manufacture, it must be understood that unless the goods that are manufactured are excisable goods, there will be no question of attracting excise duty. Section 2 (d) of the Act defines excisable goods to be “goods which are specified in the Tariff as being subject to a duty of excise”.

Therefore, first of all the items which are subject to tax must be goods, then they must be specified in the Tariff and they must come into existence as a result of manufacture.

The word “goods” has not been defined in the Central Excise Act. The word “goods” is defined in Article 366(12) of the Constitution of India as “goods include all materials, commodities and articles”.

Sale of Goods Act, 1930 in section 2(7) defines goods to mean “every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale”. To be “goods” the article concerned must be movable. In other words, immovable property cannot be goods. Any movable property whether visible, tangible, corporeal or not will constitute goods.

Black’s Law Dictionary define “goods “ as a term of variable content and meaning. It may include every species of personal property or it may be given a very restricted meaning.

In *U.O.I. v. DCM* 1997(1) E.L.T. 1199 the Supreme Court has held that in order to be goods the articles must be capable of coming to the market to be bought and sold. Therefore, to be called goods, the items must be moveable and marketable.

From the above, two fundamental aspects of the term “goods” arise that they should be ‘moveable’ and ‘marketable’.

The two fundamental aspects of the term “goods” ‘moveable’ and ‘marketable’ are discussed in detail.

1.10.1 Concept of ‘Moveable’: The first aspect of goods is that they should be moveable. In *Union of India Vs. Delhi Cloth Mills* (1977) ELT J-199 and in *South Bihar Sugar Mills Vs. Union of India* (1978) ELT J-336, the Supreme Court enunciated the principal that to be called goods, the articles must be such as are capable of being bought and sold in the market. The articles must be something, which can ordinarily come or can be brought to the market to be bought and sold. As opposed to moveable goods, immovable goods like property cannot be brought to the market to be sold. Under section 3 (36) of the General Clauses Act of 1897, moveable goods mean property of every description except

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immovable property. Section 3(26) of the General Clauses Act, 1897 defines the term immovable property as:

“immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.”

Thus excise duty cannot be levied on immovable goods and property. There are several case law on this aspect and they are discussed subsequently in the section “Dutiability of Site Activities”.

1.10.2 Concept of ‘Marketable’: Unless the goods are capable of being marketed, they cannot be charged to duty. Marketability is the capability of a product of being put into the market for sale. In order to become goods, an article must be something, which can ordinarily come to the market to be bought and sold. Marketability is an essential ingredient in order to render goods dutiable under law. Whether a product is marketable or not is to be decided on the facts of each case. The burden of proving marketability of goods is on the revenue, if the assessee were to claim non-marketability.

Let us examine some important cases under marketability: -

In *Union Carbide India Ltd. Vs. Union of India* (1986) (24) ELT-169, the Supreme Court held that to become ‘goods’, an article must be something which can ordinarily come to the market to be bought and sold. Articles in crude or elementary form are not dutiable as they are merely intermediate products and are not goods. It, therefore, held that aluminium cans or torch bodies produced by extrusion process were neither sold nor marketable and hence were not ‘goods’ and not liable to excise duty. It is clear from this decision that goods must be marketable and known in the market as such, in order to be exigible to duty.

The Supreme Court in another decision, in *C.C.EX. Vs. Ambalal Sarabhai Enterprises* (1989) (43) ELT-214 has held that the duty of excise is on the manufacture of goods and for an article to be “goods”, it must be known in the market as such or must be capable of being sold in the market as goods. Actual sale is not necessary. Usage in captive consumption is not determinative of whether the article is capable of being sold in the market or is known in the market as goods. Even transient items or articles can be goods, provided that they are known in the market as distinct and separate articles, having separate uses. They would still become goods if they were capable of being marketed during the said short period of their life. Thus, goods with unstable character can be theoretically marketable if there was a market for such transient types of articles, but one has to take a practical view on the basis of available evidence.

In the landmark decision, in *Bhor Industries Ltd. Vs. C.C.EX.* (1989) (40) ELT-280, the Supreme Court has held that marketability is essential if an article is to be liable to excise. Merely because an article is specified under the Tariff, it would not be correct to state that it is chargeable to duty, unless it is proved that the goods are marketable. Prior to this decision in Bhor Industries, it was the practice to hold all goods specified in the Tariff as chargeable to duty, regardless of this criterion of marketability. The Court held that it would be necessary to find out whether the goods are known in the market as separate, distinct and identifiable commodities.

Following the decision in *Bhor Industries*, the Madras High Court, in *Madura Coats Ltd. Vs. Asstt. Collector of C.C.EX. (1990) (48) ELT-321*, has held that where a product could neither be sold nor consumed in the market, nor was capable of being sold or consumed, it would not be liable to duty.

In *Ion Exchange India Ltd. vs. C.C.EX 1999 (112) ELT-746*, the Supreme Court has held that mere specification of an item in the Central Excise tariff is not sufficient in the absence of the marketability test.

In *CCEX. Vs. Bakelite Hylam, Ltd. (1990) (46) ELT-552*, the tribunal has held that an article is not liable to excise merely because it is specified in the Tariff Schedule, unless it is known as goods in the market. Marketability is an essential ingredient for Dutiability. This decision of the Tribunal is important since it first interpreted the Supreme Court's criterion of marketability, as laid down in the *Bhor Industries'* case, that goods were not excisable even though they were specified in the Excise Tariff, unless the test of marketability was met.

In *Cipla Ltd. Vs. UOI (1990) (46) ELT-240*, the Karnataka High Court has held that for Dutiability, a product must pass the test of marketability even if it is a transient item, which is captively consumed in, the manufacture of other finished products. It is the onus of the Department to produce evidence of marketability. The Bombay High Court, in *UOI Vs. CEAT Tyres India Ltd. (1989) (43) ELT-267*, has held that if a product is not a marketable commodity, then no excise duty is leviable.

The Calcutta High Court, in *UOI Vs. Bata India Ltd. (1993) (68) ELT-756*, has held that articles are not 'goods' under section 3 of the Act unless they are marketable. The Court has also held that goods which are specified in the excise tariff are presumed to be excisable unless shown to be non marketable and actual sales are not necessary in order to establish marketability.

1.10.3 Excisable Goods: "Excisable goods" means goods specified in the Schedule to the Central Excise Tariff Act, 1935 as being subject to a duty of excise and includes salt. The explanation to the definition clarifies that "goods" include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

On analyzing the last part of the definition "as being subject to a duty of excise" a doubt arises that whether the goods which are included in the tariff at Nil rate of duty are excisable goods or not. Therefore two conditions have to be satisfied to be excisable goods. Firstly the goods must be specified in the Schedule to the Central Excise Tariff Act, 1835. Secondly the goods so specified must be subject to duty as per the tariff. In *CCE vs Usha Martin Industries, 1997 (94) ELT 460*, the Supreme Court held that the term "appropriate amount of duty has already been paid" would also include goods cleared at nil rate of duty since nil rate is also an appropriate rate. However, this decision was overruled by a constitutional bench of Supreme Court in the case of *CCEx. v. Dhiren Chemical Industries 1997 (094) ELT 460 S.C.* The Supreme Court has held in this case that the word "appropriate" in the term "on which the appropriate amount of duty of excise has already been paid" means the correct or the specified rate of excise duty. In the said phrase, due emphasis must be given to the words "has already been paid". Where the raw material is

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not liable to excise duty or such duty is nil, no excise duty is, as a matter of fact, paid upon it.

1.10.4 Goods exempt from duty whether excisable: Having held that in order to constitute 'goods' under excise law, articles must be moveable and marketable, let us now turn to the definition of excisable goods under the Act. Section 2(d) defines excisable goods as goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to the duty of excise and includes salt. In other words, all goods specified or covered in the Tariff will be known as excisable goods. This brings us to the important point in law that goods, which are exempt from duty under a notification, are nevertheless excisable goods as long as they are covered by any of the headings of the Central Excise Tariff. This point in law was earlier in doubt. The Allahabad High Court had taken the view in couple of cases that fully exempted goods were meant to be taken out of the Schedule to the Tariff Act and hence cannot be treated as excisable goods at all. However, the Delhi, Andhra Pradesh and Madras High Courts took the view that fully exempted goods continued to be excisable goods. Finally, the Supreme Court's decision in *Wallace Flour Mills Ltd. Vs. C.C.EX. (1989) (44) ELT-598* has effectively settled the issue. It was held therein that fully exempted goods were also excisable goods and hence were chargeable to duty if the exemption was removed prior to removal of goods but subsequent to manufacture.

1.11 MANUFACTURE

1.11.1 Concept of Manufacture: The term "manufacture" literally means to make by hand. However, in the context of today's mechanised world, the term includes making articles by machines also. However, as far as central excise is concerned the term has a specific definition in the Central Excise Act, 1944 which is contained in Section 2(f) of the Act. It defines manufacture in an inclusive manner as follows :

"Manufacture includes any process,

- (i) incidental and ancillary to the completion of a manufactured product; and
- (ii) which is specified in relation to any goods in the Section or Chapter Notes of the Schedule of the Central Excise Tariff Act, 1985 as amounting to manufacture; or
- (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

and the term manufacturer shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

The definition stipulates that manufacture will include any process which is specified in the Section and Chapter Notes of the Central Excise Tariff as amounting to manufacture. In other words, the concept of deemed manufacture is given legal sanction. Thus, excise duty could be leviable on activities which do not result in the production or manufacture of a new

commodity. As already indicated, Parliament has power to levy excise duty on goods manufactured in India. In other words, manufacture or production of goods is a necessary condition for imposition of the levy. The question therefore arises as to whether Parliament can levy excise duty on activities which do not amount to manufacture or production by means of giving artificial meaning to the terms 'manufacture' and 'production'. This has been held to be valid by the Supreme Court in *Ujagar Prints v. U.O.I.* 1988 (38) E.L.T. 535 which said that resort could be had to Entry 97 of List I to the Constitution. Reference may be also made of the case of *Collector v. SD Fine Chemicals Pvt. Ltd.* 1995 (75) E.L.T. 49 (S.C.).

Since the definition of manufacture is an inclusive one and does not spell out or enumerate the activities covered therein, it is essential to arrive at an understanding of the term based on legal decisions on the point. Therefore, we go by the judicial decisions handed down to us.

The expression 'manufacture' was considered at length by the Supreme Court in its decision in *Union of India Vs. Delhi Cloth & General Mills Co. Ltd.* 1977 (1) ELT J199. In para 14 of the judgment, the court held that the word manufacture when used as a verb is generally understood to mean as bringing into existence a new substance and not merely to produce some change in the substance. The Court thereafter emphasized the definition by citing passage from an American judgement which was quoted in the Permanent Edition of Word and Phrases. The passage is as follows :-

"Manufacture implies a change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation. But something is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use".

This famous paragraph is now the basis for determining whether or not an activity or process amounts to manufacture.

In case of *South Bihar Sugar Mills Ltd. Vs. Union of India* (1978) ()ELT J336 Apex court has held that the word manufacture implied a change, but every change in the raw material does not tantamount to manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name , character and use. Again, the Supreme Court, in *Empire Industries Ltd., Vs. Union of India* 1985(20) ELT 1 held that to constitute manufacture it is not necessary that one should absolutely make out a new thing because it is well settled that one cannot absolutely make a thing by hand in the sense that nobody can create matter by hand (scientifically). It is transformation of a matter into something else that would amount to manufacture. That something else is a question of degree. Whether that something else is a different commercial commodity having its distinct character, use and name and is commercially known as such, is an important consideration in determining whether there is a manufacture.

Whether or not something results in manufacture would depend on the facts of the case but any number of processes undertaken which do not result in a commercially different commodity cannot result in manufacture – *U.O.I. v. Parle Products* 1994 (74) E.L.T. 492 (S.C.).

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The Supreme Court in *Ujagar Prints Vs. U.O.I 1988 (38) ELT 535* held that prevalent and generally accepted test to ascertain whether there was manufacture was whether the change or the series of changes brought about by application of processes take the commodity to the point where, commodity can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged because of the result of the processes. There might be border line cases where either conclusion can be reached with equal justification. Insistence on any sharp or intrinsic distinction between processing and manufacture results in an over simplification of both and tends to blur their interdependence in cases.

The Tribunal, in *B.P.L. Electronics Ltd., Vs. CCE 1994 (71) ELT 801*, has held that levy of excise duty is on manufacture and not on sale and hence the fact that invoices have been raised by the manufacturer in favour of a leasing company in respect of captively consumed excisable goods would not have any bearing on excise duty liability.

The Bombay High Court in *Critic India Ltd. Vs. U.O.I 1993 (66) ELT 566* has held that excise duty is a tax on manufacture and the liability to pay the duty does not depend on the end use of the product.

The production or manufacture of goods is sufficient to attract duty, whether the goods are consumed, sold or not used thereafter is wholly irrelevant. The mere fact that the product is not actually sold would not make any difference in determining the excisability of that product.

It is the effect of the operation carried out on a commodity that is material for the purpose of determining whether the operation constitutes 'manufacture' under excise law. Any process or processes creating something else having distinctive name, character and use would amount to manufacture. The moment there is a transformation of an input into a new commodity which is commercially known as a distinct and separate commodity, having its own character, use and name, whether it is the result of a process or several processes, manufacture takes place and the liability to duty is attracted.

1.11.2 Manufacture and processing: It is necessary to differentiate between manufacture and processing. Manufacture involves a series of processes, whereas a process is one of the activities undertaken for manufacture of a product from input materials. Manufacture is the cumulative effect of various processes to which raw materials are subjected and each such step towards the finished product would constitute processing in relation to the manufacture.

The definition of manufacture under section 2(f) states that it includes any process incidental or ancillary to the completion of the manufactured product. The definition clarifies that a process, which is incidental to the manufacture of the product, is also manufacture under law. Consequently, it would be incorrect to state that the manufacture of a product was complete merely by means of carrying out one or more processes on raw materials. It is only when a process or a series of processes has taken the input material to a point where it is recognised as a new and distinct article commercially, that manufacture of goods is said to have taken place. The inclusive nature of the definition would thus cover all intermediate processes, packing of final products etc.

If there is no essential difference in identity between the original article and the processed article, then no manufacture under excise law has taken place. Although the input material has undergone a degree of processing, it must be regarded as still retaining its original identity. Where the article retains its substantial identity through the stage of processing, it could be said to have been merely processed and not manufactured. If there are separate and distinct processes of manufacture and each such process results in such a transformation that a new and distinct article known in the market comes into being, then each process would be subject to duty. The question whether a process amounts to manufacture under excise law would hence depend on the facts of each case.

The distinction between the manufacture and process has been dealt by the Supreme Court in the case of *Union of India vs J.G. Glass Industries Ltd. 1998 (097) ELT 0005 (S.C)* wherein the apex court observed that the answer to the question whether the process is that of "manufacture" would be based on two-fold test - First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist - Secondly, whether the commodity which was already in existence will serve no purpose or will be of no commercial use but for the said process. In the above case with reference to the process of 'Printing', whether a process amounting to "manufacture" - Test is whether the product would serve any purpose but for the printing - If the product could serve a purpose even without printing and there is no change in the commercial product after the printing is carried out, the process cannot be said to be one of "manufacture".

The meaning of incidental or ancillary processes needs to be understood. Before a process can be regarded as "incidental or ancillary to the completion of manufactured product, it must have some relation to the manufacture of finished product. However inessential the process may be, if it is found incidental or ancillary to the completion of the manufactured product, then that process falls within the compass of the expression manufacture. If the process is not integral to or connected with manufacture, it will not be incidental. Here again, the finding is one of fact as prevalent in each case.

In sum, the question whether a particular process is a process of manufacture or not, has to be determined having regard to the facts and circumstances of each case and having regard to the well known tests laid down by the Courts in the aforementioned decisions. The following are some representative cases, where the Courts have decided on what constitutes manufacture under law :-

1.11.3 Instances of Goods/Processes not amounting to Manufacture :

Final Product	Product/process/activity	Citation
Aluminium	Cutting, drilling and punching of aluminium section	<i>CCE v. Ajit India Pvt. Ltd.</i> 2000 (119) E.L.T. 274 (S.C.)
Aluminium cans	Aluminium slugs converted	<i>Union Carbide India Ltd. v. CCE</i>

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(torch bodies)	to intermediate product	1986 (24) E.L.T. 169 (S.C.); <i>Geep Industrial Syndicate Ltd. v. CG</i> 1987 (31) E.L.T. 865 (S.C.)
Butter	Stirring of cream	<i>State of Tamil Nadu v. Bharat Dairy Farm</i> 1992 (61) E.L.T. 25 (Mad.)
Cable joining kits	Putting together different duty paid items not manufacture	<i>XI Telecom Ltd. v. CCE</i> 1999 (105) E.L.T. 263 (A.P.)
Chilled water	Chilling of water	<i>Farm & Co. v. CCE</i> 1987 (30) E.L.T. 541 (T)
Chilly powder	Pulverising of chilly	<i>Namputhiris Pickle Industries v. State of Kerala</i> 194 (92) STC 1 (S.C.)
Coffee	Reprocessing of coffee	<i>CCE v. Brooke Bond India Ltd.</i> 1998 (101) E.L.T. 2965 (T-SZB)
Coloured/ printed paper	Colouring/printing of white paper	<i>Swastic Products v. SCE</i> 1980 E.L.T. 164 (Guj.)
Coloured plastic granules	Conversion of plastic granules	Vadodara CTN No. 61/92, dated 22-7-1992, 1992 (60) E.L.T. T43
Computer under Heading No. 84.71	Upgradation does not amount to manufacture Installation at customers site not manufacture	CBEC Circular No. 454/ 20/99-CX, dated 12-4-1999 <i>Universal Micro Systems v. CCE</i> 1999 (107) E.L.T. 505 (T)
Curry powder rasam powder, masala powder	Mixing of chilly powder coriander powder	<i>State of Tamil Nadu v. SVS Natarajan & Sons</i> 1992 84STC (Mad.)
Cycle	Assembling of cycle parts	<i>T.I. Cycles of India v. U.O.I.</i> 1983 E.L.T. 681 (Mad.)
Feeding bottle	Putting together bought out parts like bottles, nipples, lids etc. is not manufacture	<i>Dalmia Industries Ltd. v. CCE</i> 1999 (112) E.L.T. 305 (T)
Filler wire	Straightening and cutting into required sizes of wires (stainless steel)	<i>D & H Sechron Electrodes Pvt. Ltd. v. CCE</i> 1990 (40) E.L.T. 401 (T)
Furniture (for resale)	Polishing/colouring of old furniture	<i>CST v. Musarafalli Kutbuddin</i> 35 STC 503 (Bom.) <i>CST v. Habib Kasambai</i> 35 STC 560 (Bom.)

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Garland/ bouquets	Preparation of flowers	<i>Sudhir Ch. Mukherjee v. Addl. Commissioner of CT</i> 1976 (37) STC 554 (Cal.)
Ingots/billets	Recycling of aluminium waste	<i>Salco Extrusions P. Ltd. v. CCE</i> 1984 (16) E.L.T. 356 (T)
Jelly (stone) (See contra decision under Table below)	Breaking of boulders	<i>Reliable Rock Builders v. State of Karnataka</i> , 49 STC 110 (Kant); <i>Kher Stone Crushers v. G.M. District Industries Centre</i> , 1992 (62) E.L.T. 586 (M.P.)
Pan-masala	Mixing of supari, varyali, dhana dal, etc	<i>State of Gujarat v. Sukhram Jagannath</i> 50 STC 76 (Guj.)
Paper	Polishing/ printing of paper	<i>Modern Paper Industries v. Union of India</i> 1983 ECR 636 D (Bom.)
Pillows	Covering an uncovered pillow	<i>DP Foam Pvt. Ltd. v. CCE</i> 1999 (106) E.L.T. 544 (T)
Pine apple	Slicing of pineapple	<i>Dy. CST v. PIO Food packers</i> , 1980 (6) E.L.T. 343 (S.C.)
Planks/rafters	Sawing of timber logs	<i>Y. Mohiden Kunhi and Others v. CCE</i> 1986 (23) E.L.T. 293 (Kar.) See also <i>Sanghvi Enterprises v. CCE</i> 1984 (16) E.L.T. 317 (T) <i>CCE v. Kuttly Flush Doors & Furniture P.d.</i> 1988 (35) E.L.T. 6 (S.C.). Departmental appeal dismissed 1997 (89) E.L.T. A105.
Powdered pepper/ Turmeric	Powdering of pepper/turmeric	<i>Mahabirprasad Bishiwala v. State of W.B.</i> 31 STC 628 (Cal.) <i>Krishna Chander Dutta (Spice) Pvt. Ltd. v. CTO</i> (1994) 93 STC 180 (S.C.) 1994 (70) E.L.T. 501 (S.C.)
Reels of lesser width and diameter	Slitting and rewinding of paper (jumbo reels)	<i>CCE v. Reelco Paper Products (P) Ltd.</i> 1989 (40) E.L.T. 435 (T)
Turmeric powder	Pulverising of turmeric	<i>Krishna Chander Dutta (Spice) P. Ltd. v. CTO</i> 1994 (70) E.L.T. 501 (S.C.)
Water	Process of removing chemicals to make it soft without purifying	<i>McDowel Co. Ltd. v. CCE</i> 1999 (105) E.L.T. 577 (T)

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1.11.4 Instances of Goods/Processes amounting to Manufacture

Final Product	Product/process/activity	Citation
Audio cassettes	Recording of audio cassettes amounts to manufacture as pre-recorded cassette is distinct	<i>Gramophone Co. Ltd. v. CC</i> 1999 (114) E.L.T. 770 (SC)
Bagasse	Crushing of sugarcane	<i>Deccan Sugar and Abkhari Company v. Union of India</i> , 1986 (26) E.L.T. 209 (Mad.)
Bed sheets, bed spreads and table cloths	Cutting, hemming and stitching of running cloth	<i>Kapri International v. CCE</i> 1986 (23) E.L.T. 538 (T)
Biris	Rolling of tobacco	<i>Y. Tirupathy Rao v. CCE</i> 1983 E.L.T. 2346 (AP)
Brass	Mixing of copper & zinc	<i>Khandelwal Metal & Engg. v. Union of India</i> , 1983 E.L.T. 292 (Del.) (affirmed in 1985 (20) E.L.T. 222 (SC))
Brass tubes new	Melting and remaking of tubes of brass out of old brass tubes	<i>Multi. Metals Ltd. v. CCE</i> 1995 (75) E.L.T. 938 (T) affirmed by the Supreme Court in 1995 (78) E.L.T. A31
Bright bars	Drawing of round bars	<i>Veekayan Industries v. CCE</i> 1985 (21) E.L.T. 596 (T)
Camphor cubes	Conversion of camphor granules	<i>Om Prakash Gupta v. CTO</i> 38 STC 73 (Cal.)
Canned foods	Canning of vegetable products	<i>Ramnagar Cane & Sugar Co. v. Union of India</i> , 1983 E.L.T. 6 (Raj.)
Chappals	Assembly of rubber sole & rubber strap mouldings	<i>Achamma Sebastian v. State of Kerala</i> , 1967 (20) STC 483 (Ker.)
Cinema wall paper	Printing of paper	<i>CCE v. Sudhakar Litho Printers</i> , 1988 (36) E.L.T. 346 (T)

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Circles	Rolling & billets of copper	<i>Union of India v. Ramlal</i> , 1978 E.L.T. (J389) (SC)
Computers	Assembly of computer from duty paid parts amounts to manufacture	<i>Sheth Computers Pvt. Ltd. v. CCE</i> 2000 (121) E.L.T. 738 (T)
Dyed & printed cloth	Dyeing & printing of grey cloth	<i>Lal Woolen and Silk Mills P. Ltd. v. CCE</i> 1999 (108) E.L.T. 7 (S.C.)
Evacuated Bottles	Empty bottles cleaned, siliconized, evacuated sealed and sterilised to make a new product	<i>Shri Krishna Keshav Laboratories Ltd. v. CCE</i> 1999 (105) E.L.T. 117 (T)
Fruit Drink	Conversion of fruit pulp to ready made drink	<i>Godrej Foods Ltd. v. CCE</i> 2000 (122) E.L.T. 231 (T)
Ghee	Boiling of butter	<i>Motilal Ramchandra Oswal v. State of Bombay</i> 3STC 140 (Bom.)
Gittis, ballast	Crushing of stone boulders	<i>Kher Stone Crusher v. G.M. Dist. Industries Centre</i> 1992 (61) E.L.T. 587 (MP-FB); <i>Contra Reliable Rock Builders v. State of Karnataka</i> , 1982 49 STC 110 (Kar.)
Ground black pepper	Grinding of black pepper	<i>CCE v. Herbal Isolates (P) Ltd.</i> 1994 (74) E.L.T. 929 (T)
Ingots	Metting of scrap iron	<i>Rangoon Metal & Refining Com v. State of Tamil Nadu</i> 47 STC 60 (Mad.)
Jewellery	Conversion of crude diamonds	<i>Bapalal & Co. v. Govt of India</i> , 1981 E.L.T. 587 (Mad.)
New jewellery	Melting/conversion of jewellery (Old)	<i>Chenna Kesavalu v. Board of Revenue</i> , 1981 (47) STC 403 (Mad.)
Photographic films	Cutting slitting of jumbo rolls of photographic films	CBEC Circular No. 13/ 92-CX3, dated 28-12-1992, 1993 (63) E.L.T. T31

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Recorded video cassette	Recording and re-recording of blank video cassette	<i>Garware Plastics & Polyesters Ltd. v. CCE</i> 1993 (67) E.L.T. 670, 673 (T).
Rice	Dehusking of paddy	<i>State of Karnataka v. B. Raghuram Sathy</i> , 47 STC 282 (S.C.)
Rice	Milling of paddy	<i>M. Narayanan Nambiar v. State of Karnataka</i> 44 (STC) 191 (Ker.)
Water filter	Putting together parts alongwith bought out filter cum purifier	<i>Eureka Forbes Ltd. v. CCE</i> 2000 (122) E.L.T. 550 (T)

It should be noted that the above decisions may not be the final word since we normally see conflicting decisions being rendered by various courts on the same set of facts.

1.12 DUTIABILITY OF INTERMEDIATE PRODUCTS AND CAPTIVE CONSUMPTION

The definition of manufacture under section 2(f) of the Act would also imply that manufacture would take place at an intermediate stage of the process, as long as the intermediate product was known commercially as a distinct and identifiable product. Further, the word 'product', as occurring in Entry 84, List I, Schedule VII of the Constitution would cover intermediate goods also. However, although excise duty is chargeable on manufactured goods, the collection of the levy is postponed to the time of removal of goods from the factory. In other words, even though section 3 of the Act imposes the levy on the event of manufacture, the Rules require the duty to be paid only at the time of removal from the factory. In case of *Collector v. Vazir Sultan Tobacco Co. Ltd.* 1996 (83) E.L.T. 3, the Supreme Court has held that the words used in section 3(1) "in such manner" applies to "collection". Hence, the section creates the "levy" itself and collection is left to be regulated by the Rules. Captive Consumption in the context of Excise Law signifies utilisation of goods produced or manufactured within the factory of production. This is normally prevalent in large factories with several departments in diverse manufacturing processes with their departmental and intradepartmental stock transfers. In such cases, emergence of goods in one process, which are used in another process, would require compliance of procedure relating to captive consumption, as the removal of goods or consumption thereof for or in another process would be a 'clearance' in law as per Rule 9 read with Rule 49 of the Rules (now Rule 4), which requires payment of duty.

Rules 9 and 49 of the Central Excise Rules 1944, prior to 1st July 2001, and Rule 4 presently, specify that excise duty will be chargeable only on removal of excisable goods from the factory premises or from the approved place of storage. Prior to their amendment by the Finance Act, 1982, these Rules, read together, implied that there was no excise duty

liability on intermediate goods of any kind, since there was no removal of such goods from the factory at all but these goods were consumed within the factory in the manufacture of finished products.

The Delhi High Court, in *J.K Cotton Spinning & Weaving Mills Co. Ltd. Vs. Union of India* (1981) (8) ELT-887, held that intermediate goods were not 'removed', since they were captively consumed and hence no duty could be collected on such goods in terms of Rules 9 and 49 (prior to amendment). The decision was rendered in the context of usage of such goods in an uninterrupted and continuous process. The Gujarat High Court and the Karnataka High Court took a contrary view. However, several assesses began to follow the decision in J.K Cotton's case and discontinued payment of duty on intermediate products.

However, the Finance Act, 1982 amended the provisions of Rules 9 and 49 of Central Excise Rules 1944 with retrospective effect from 28.2.1944, being the date on which the Central Excise Act came into force. The amendments meant that intermediate goods would be chargeable to duty as they would be deemed to have been removed prior to consumption in the manufacturing process. This amendment was upheld by the Supreme Court in *J.K. Spinning & Weaving Mills vs UOI* 1987 (32) ELT 234 (SC). Therefore, captive consumption would amount to removal though there are several exemption notifications like 67/95 which under specified circumstances exempt captive consumption from payment of duty.

It must also be understood that as discussed earlier the Supreme Court in its decisions in *Union Carbide India Ltd. Vs. Union of India* (1986) (24) ELT-169 and in *Bhor Industries Ltd. Vs. C.C.EX.* (1989) (40) ELT-280 has held that an intermediate product would be excisable only if it is a complete product in the sense that it is capable of being sold to a consumer. Thus marketability is essential for charging an article to duty. Therefore where the intermediate product is not capable of being sold it is not dutiable even if it is included in the Tariff Entry. In other words intermediate goods will be chargeable to duty under law only if the test of marketability is met.

The Tribunal, in *Hindustan Lever Ltd. Vs. C.C.EX.* (1990) (30) ECR-180, has held that intermediate goods which are not sold nor are marketable, are not excisable and that the burden of proof regarding marketability is on the Revenue.

In *Krishna International Vs. C.C.EX.* (1994) (71) ELT-694, the Tribunal has held that the burden of proving that products emerging at an intermediate stage of processing are marketable and hence are 'goods' is to be discharged by the excise authorities and, if not, excise duty would not be leviable.

Intermediate goods which are bought into being *insitu* in the process will not be chargeable to duty since they are not marketable. Moreover, transient and unstable intermediate goods would also not be chargeable to duty on the same basis. However, other kind of intermediate products, which are capable of being marketed as goods in their own right, will be chargeable to duty, notwithstanding that they are not packed or stored separately but are used as part of a continuous process.

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In *BPL Electronics Vs CCE 1994 (71) ELT 801*, the Tribunal held that exemption to captive consumption is not deniable merely because manufacturer has raised an invoice but used the goods within the factory of production. In the instant case the manufacturer manufactured the moulds intended for use in factory in which they are manufactured and merely on the fact of raising an invoice in respect of certain moulds in favour of a financial company, a liability for charging duty is not created, levy of excise duty being on manufacture and not on saleability.

1.13 DUTIABILITY OF SITE RELATED ACTIVITIES AND IMMOVABLE PROPERTY

We have already seen that excise duty is a levy on moveable goods and not on immovable goods or property. The aforesaid principle is of paramount relevance for determining the excisability of activities undertaken at project sites. The aspect of excisability of site related activities is source of perennial litigation between department and assesses. Reference may be made to the definition of immovable property which has been set out earlier.

Excise duty is chargeable when, at site, there emerges moveable goods during the course of fabrication or bringing into being of immovable property in the form of buildings, plant etc. In other words, if movable goods such as fabricated parts, structures, equipment are brought into being and they are thereafter mounted or fixed on civil foundations so as to complete the construction, excise duty will be chargeable on such movable goods, notwithstanding that the final products are items of immovable property. On the other hand, if the site work is carried out on top of civil foundation and such parts, structures etc are erected piece by piece on such foundation, no movable goods are brought into being and hence no duty is chargeable of such activities.

In this connection, the Central Board of Excise and Customs has issued a circular on the subject in 17/89 dated 21.4.89. The principles laid down therein are as follows :-

- (i) At the factory, duty would be chargeable on the parts and components of such goods leaving the factory in the condition in which they are removed. Thus if together, the goods can be regarded as a chimney or a tank or a scrubber or tower or a hopper in completely knocked down condition, or having the essential character of the aforementioned goods, the goods would be chargeable to duty under the headings/sub-headings appropriate to such goods in their complete form; otherwise such parts and components should be charged to duty under the headings/sub-headings appropriate to such parts and components.
- (ii) At site, duty would be chargeable only if the assembly of parts/components results in a different recognizable marketable product before installation in an immovable manner. Mere bringing together of parts and components would not be excisable.
- (iii) However, at site, if the piece by piece erection or installation of parts or components result in an immovable property, then no duty would be required to be levied on such property. The Board has thus reiterated the well-known principles for deciding on whether or not specific site related activities would attract excise duty liability.

The tests laid down by the Supreme Court as found in the celebrated case of *Municipal Corporation of Greater Bombay vs Indian Oil Co.Ltd* 1991 Suppl(2) SCC 18 can be summarized as under:

“The test was one of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the former is positive it must be movable property but if the answer to the latter part is in the positive, then it would be treated as permanently attached to the earth.”

Immovable property or articles embedded to earth, structures, erections and installations are also not “goods” because they cannot ordinarily come to the market to be bought and sold - *Quality Steel Tubes (P) Ltd. v. Collector* 1995 (75) E.L.T. 17 (S.C.) & *Mittal Engg. Works (P) Ltd. v. Collector* 1996 (88) E.L.T. 622 (S.C.). Reference can also be made to the following :

Otis Elevator Company's Case 1981 E.L.T. 710 (G.O.I.)

Gujarat Machinery Manufacturers Ltd. v. Collector 1983 (12) E.L.T. 825 (CEGAT)

Hyderabad Race Club's case 1996 (88) E.L.T. 633 (S.C.)

However, the Supreme Court in *Sirpur Paper Mills Ltd. v. CCE* 1998 (97) E.L.T. 3 held that assembly of a paper making machine and its erection at site mainly from bought out components and by fabricating the rest of the parts at site, amounts to manufacture. This decision has caused considerable amount of re-thinking as to what constitutes immovable property and also has left the field open for further disputes.

The Supreme Court in a landmark judgement in *Triveni Engineering & Industries Ltd. v. CCE* 2000 (120) E.L.T. 273 held that while fixing of steam turbine, alternator and coupling them to form a turbo alternator amounts to a manufacturing process, the resultant property being immovable the same cannot be brought to excise. This decision has once again set the ball rolling in favour of the assessee as regards immovable property and excise.

In *CCE Vs. Man Structural Ltd.* 2001 (130) ELT 401 (S.C.) the Supreme Court held that the Tribunal has failed to consider the facts and proceeded simply upon the basis that structurals are not exigible to excise duty. It has failed to appreciate that there is a tariff entry which makes structurals exigible to excise duty and that they are so exigible, provided that they are new identifiable goods that are the result of manufacture or processes and they are marketable.

Considering the above conflicting judgements, CBEC issued *Circular No. 58/1/2002-CX*, dated 15-1-2002 to clarify its position on the excisability of immovable property which is as under:

- (i) For goods manufactured at site to be dutiable they should have a new identity, character and use, distinct from the inputs/ components that have gone into its production. Further, such resultant goods should be specified in the Central Excise Tariff as excisable goods besides being marketable i.e. they can be taken to the market and sold (even if they are not actually sold). The goods should not be immovable.

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- (ii) Where processing of inputs results in a new product with a distinct commercial name, identity and use (prior to such product being assimilated in a structure which would render them as a part of immovable property), excise duty would be chargeable on such goods immediately upon their change of identity and prior to their assimilation in the structure or other immovable property.
- (iii) Where change of identity takes place in the course of construction or erection of a structure which is an immovable property, then there would be no manufacture of "goods" involved and no levy of excise duty.
- (iv) Integrated plants/machines, as a whole, may or may not be 'goods'. For example, plants for transportation of material (such as handling plants) are actually a system or a net-work of machines. The system comes into being upon assembly of its component. In such a situation there is no manufacture of "goods" as it is only a case of assembly of manufactured goods into a system. This cannot be compared to a fabrication where a group of machines themselves may be combined to constitute a new machine which has its own identity/marketability and is dutiable (e.g. a paper making machine assembled at site and fixed to the earth only for the purpose of ensuring vibration free movement)
- (v) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.
- (vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be moveable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. Rule 2(a) of the Rules for the Interpretation of Central Excise Tariff will be attracted as the guiding factor is capability of being marketed in the original form and not whether it is actually dismantled or not, into its components. Each case will therefore have to be decided keeping in view the facts and circumstances, particularly whether it is practically possible (considering the size and nature of the goods, the existence of appropriate transport by air, water, land for such size, capability of goods to move on self propulsion -ships- etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and marketed without first being dismantled into component parts, the goods would be considered as immovable and therefore not excisable to duty.

- (vii) When the final product is considered as immovable and hence not excisable goods, the same product in CKD or unassembled form will also not be dutiable as a whole by applying Rule 2(a) of the Rules of Interpretation of the Central Excise Tariff. However, components, inputs and parts which are specified excisable products will remain dutiable as such identifiable goods at the time of their clearance from the factory or warehouse.
- (viii) The intention of the party is also a factor to be taken into consideration to ascertain whether the embedment of a machinery in the earth was to be temporary or permanent. This, in case of doubt, may help determine whether the goods are moveable or immovable.

Keeping the above factors in mind the position is clarified further in respect of specific instances which have been brought to the notice of the Board.

- (i) Turn key projects like Steel plants, Cement plants, Power plants etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their assembly/installation/erection/integration/inter-connectivity on foundation/civil structure etc. at site, will not be considered as excisable goods for imposition of central excise duty - the components, however, would be dutiable in the normal course.
- (ii) Huge tanks made of metal for storage of petroleum products in oil refineries or installations. These tanks, though not embedded in the earth, are erected at site, stage by stage, and after completion they cannot be physically moved. On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are, therefore, not moveable and cannot be considered as excisable goods [Reference para 15 of Triveni judgement supra and the case of *CCE Chandigarh v. Bhagwanpura Sugar Mills reported in 2001 (134) E.L.T. 673 (Tri.-Del.) = 2001 (47) RLT 409 (CEGAT-Del)*]
- (iii) Refrigeration/Air conditioning plants. These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff.
- (iv) Lifts and escalators. (a) Though lifts and escalators are specifically mentioned in the tariff, those which are installed in buildings and permanently fitted into the civil structure, cannot be considered to be excisable goods. Such lifts and escalators have also been held to be non-excisable by the Govt. of India in the case of *Otis Elevators India Co. Ltd. reported in 1981 (8) E.L.T. 720 (GOI)*. Further, this aspect was also a subject matter of C&AG's *Audit Para No. 7.1(b)/98-99 [DAP No. 186]* which has since been settled by the C&AG accepting the Board's view that such lifts and escalators are

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not excisable goods. Also refer *CCE v. Kone Elevators India Ltd. reported in 2001 (138) E.L.T. 635 (Tri.-Chen.) = 2001 (45) RLT 676 (CEGAT-Chen)*. (b) There may, however, be instances of fabrication of complete lifts and escalators which are movable in nature as a whole and can be temporarily installed at construction sites or exhibitions for carrying men or material. Such cases alone would be liable to duty under sub-heading 8428.10 of the Central Excise Tariff.

In *Unicorn Industries Vs. CCE 1990 (50) ELT 279*, the Tribunal has held that the operation of supply of manufactured and bought out equipment and components by the assessee and erection and commissioning of the plant which comprised of the equipment and components amounts to manufacture. It was held that manufacture and clearance of various manufactured and bought out equipments taken from their factory and erected at site led to the emergence of a new commodity liability to duty. The Tribunal followed the Supreme Court's decision in *Narne Tulaman Manufacturers Pvt. Ltd. Vs. CCE 1988 (38) ELT 566*, wherein it was held that assembly of an excisable product out of duty paid components would amount to manufacture and the assembly of both own manufactured parts together with bought out parts/components would amount to manufacture and accordingly the person carrying on such activity was a manufacturer and liable to duty. However, the aspect on non excisability of immovable property was not argued in *Narne Tulaman's* case. If the emergent final product is immovable property then no liability to excise duty accrues.

1.14 WHETHER ASSEMBLY AMOUNTS TO MANUFACTURE

Assembly is a process of putting together a number of items or parts of an item to make a product or item. From a general point of view not all cases of assembly would amount to manufacture in as much as an already manufactured item may be put in a readily usable form. The assembly may take place before the sale or after the sale of manufactured goods and again at the factory gate of the manufacturer or the customer's site. It may be done by the manufacturer/buyer/intermediary/technician. In all such cases, the questions that arise are :-

- (a) Whether such assembly is manufacture?
- (b) Do new goods emerge as a result of assembly?

The leading judgment in this context is *Narne Tulaman Manufacturers Pvt. Ltd. v. CCE 1988 (38) E.L.T. 566 (S.C.)*. Their Lordships held that as the Tribunal had found that the Appellant had fitted a platform, load cells and indicator system which in the assembled form became a weigh bridge, there was a commercial commodity, having a distinct name, character and use resulting in manufacture. The aspect whether the resultant product would become an immovable property was not argued or considered. Therefore, the general proposition would be that if the assembly results in new commercial commodity with a distinct name, character and use, then it would amount to manufacture.

In *BPL India Ltd. Vs CCE 2002 (143) ELT 3*, the Supreme Court held that assembly of imported kits of VTR with colour monitors imported in disassembled condition amounted to

manufacture since the end product had a distinct character and use and the process of assembly was done by technical experts or skilled persons.

1.15 DUTIABILITY OF WASTE AND SCRAP

The long legal battle on the dutiability of waste and scrap was settled by the Supreme Court by its decision in *Khandelwal Metal & Engineering Works Vs. U.O.I 1985(20) ELT 222* by holding that notwithstanding that process waste and scrap arose as intermediate products or by-products out of final products, nevertheless such process waste and scrap, if marketable, would be chargeable to duty in view of the incorporation of the specific sub-headings in various Chapters of the revised Tariff. The apex court held that process waste and scrap was a commercially distinct and identifiable product and has commercial value. Hence, such waste and scrap were chargeable to duty, if covered in the Tariff.

Following the decision in Khandelwal's case, the Tribunal, in *Tata Iron & Steel Co. Ltd. Vs. CCE 1993 (49) ECT 665*, has held that a waste product arising during the course of manufacture of a final product is excisable if classified under the Central Excise Tariff. In *CCE Vs. Oswal Vanaspati & Allied Industries 1994 (70) ELT 236*, it was held that spent earth is excisable goods in view of the fact it is classifiable under a particular subheading of the Central Excise Tariff.

Hence the position as it currently stands is that all process waste and scrap, if incorporated in the Tariff and if marketable, would be chargeable to duty. However, the Supreme Court in *UOI vs Indian Aluminium Co.Ltd 1995 (77) ELT 268* made a slight departure on the facts and held that refuse, ashes and rubbish are different from waste and scrap and though they may fetch a value, they are not marketable and hence not excisable. In that case, aluminium dross was considered to be a refuse.

It is important to note here is that as the excise duty is on manufacture, the waste and scrap actually generated in the course of manufacture alone is chargeable to duty and the waste and scrap generated without any process is not liable to excise duty.

1.16 PACKING, LABELLING AND BRANDING ACTIVITIES

Packing of dutiable goods is a process of manufacture. The definition of manufacture as contained in section 2(f) of the Act, covering incidental and ancillary activities there under, would incorporate within its ambit the activity of packing, which is a necessary adjunct to manufacture. Further, goods are normally treated as fully manufactured for the purpose of accounting in the statutory excise records at the stage where they are packed in their normal packing, without which they cannot be delivered in wholesale at the factory gate. In other words the activity of packing of otherwise fully manufactured goods is the process which renders such goods marketable and consequently the activity of packing is part and parcel of manufacture. Reference is also made in this connection to section 4 of the Central Excise Act governing the determination of value of excisable goods. The aforesaid provisions of section 4 would also indicate that packing is always contemplated under excise law as a part of the entire process of manufacture by which input materials are

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transformed into commercially distinct, identifiable and marketable finished products. It is to be noted that for the goods specified in Third Schedule of Central Excise Tariff, the process of packing or repacking of such goods in a unit container or labelling or re-labelling of containers amounts to manufacture. Further, the declaration or alteration of retail sale price or adoption of any other treatment on the goods to render the product marketable to the consumer also results in manufacture. The goods specified in Third Schedule of the Central Excise Tariff are valued on MRP basis as per the provisions of Section 4A.

Further, several Chapters of the Central Excise Tariff also incorporate the duty rates on excisable goods packed in packages. In other words, the Tariff itself determines the duty rates of excisable goods in a fully packed and saleable condition. For example, milk powder is chargeable to duty only if it is put up in unit containers. In case it is produced and consumed within the factory of production without packing in such unit containers, there is no liability to duty. Unit containers are also defined in the Tariff as containers, large or small, designed to hold a predetermined quantity or number. Several examples of unit containers are also described therein.

The position in law however changes when excisable goods which are packed in bulk are charged to duty and are thereafter dispatched to outside godowns wherein they are repacked into small containers. In such a situation, the principle in law is that since the bulk product has already been fully manufactured and has been marketed or dispatched in the factory, the repacking activity would not constitute manufacture in law. There are numerous decisions to this effect both of the Tribunal and of the High Courts. In *C.C.EX. Vs. Prabhat Packaging Corporation (1990) (47) ELT-112*, the Tribunal held that repacking of an already-manufactured product would not amount to manufacture in excise law. Also, the reason why repacking would not constitute manufacture is that the activity does not result in the emergence of any commercially distinct end product since both the bulk duty paid finished products as well as the individually packed finished products are commercially known as one and the same articles. Hence, the test of transformation into a distinct end product, in terms of the Supreme Court's decision in DCM's case, is not fulfilled and hence repacking would not amount to manufacture.

Another aspect of the issue is that of packing together of a manufactured item together with a bought out or purchased item. It was held by the tribunal that packing together of a fully manufactured product and the bought out item would not bring into existence any new commodity. Consequently, the duty liability would be restricted to the manufactured product only. The mere activity of packing together of two distinct goods in a single container would not bring into existence any new commodity; here it is important to distinguish the activity of packing together of two different products from that of assembly of the products together to form a distinct third product. In other words, while such packing would not constitute manufacture, assembly would certainly constitute manufacture. Reference is made in this connection to the Supreme Court's decision in the *Narne Tulaman* case.

Coming now to the aspect of whether labelling and branding activities constitute manufacture or not, the settled position in law is that an unlabelled and a labelled product is normally treated in commercial parlance as the same and consequently the mere labelling of

fully manufactured products would not constitute manufacture in law. The Bombay High Court, in *Pioneer Tools and Appliances (P) Ltd. Vs. Union of India* (1989) (42) ELT-384 has held that mere affixation of labels would not render the person who undertakes the said activity as a manufacturer since the activity would not constitute manufacture in law.

As far as question of branding of goods is concerned there are numerous decisions, which hold that such branding would not amount to manufacture. In most of these cases, the manufacturer was affixing the brand name of the customers on the specified goods and the Department sought to establish that the brand name owner was the manufacturer in law. This was negated by the Supreme Court in a series of three decisions in *Union of India Vs. Cibatul Ltd.* (1985) (22) ELT- 302, *Joint Secretary to Govt. of India Vs. Food Specialties Ltd.* (1985) (22) ELT-324, and in *Sidhosons Vs. UOI* (1986) (26) ELT-881. The question whether branding of already manufactured goods was a process of manufacture was not per se considered in these decisions and Court rendered its decision only on whether or not the brand name owner was the manufacturer under excise law. However, in *Banner & Co. Vs Union of India* (1994) (70) ELT-181, the Calcutta High Court held that affixation of a brand name on specified goods did not amount to manufacture. Similarly, in the Pioneer Tools case (supra), the Bombay High Court impliedly held that the activity of branding carried out by a wholesale buyer on fully manufactured goods could not constitute manufacture under excise law so as to require excise duty liability discharged on such an activity. The Apex Court agreed in this regard in *Metal Box (I) Ltd.* (1996).

In view of the aforesaid position of law, wherever there are serious revenue implications, the Legislature has introduced the concept of artificial definition of manufacture to include the activity of repacking, relabelling or branding as amounting to manufacture. For example, you would find these activities as amounting to manufacture under Chapter 21 or Chapter 30 of the Tariff. Therefore, wherever the Tariff would state so, such activities would amount to manufacture.

1.17 CAN THE TEST OF CHANGE IN TARIFF HEADING/SUB-HEADINGS BE ADOPTED FOR IDENTIFYING WHETHER A PROCESS AMOUNTS TO MANUFACTURE

The manufacture and production of goods is the event for attracting the levy of duty. However, unless such goods are covered under the individual headings/sub-headings of the Chapters of the Central Excise Tariff, no duty liability would arise. There is thus an intricate link between manufacture of goods and the liability that would arise. The aforesaid aspect brings into focus the question whether there has to necessarily be a change from one Tariff Heading/sub-heading to another in order to bring the said activity within the ambit of the definition of manufacture under excise law. In other words, the question to be answered is whether a change in Tariff heading or sub heading between input material and the resultant finished product is required so as to render such finished products liable to duty.

This question was considered by the larger Bench of the Appellate Tribunal in *Guardian Plasticote Vs. C.C.EX.* (1986) (24) T-542 wherein the Tribunal held that in such an eventuality, the definition of manufacture would be attracted. The reasoning was that there was a transformation from one identifiable and distinct article to another identifiable and

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distinct article, known differently in the trade parlance. It was held that since the market understood the two goods differently, the fact that the tariff headings or sub headings did not change as a result of the process was of no relevance for determining the chargeability. The decision was upheld by the Hon'ble Supreme Court in landmark decisions in *Laminated Packings (P) Ltd. Vs. C.C.EX. (1990) (49) ELT-326* and in *Union of India Vs. Babubhai Nychand Mehta (1991) (51) ELT-182*. The Supreme Court held that a process would amount to manufacture when input and output material were differentiated in the commercial or trade parlance and that the fact that the same chapter heading or sub heading would govern both the input and output material was not germane to the issue. The Apex Court held that the commercial or trade parlance test was a safe and reliable test which must necessarily be adopted in such a situation so as to determine whether or not the process amounted to manufacture or not.

Therefore, the test would be of commercial differentiation and not whether the Tariff heading changes or not.

1.18 DETERMINATION OF TAXABLE EVENT FOR CHARGE OF DUTY

Before getting into the discussion it will be relevant to note the differences between the exempted goods and the goods which are out side the purview of the Central Excise. Exempted goods are basically chargeable to duty but with an intention of giving relaxation, they are exempted from payment of duty. On the other hand the goods out side the purview of levy are either goods which are not included in the tariff at all .

The taxable event for the charge of excise duty is the manufacture of goods, as per section 3 of the Central Excise Act. However, the collection of duty is postponed to the stage of removal of goods as per Rules 4 of the Central Excise Rules 2002. The question which arises for consideration is whether goods which are manufactured at the period in time when they were either not chargeable to duty or were exempted from duty could be charged to duty if, subsequent to manufacture but before removal such goods become chargeable to duty, either due to their inclusion in the Tariff or due to withdrawal of the exemption from duty.

In its decision in *Wallace Flour Mills Vs. C.C.EX. (1989) (44) ELT-598*, the Supreme Court held that the taxable event for the liability to duty was manufacture of goods but the duty could be levied and collected at any later stage for administrative convenience. Merely because the payment of duty under Rules is postponed to the stage of removal it could not be contended that the removal of goods has become the taxable event for the levy of duty. The Supreme Court considered the several earlier High Court judgements on the point, especially, the Madhya Pradesh High Court's decision in *Union of India Vs. Kirloskar Brothers (1978) (2) ELT-690*, the Bombay High Court's decision in *Synthetics & Chemicals Ltd. Vs. S.C. Coutinho (1981) (8) ELT-414* and the Madras High Court's decision in *Sudaram, Textiles Ltd. Vs. Asstt. Collector C.EX. (1983) (13) ELT-909*. Consequently, the excisable goods which were chargeable to duty under the Tariff at the time of manufacture but were exempted under an exemption notification will be liable to payment of duty if, post manufacture and prior to removal, such exemption from duty is withdrawn. However, in

cases where the goods were outside the purview of the Tariff at the time of manufacture such goods would not be chargeable to duty even though, subsequent to manufacture but prior to removal, such goods were brought within the purview of the Tariff or were charged to a duty of excise by means of an amendment to the Tariff. In other words, since the goods were not excisable goods as per the provisions of section 2(d) at the time of manufacture, they would not be liable to duty even though they were brought within the purview of the aforesaid section prior to removal from the factory.

This was the implication of the decision of the Supreme Court in *Vazir Sultan Tobacco Co.Ltd vs CCE 1996 (83) ELT 3*.

To summarise, the current position in law is that exempted goods will be chargeable to duty at the time of removal if, subsequent to manufacture but before removal, the exemption from duty is withdrawn. However, goods that are not covered within the ambit of the Central Excise Tariff will not be chargeable to duty even though subsequent to manufacture but before removal such goods are brought within the purview of the tariff or are made chargeable to a specified rate of duty under the Tariff. [*Vazir Sultan Tobacco case*]

Self-examination questions

1. Define the nature of excise duty and enumerate the duties leviable under the various excise laws and rules made thereunder.
2. Describe the taxable event in central excise.
3. Discuss briefly whether excise duty is attracted on the excisable goods manufactured in:
 - (a) Jammu & Kashmir;
 - (b) Special Economic Zone;
 - (c) 100% EOU;
 - (d) Indian Territorial Waters;
 - (e) Beyond Indian Territorial Waters.
4. Examine whether the following amount to 'manufacture':
 - (i) Labeling or re-labeling of unit containers of chocolate
 - (ii) Dyeing and colouring of yarn
 - (iii) Pulverising of chilly
5. With reference to the Central Excise Act, 1944, define the following:
 - (i) Factory
 - (ii) Appellate Tribunal
 - (iii) Excisable Goods

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- (iv) Wholesale Dealer
 - (v) Sale and purchase
 - (vi) Broker or commission agent
6. Discuss whether the following can be considered as excisable goods for the purpose of levying excise duty:
- (a) Turn key projects
 - (b) Lifts and escalators
 - (c) Refrigeration or Air conditioning plants
7. Explain briefly whether "assembly" would tantamount to "manufacture" under the Central Excise Act, 1944.
8. M/s. Onkar Steel Works processes cold rolled strips from duty paid hot rolled strips. Duty is being paid by M/s. Onkar Steel Works on removing cold rolled strips. M/s. Onkar Steel Works contends that cold rolled strips are only those strips, which emerge after the hot rolled strips have been processed and the edges sheared and slit according to the specification of the customer. However, Department has claimed that cold rolled strips meant and included unsheared and unslit strips also. The basis of the Department's claim is Indian Standard Specification Nos. 1956 to 1962, which specify that a strip "is supplied in straight length or in coil with mill, trimmed or sheared edges." On this basis duty is demanded on the unsheared and unslit strips also. Discuss whether the demand put forth by the Department is tenable in law. You may refer to any decided case laws on this issue.
9. Agrotech Industries Pvt. Ltd uses coal as fuel for producing steam to run the machines used for manufacturing the end product. Coal is burnt in boilers and furnaces to produce steam. Normally coal is reduced to ash when it is burnt in boilers. Some part of it does not get fully burnt because of its low combustible quality. This unburnt or half burnt portion left out in the boiler is called cinder. A show cause notice is issued asking why the duty should not be demanded on such cinder produced by Agrotech Industries Pvt. Ltd on the following grounds:
- (i) Cinder is an excisable good as it finds a place in Serial no. 26.21 of Chapter 26 of the First Schedule of The Central Excise Tariff Act, 1985. Serial no.26.21 covers "other slag and ash, including seaweed ash (kelp).
 - (ii) Cinder is exigible to excise duty as it is manufactured as a by-product of coal that emerges in the course of manufacture of the end product. Also, it is marketable as the same is sold by the Agrotech Industries Pvt. Ltd.

You are appointed as a consultant of Agrotech Industries Pvt. Ltd. Discuss your views on the above issue.

10. Pravaal purchases duty paid wire rods and draws them into a thinner gauge. The two items fall under different tariff headings. Pravaal claims that the process undertaken by him does not amount to manufacture. His claim is based on a decision given by the Apex Court in the case of *Collector of Central Excise v Technowled Industries 2003 (155) E.L.T. 209 (S.C.)*. Is the claim of the assessee correct in the present position of law?
11. MTZ Ltd. purchases edible vegetable oil from the open market and refines it. Refined edible vegetable oil falls in Chapter 15 of the First Schedule to the Central Excise Tariff. MTZ Ltd. claims that the process undertaken by it does not amount to manufacture as there is no Chapter Note or Section Note which specifies that refining of edible vegetable oil amounts to manufacture.

You are required to advise with reference to the present position of law in this regard.

12. Alpha Ltd. is engaged in the activity of cutting/slitting of jumbo rolls of toilet paper of a width exceeding 36 cms. The jumbo rolls are purchased on payment of excise duty from various suppliers. The process undertaken by Alpha Ltd. reduces the width of the jumbo rolls to less than 36 cms. The rolls with width exceeding 36 cms and with width less than 36 cms fall under different tariff headings. The excise department contends that such reduction of width amounts to manufacture. The excise department has assessed and demanded duty from Alpha Ltd. on the basis of the heading covering jumbo rolls of width less than 36 cms.

You are required to examine the situation with the help of a decided case law.

Answers

8. Similar issue came up for consideration before Supreme Court in the case of *Tata Iron & Steel Co. Ltd. v. Union of India 2004 (164) E.L.T. 372 (S.C.)*. Here, the Apex Court pointed out that there was no separate heading in respect of cold rolled strips and hot rolled strips.

Another reasoning put forward by the Supreme Court was that there was no proof of the marketability of the cold rolled strips, which is an essential item of manufacture. The Court held that Marketability is a question of fact and does not follow from the mere mention of item in the ISI. Therefore, it was held by the Court that the processing of cold rolled strips from duty paid hot rolled strips does not amount to manufacture.

Therefore, the Department's claim in the instant case is not tenable as the very process of manufacturing cold rolled strips from hot rolled strips does not amount to manufacture, thereby, making the demand on unsheared and unslit strips void.

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9. This issue came up for consideration before Supreme Court in the case of *Union of India vs Ahmedabad Electricity Co. Ltd. & Ors.* 2003 (111) ECR 274 (SC). In this case, the Supreme court observed that simply because goods find mention in one of the entries of the First Schedule, it does not mean that they are liable for payment of excise duty. Goods have to satisfy the test of being produced or manufactured in India. Further, the Apex Court held that cinder is not ash – it is something between coal and coal ash.

On the issue regarding manufacture, Supreme Court held that excise duty is an incidence of manufacture and, therefore it is essential that the product sought to excise duty should have gone through the process of manufacture i.e. the raw material should have gone through the process of transformation in to a new product by skillful manipulation. In producing cinder there is no manufacturing process involved. Coal is simply burnt as fuel to produce steam. Coal is not tampered with, manipulated or transformed in to the end product. Burning of coal for purpose of producing steam cannot be said to be manufacturing activity. From burning coal no new product emerges except cinder or ash that is nothing but the inferior quality of coal itself.

Moreover, coal which leads to production of cinder is not used as a raw material for the end product. It is being used only for ancillary purpose that is as a fuel. Therefore, irrespective of the fact whether any manufacture is involved in production of cinder it should be held to be out of tax net for the reason that it is not a raw material for the end product. As regards the marketability aspect, the Court held that since cinder fails the test of being manufactured in India, even if it is saleable, it does not make any difference.

In the light of the above discussion it can be inferred that cinder is not liable to excise duty and the demand by the Department is not tenable in law.

10. The Apex Court had held in the case of *Collector of Central Excise v Technowled Industries* 2003 (155) E.L.T. 209 (S.C.) that there is no manufacture of a new product when the gauge of the rod is made thinner and the product is finished a little better.

However, Finance (No. 2) Act, 2004 has inserted a section note in section XV of the First Schedule to the Central Excise Tariff Act so as to provide that 'the process of drawing or redrawing a rod, wire or any other similar article, into wire' shall amount to 'manufacture'. Therefore, this chapter note overrules the judgment of the Supreme Court.

Hence, the contention of the assessee is not correct in law.

11. The definition of manufacture inter alia provides that "manufacture includes any process, which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture."

Finance Act, 2005 has inserted a Note in Chapter 15 of Central Excise Tariff to provide that in relation to refined edible vegetable oils falling under Headings 1507 to 1515, the process of refining shall amount to manufacture. In this context, the process of refining shall include treatment of crude oil with alkali, bleaching and deodorisation. This Chapter note has been given retrospective effect from 1.03.1986.

Therefore, in the current position of law the process of refining of edible vegetable oil undertaken by MTZ Ltd. shall amount to manufacture.

Note: This matter had come up before the Supreme Court in the case of *Shyam Oil Cake Ltd. v. CCEx., Jaipur, 2004 (174) E.L.T. 145 (SC)*. The Apex Court stated that merely setting out a process in tariff entry would not be sufficient to hold that the particular process resulted in manufacture. If the process was indicated in the Tariff Entry, without specifying that the same would amount to manufacture, then the indication of the process was merely for the purpose of identifying the product and the rate which was applicable to that product. The Apex Court emphasised that for a deeming provision to come in to play it must be specifically stated that a particular process would amount to manufacture. In the absence of it being so specified, the commodity would not become excisable merely because a separate Tariff Item existed in respect of that commodity.

It was observed by the Supreme Court that neither the Section Note nor the Chapter Note nor the Tariff Item gave any indication that the process indicated would amount to manufacture. The product remained edible vegetable oil even after the processing/refining. It was held by the Apex Court that as actual manufacture had not taken place, deeming provision could not be invoked in the absence of a specific statement that the process would amount to manufacture.

However, in view of the above-mentioned amendment made by Finance Act, 2005 this judgment does not hold good anymore.

12. The facts of the problem are similar to that of the case of *CCEx. New Delhi – I v. S.R. Tissues Pvt. Ltd. 2005 (186) ELT 385 (SC)*. In this case, the Supreme Court has held that slitting/cutting of jumbo rolls of plain tissue paper into smaller size does not amount to manufacture as its character and end-use viz., household purposes, do not undergo any change on account of winding, cutting/slitting and packing. Further, slitting and cutting of toilet paper cannot be termed as deemed manufacture as the said process is not treated as manufacture by legislature under any of the Section/Chapter Notes of the Central Excise Tariff.

The Apex Court has elaborated that mere mention of a product in a tariff heading does not necessarily imply that said product is obtained by process of manufacture. Just because raw material and finished product come under two different headings, it cannot be presumed that process of obtaining finished product from such raw

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material automatically constitute manufacture. Therefore, slitting/cutting of jumbo rolls of toilet tissue paper into various shapes and sizes shall not amount to manufacture merely because tissue paper in jumbo roll of size exceeding 36 cms. fall in one entry and toilet roll of a width not exceeding 36 cms. fall in a different entry. The Supreme Court further explained that value addition on account of transport charges, sales tax, distribution and selling expenses and trading margin without any change in name, character or end-use by mere cutting/slitting of jumbo rolls cannot constitute the criteria to decide what is “manufacture”.

In view of the abovementioned decision, the contention of the excise department does not hold good.

