

DEMAND, ADJUDICATION AND OFFENCES

8.1 DEMAND

The word “demand” as per Black’s Law Dictionary means assertion of a legal right; an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act.

8.1.1 Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded [Section 11A]

In accordance with the principles of natural justice the central excise law rightly provides that before any action is taken against an assessee he must be given reasonable opportunity of presenting his case. One such situation would be that relating to the demand of duty not paid, short paid or erroneously refunded.

The show cause notice is invariable to be issued if the department contemplates any action prejudicial to the assessee. Thus, if on account of an infraction of the provisions of the central excise law it is considered appropriate to penalise the defaulter, it is necessary to first issue a show cause notice. The show cause notice would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him. Thus, a show cause notice gives the noticee the opportunity to present his case.

Issue of duty demand notice [sub-section (1)]: A central excise officer serves a show cause notice in the following circumstances:

- (i) when any duty of excise has not been levied, or
- (ii) when any duty of excise has not been paid, or
- (iii) when any duty of excise has been short-levied, or
- (iv) when any duty of excise has been short-paid, or
- (v) when any duty of excise has been erroneously refunded.

The show cause notice is issued whether or not such non-levy or non-payment, short levy or short payment or erroneous refund was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other

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provisions of this Act or the rules made thereunder. The show cause notice is served on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Time limit for issuance of notice: The show cause notice may be served by the central Excise officer within one year from the relevant date.

Extended time limit for issuing the show cause notice [First proviso to sub-section (1)] : However, where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the notice can be served within **five** years from the relevant date.

This provision is very important because the department seeks to always invoke this provision for getting the benefit of extended time limit and also to levy penalty on the defaults made under section 11AC.

The important terms used in the said proviso are “fraud, collusion, willful mis-statement, suppression of fact” and “with an intent of evading the payment of duty”.

Fraud may be defined as “deceit, imposture, criminal deception done with the intention of gaining an advantage”.

Collusion may be defined as “to act in concert especially in fraud; a secret agreement to deceive”.

Willful mis-statement may be explained as “stating wrongly or falsely deliberately”.

Suppression of facts may also be explained as “to hold back the facts”.

‘Intent of evading the payment of duty’ may be analysed as the person acting upon to avoid the payment of duty which he was entitled to pay. Intent shows that *mens-rea* (knowledge) should be present.

Related cases : There are numerous decision regarding this section and proviso. Some of them are listed below :

1. Mere inaction or failure to do something does not constitute suppression. There must be something positive to prove suppression - *CCE v. Chemphar Drugs and Liniments* 1989 (40) E.L.T. 276 - (SC) and also in *Padmini Products v. CCE* 1989 (43) E.L.T. 195(SC).
2. Demand against approved classification list only prospective - *CCE v. Cotspun Ltd.* 1999 (113) E.L.T. 353 (SC -LB).
3. Extended period cannot be invoked where classification list is approved. - *Nat Steel Equipment v. CCE* 1988(34) E.L.T. 8; *Prabhu Steel Industries v. CCE* 1997 (95) E.L.T. 164 (SC).

4. Extended period not invocable when bonafide belief arises out of court judgements - *Cosmic Dye Chemicals v. CCE* 1995 (75) E.L.T. 72(SC).
5. Intention to evade payment of duty necessary in addition to proving fraud, etc - *Tamil Nadu Housing Board v. CCE* 1994 (74) E.L.T. 9(SC).
6. Extended period not invocable when there are conflicting decisions prevailing and non-requirement under law to do something.- *Pushpam Pharmaceuticals Co.v. CCE* 1995 (78) E.L.T. 401 (SC).
7. Proviso to Sec. 11A does not require that notice should be issued within 6 months of knowledge of Department. Notice can be issued anytime within 5 years of relevant date. - *Nizam Sugar Factory v. CCE* 1999 (114) E.L.T. 429 (T-LB).
8. Wrongful understanding of law does not constitute suppression - *Vinod Paper Mills Ltd. v. CCE* 1997 (91) E.L.T. 245 (SC).
9. Mere change in opinion regarding classification not sufficient to invoke extended period - *Prabhu Steel Industries Ltd. v. CCE* 1997 (95) E.L.T. 164 (SC).
10. Information not required to be supplied under law when not supplied does not amount to suppression - *Apex Electricals Pvt.Ltd. v. UOI* 1992 (61) E.L.T. 413 (Guj).
11. Department cannot sleep over the matter for years and accuse the assessee of suppression - *Mutual Industries Ltd v. CCE* 2000 (117) E.L.T. 578 (T-LB).

Period of stay to be excluded in computing the time limit [Explanation to sub-section (1)]: It is clarified that were the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of 1 year or 5 years, as the case may be.

Payment of duty and penalty equal to 25% of the duty within 30 days [sub-section (1A)]: An option is being provided to the person or his agent to whom a notice has been served by the Central Excise Officer for short/non levy or short/non payment or erroneous refund of excise duty by reason of fraud, collusion, or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Central Excise Act or the rules made thereunder with an intent to evade payment of excise duty. Such person or his agent may pay the excise duty in full or in part as may be accepted by him, including the interest payable thereon under section 11AB and penalty equal to 25% of the excise duty specified in the notice or the excise duty so accepted by such person within 30 days of the receipt of the notice.

Determination of duty or interest [sub-section (2)]: The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

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However, where such person has paid the excise duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notices under sub-section (1) have been served shall be deemed to have been concluded in respect of the matters stated therein. The proceedings shall conclude notwithstanding anything contained in sections 9, 9A and 9AA.

In cases where such person has paid excise duty in part along with interest and penalty, the Central Excise Officer shall determine the amount of excise duty or interest which will not exceed the amount partly due from such person.

Time limit for adjudication [sub-section (2A)]: Where any notice has been served on a person under sub-section (1), the Central Excise Officer,

(a) in case any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year;

(b) and in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months,

from the date of service of the notice on the person under sub-section (1).

Waiver of notice [sub-section 2B]: In order to provide a mechanism for early dispute resolution, it has also been provided vide sub-section (2B) of section 11A that an assessee may request for waiver of notice, if he deposits the amount of differential duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer along with interest in respect of only such cases where such non-levy or short levy or non-payment or short payment is by reason other than suppression of facts, fraud, collusion etc.

By opting for waiver of issue of notice, the assessee may avoid long drawn process of adjudication and appellate process including interest on the differential duty demanded. It is therefore, advisable that in cases where the assessee is convinced that the Department is correct in demanding duty, he may opt for this facility.

Normally, a proceeding starts with the issue of a show cause notice to the assessee and giving him an opportunity of representing his case.

Meaning of relevant date [sub-section (3)]: For the purposes of this section,

(i) **"refund"** includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) **"relevant date"** means,—

- (a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid—
- (A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;
- (B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
- (C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;
- (b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;
- (c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

8.1.2 Frequently asked questions on demand

1. When can proceedings be taken under Sec. 11A?	Whenever there is a short levy/short payment or non-levy or non-payment, erroneous refund of duty, the proceedings can be undertaken.
2. What is the difference between non-levy and short levy?	When excise duty has not at all been charged on the product, it becomes non-levy. When the levy has been charged but not correctly, there is short levy.
3. What is the difference between short payment and non-payment?	Short payment means payment of an amount less than what is due. Non-payment means the levy itself has not been paid.
4. What is the difference between short levy and short payment ?	Short levy arises when the charge itself is done at lower rates, for eg., wrong classification of the product. Short payment can be due to short levy or short payment of a correct levy (when payment is made less than what is due).
5. Should the Department intimate the assessee?	It is mandatory for the Department to issue a show cause notice.
6. Within what time should the show cause notice be served?	Where there is fraud, collusion, willful mis-statement or suppression of facts or contravention of any provisions with an intent to evade payment of duty , 5 years from relevant

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	date. In other cases, 1 year from relevant date. Where the service of notice is stayed by court order, the period of such stay would be excluded in computing this time limit. If the matter is before the Settlement Commission, Sec. 32L(3) specifies that the time commencing from date of application to receipt of order sending back the case shall be excluded. It is very important to note that such notice must be received by the assessee within the time limit stipulated above.
7. What is the relevant date?	Relevant date is defined in Sec. 11A(3)(ii) to mean - - in case of short levy/non-levy or short payment/non-payment the date on which the monthly/quarterly return is filed or required to be filed; If there is no such time limit, date of payment of duty. - In cases of provisional assessment, the date of adjustment of duty after final assessment. - In case of erroneous refund, the date of such refund
8. Is it obligatory on the part of the Department to take on record the assessee's representation?	Sub-section 2 makes it mandatory for the officer to consider the representation of the assessee. The officer has to comply with the principles of natural justice.
9. Is it mandatory for the officer to pass a written order or will a simple letter from the department suffice?	It is mandatory for the officer to pass a speaking order. Speaking order is one which gives the reasons for the decision. A simple letter asking for payment of duty is not an order.
10. Should the assessee pay the amount after passing the order?	The assessee has a right of further appeal which grants him rights of obtaining stay of demanded amounts. Please see Chapter on Appellate Procedures.
11. Should the officer adjudicate cases within a particular time limit?	For cases involving fraud, etc. adjudication should complete within 1 year and other cases within 6 months from the date of service of the notice on the person under section 11A(1).
12. Can the assessee pay duty before issue of show cause notice?	No notice would be issued if full duty is paid and intimated to the Department. However this will not apply to cases of fraud etc. Moreover, if there is still some short payment, the officer can recover within 1 year of such intimation.

8.2 INTEREST ON DELAYED PAYMENT OF DUTY [SECTION 11AB]

Interest of duty not paid on time is provided for in the Central Excise statute. It is expected that the interest provision would normally not have to be invoked as the assessee would make the duty payment on time.

Section 11AB contains the provisions in this regard. All cases of short payment etc. will carry interest from the month following the month when the duty should have been paid whether it involves fraud, collusion, willful mis-statement or suppression of fact with an intent to evade the payment of duty or not.

Therefore if the demand is raised, the interest under section 11AB will follow. The interest as said above is payable at a rate not below 10% per annum and not exceeding 36% per annum starting from the date of the next month succeeding the month in which the duty ought to have been paid. Currently, the rate specified is 13% per annum vide *Notification No. 66/2003 dated 12.09.2003*.

However, if in the appeal the demand is increased or decreased the interest is accordingly increased or decreased.

8.3 ADJUDICATION

Central Excise law is a self-contained provision. Besides containing the provisions for levy of duty, the law also provides for the adjudication of matters relating to the legal provisions. The central excise officers are required to adjudicate matters in respect of demand of duty short paid/not paid and imposition of penalty and confiscation of goods. Demand of duty can be raised by any central excise officer under section 11A subject to certain restrictions (*Refer point 8.3.1*). Matters relating to penalty and confiscation of goods are adjudicated by Commissioners of Central Excise under section 33 (*Refer point 8.3.2*).

8.3.1 Adjudication and determination of duty: Central Excise Officers have the power to determine duty short paid or not paid, but erroneously refunded under section 11A of the said Act. For this purpose, the Board has decided that the powers of adjudication and determination of duty shall be exercised, based on monetary limit (duty involved in a case) as follows: -

- (a) All cases involving fraud, collusion, any willful mis-statement, suppression of facts, or contravention of Central Excise Act/ Rules made thereunder with intent to evade payment of duty and / or where extended period has been invoked in show-cause-notices, (including CENVAT cases), will be adjudicated as follows:-

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
(i) Commissioners	Without limit

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(ii) Additional Commissioners	Above Rs.20 lakhs & upto Rs.50 lakhs
(iii) Joint Commissioners	Above Rs.5 lakhs & upto Rs.50 lakhs
(iv) Deputy/Assistant Commissioners	Upto Rs 5 lakhs

- (b) Cases which do not fall under the category (a) above, including all cases relating to determination of classification and valuation of excisable goods and CENVAT credit will be adjudicated as follows:

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
(i) Commissioners	Without limit
(ii) Additional Commissioner	Above Rs. 20 lakhs and upto Rs. 50 lakhs
(iii) Joint Commissioners	Above Rs. 5 lakhs and upto Rs. 50 lakhs
(iv) Deputy/Assistant Commissioners	Upto Rs. 5 lakhs.

- (c) Cases related to issues mentioned under first proviso to section 35B(1) where the cases do not go to Tribunal and have to be referred for the revision petition to Central Government under Section 35EE of Central Excise Act, 1944 would be adjudicated by the Additional Commissioners/ Joint Commissioners without any monetary limit.

8.3.2 Adjudication of confiscations and penalties: Section 33 provides that where anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged —

- (a) without limit, by a Commissioner of Central Excise;
- (b) up to confiscation of goods not exceeding Rs.500 in value and imposition of penalty not exceeding Rs.250 by an Assistant/Deputy Commissioner of Central Excise.

However, the Board, may, in the case of any officer performing the duties of an Assistant/Deputy Commissioner of Central Excise reduce the limits indicated in clause (b) of this section and may confer on any officer the powers indicated in clause (a) or (b) of this section. *[Refer point 8.5 for discussion on penalty and confiscation]*

Section 33A states that the adjudicating authority shall give an opportunity of being heard to a party during the adjudication proceeding, if the party so desires. The adjudicating authority may, if sufficient cause is shown, at any stage of such proceeding grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

Option to pay fine in lieu of confiscation [Section 34]: Section 34 provides an option to pay fine in lieu of confiscation. Whenever confiscation is adjudged, the officer adjudging it, shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

Section 34 makes it clear that confiscation made or penalty imposed under the Central Excise Act or the rules shall not prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law.

8.4 ENFORCEMENT

The central excise officers not only have powers of adjudication but also have powers of enforcement of law. The powers of enforcement include visits, searches, seizures and arrest. The powers are similar in excise, customs and service tax. However, there are differences depending on nature of each tax. Some provisions of customs relating to enforcement powers of Departmental officers have been made applicable to central excise.

Applicability of some provisions of the Customs Act to the Excise Act [Section 12]

Section 12 empowers the Central Government to apply provisions of the Customs Act, 1962 relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals to the Central Excise Act, 1944. In exercise of such power the Central Government has issued *Notification No. 68/63-CE dated 4th May, 1963* making some provisions of Customs Act applicable to central excise subject to some modifications.

The following provisions of Customs Act have been made applicable to Central Excise Act:-

<i>S.no.</i>	<i>Section No. of the Customs Act</i>	<i>Provisions of the Customs Act adapted to the Central Excise Act</i>
(i)	Section 105 (1)	Power to search premises
(ii)	Section 110	Seizure of goods, documents and things
(iii)	Section 115 [excluding clauses (a) and (e) of sub-section (1)]	Confiscation of conveyances
(iv)	Section 118 (a)	Confiscation of packages and their contents
(v)	Section 119	Confiscation of goods used for concealing contravening goods
(vi)	Section 120	Confiscation of smuggled notwithstanding any change in form etc.
(vii)	Section 121	Confiscation of sale proceeds of contravening goods
(viii)	Section 124	Issue of show cause notice before confiscation of goods, etc.

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| (ix) | Section 142(1)(b) and 142(1)(c)(ii) | Recovery of sums due to Government |
| (x) | Section 150 | Procedure for sale of goods and application of sale proceeds |

Applicability of some provisions of the Central Excise Act to service tax [section 14]: Section 14 of Central Excise Act which makes provisions in respect of summons has been made applicable to Service tax. However, provisions relating to search, seizure and arrest are not applicable to Service tax.

Certain other officers required to assist central excise officers [Section 15]: Certain other officers are required to assist central excise officers in delivering their duties of enforcement of law. Section 15 empowers and requires all officers of police and customs and all officers of Government engaged in the collection of land revenue, and all village officers to assist the Central Excise Officers in the execution of Central Excise Act.

Protection of Acts done in good faith [Section 40]: Section 40 provides that no suit, prosecution or legal proceedings shall lie against Central Government or any officer of Central/State Government for anything done or intended to be done, in good faith, in pursuance of Central Excise Act or any rule made thereunder. As per section 40(2), if any proceeding (other than a suit) is to be commenced, one month advance notice is required to be given to Central Government.

8.4.1 Search

Provisions of search and seizure are used by the Central Excise Officers to enforce the provision of the Central Excise Law. These provisions are used as an exception when the direct physical intervention becomes necessary. At the same time the search and seizure is to be done in accordance with the laid down law. In this regard reference is to be made to the applicable provisions of other statutes, i.e. Code of Criminal Procedure and section 105(1) of the Customs Act, 1962 [Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Part C of this Study Material for section 105(1) of the Customs Act, 1962].

The provisions relating to search are given in section 18 of the Central Excise Act which provides that all searches should be made in accordance with the provisions of the Code of Criminal Procedure.

Rules 22 & 23 of the Central Excise Rules, 2002 (hereinafter referred to as the said Rules), empower the authorized officer to enter and search any premises, conveyance or other place. Further, Rule 24 *ibid* specifically empowers such officer to effect a seizure or detention. Moreover, Section 12 of the Central Excise Act, 1944, empowers the Central Government to apply the provisions of the Customs Act to the Central Excise also. In exercise of such powers the Central Government has issued Notification No.68/63, dated 4.5.1963 modifying and extending the various sections of Customs Act, 1962 to Central Excise matters.

In terms of the said rules, an officer empowered by Commissioner by special or general order, can search at any time, any premises or conveyance where he has reason to believe that excisable goods are manufactured, stored or carried in contravention of the provisions of the Act or rules. For a registered premises or for stopping and searching any conveyance in transit no search warrant is required. However, in other cases, normally search warrants are issued by the Deputy/Assistant Commissioner authorizing the search. The Central Excise Officer is also authorized to stop and search any conveyance as well. The search is to be carried out in the presence of two independent witnesses.

Vexatious search and seizure [Section 22]: Section 22 deals with vexatious searches, seizure etc. by Central Excise Officers. In such case the Central Excise office will be liable to punishment under the law. Similar provision is made applicable to any person willfully and maliciously giving false information leading to vexatious search.

8.4.2 Seizure

Rule 24 of the said rules provides for power to detain goods or seize the excisable goods. Provisions of section 110 of the Customs Act are also applicable in this regard [Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Part C of this Study Material for section 110 of the Customs Act, 1962].

It must be noted that seizure is an act depriving the owner of the possession of the goods. Confiscation however results in the ownership of the goods getting transferred to the Central Government. If a Central Excise Officer, has reason to believe that any goods, which are liable to excise duty but no duty has been paid thereon or the said goods were removed with the intention of evading the duty payable thereon, the Central Excise Officer may detain or seize such goods.

Provisional release of seized goods: The power to release seized goods emanates from power to seize itself. The goods seized may be released provisionally under bond along with 25% security or surety by the officer who is normally competent to adjudicate the case. The adjudicating officer will also consider the importance of such goods for evidence, and will release the goods provisionally if the bond is furnished. Wherever necessary, sample may also be drawn. The adjudicating officer, however, will ask the owner or in-charge of the goods to whom the goods were released provisionally to produce the goods any time before the issue of adjudication order, if he is of the view that the goods are liable for confiscation. In case the person to whom goods were released provisionally fails to produce the goods at appointed time, the bond may be enforced for recovering.

Return of records [Rule 24A]: *Where the books of accounts or other documents, seized by the Central Excise Officer or produced by an assessee or any other person are not relied on for the issue of notice, they should be returned within 30 days of the issue of said notice or within 30 days from the date of expiry of the period for issue of said notice. However, the Commissioner of Central Excise may retain such books of accounts or documents, for reasons to be recorded in writing and the Central Excise Officer shall*

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intimate to the assessee or such person about such retention.

The Central Excise Officer derives its power to seize books of accounts or other documents from section 110 of the Customs Act.

8.4.3 Arrest

Provisions for arrest are contained in sections 13 and 18 of Central Excise Act, 1944. These provisions provide for power to arrest, searches and arrests how to be made, disposal of persons arrested, procedure to be followed.

Any Central Excise Officer not below the rank of Inspector of Central Excise with the prior approval of Commissioner of Central Excise can arrest any person under Section 13 whom he has reason to believe that he is liable to punishment under the Central Excise Act. In normal circumstances, prior approval of Commissioner will be taken before arresting a person.

The arrested person shall be produced before the Jurisdictional Magistrate or the Chief Judicial Magistrate, as the case may be, within twenty-four hours of the arrest.

Power to grant bail is normally to be exercised by a Jurisdictional Magistrate.

8.4.4 Recovery of dues [Section 111]

Section 11 contains the provisions, which determine the procedure for recovering the sums payable by any person to the credit of the Government. The section provides that:

The officer empowered by the Central Board of Excise and Customs may recover the duty and any other sums of any kind payable to the Central Government by:

- (i) deducting the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be under his control, or
- (ii) attachment and sale of excisable goods belonging to such person.

However, if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business. The said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Further, if a person from whom some recoveries are due, transfers his business in whole or in part to another person, then all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the possession of the transferee can be attached and sold for recovery. An officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, can make such recovery.

Central Excise Officers not below the rank of Assistant Commissioner have been empowered vide *Notification No.4/2004 – C.E.(N.T.)*, dated 17.02.2004 to require the payment of duty and any other sums of any kind payable to the Central Government,

under any of the provisions of the Act or of the rules made thereunder (including the amount required to be paid to the credit of the Central Government under Section 11D of the Act), within their jurisdiction and thereby to exercise all the powers of such officers specified under section 11.

Further, for the recovery of dues the provisions of section 142 of the Customs Act, 1962 have been made applicable to like matters in Central Excise by Notification No. 68/63-Central Excise dated 4.5.1963 issued under Section 12 of the Central Excise Act, 1944.

If the stay application is filed by the assessee against the order-in-original confirming the duty demand, no coercive action should be taken to realise the dues till the disposal of the stay application by the Commissioner of Central Excise (Appeal). However, the Commissioner (Appeal) must dispose of the stay application within one month of its filing.

A period of 3 months from the date of communication of the order-in-original/ order-in appeal should normally be provided for (one month for filing appeal and stay application and two more months for obtaining orders on the stay application), before taking coercive measures to recover the dues. However, if a stay application of an assessee is rejected by an appellate authority even before the lapse of the time limit of three months, recovery proceedings should be initiated immediately thereafter.

In respect of cases decided by Commissioner of Central Excise (Appeals), Tribunal, Government of India or High Court, the assessee should be given a maximum period of one month from the date of communication of the order to pay up the dues before resorting to any coercive action. In case of decision of Supreme Court of India, the assessee should pay the Government dues, if any, forthwith or else the recovery proceedings shall be initiated within 15 days of the communication of the order.

Provisions of section 142(1)(b) of the Customs Act relating to recovery of sums due to Government are applicable to the Central Excise Act [Refer Chapter 15 – Miscellaneous Provisions of Part C of this Study Material for section 142(1)(b) of the Customs Act, 1962].

8.5 PENALTY AND CONFISCATION

Penalty and confiscation of offending goods i.e. which have violated the provision of the Central Excise law are an outcome of the adjudication proceedings. These are deterrents aimed at cautioning the dishonest taxpayer.

Penalty : Penalty is imposed under any of the following provisions of the Central Excise Act, 1944 or the rules made thereunder: -

- (i) Section 11AC prescribes a mandatory penalty equal to the duty not levied or paid or short paid or erroneously refunded by reason of fraud, suppression etc. However, in the event the duty and interest thereon is paid within 30 days of the communication of the order, the penalty shall be 25% of the duty subject to it being paid within the said period of 30 days.
- (ii) Rule 25 of the Central Excise Rules 2002 provides for penalty on any producer,

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manufacturer, registered person of a warehouse or a registered dealer not exceeding the duty on the excisable goods in respect of which any of the specified contravention have been committed, or Rs.2,000, whichever is greater. The penalty is subject to the provisions of section 11 AC of the Central Excise Act, 1944. The offending goods are also liable to confiscation. The specified contraventions are:

- (a) Removal of any excisable goods in contravention of any of the provisions of the said rules or the notifications issued under the said rules; or
 - (b) Non-accountal of any excisable goods produced or manufactured or stored; or
 - (c) Manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Central Excise Act; or
 - (d) Contravention of any of the provisions of the said rules or the notifications issued under the said rules with intent to evade payment of duty.
- (iii) **Penalty for knowingly dealing in goods liable to confiscation [Rule 26]:** Under rule 26 of the Central Excise Rules 2002 it is provided that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or the said Rules, shall be liable to a penalty not exceeding the duty on such goods or Rs.2000, whichever is greater. It may be noted here that rule 25 is applicable only in respect of manufacturer, registered person of a warehouse etc. Thus, other persons like transporters, person concealing goods etc. shall be liable to penalty under rule 26.

Further, sub-rule (2) of rule 26 provides for penal action against the person who issues:

- (i) excise duty invoice without delivery of goods mentioned therein or abets in making such invoice; or
- (ii) any other document shipping bill, bill of lading, etc. or abets in making such document,

on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefits like CENVAT credit or refund.

Such person shall be liable to a penalty not exceeding the amount of such benefit or Rs.5,000 whichever is greater.

- (iv) **General penalty [Rule 27]:** Rule 27 of the Central Excise Rules, 2002 provides for imposition of a general penalty which may extend to five thousand rupees and with confiscation of the goods in respect of which the offence is committed. This is attracted when no other specific penalty is provided for.

Simultaneous penalty under rule 25 and section 11AC cannot be imposed: If penalty is imposed under section 11AC, penalty under rule 25 will not be imposed. This, however,

does not preclude the Department from confiscating the goods, imposing any fine in lieu of confiscation and prosecuting a person.

Issue of notice before imposing penalty: Rule 26 of the said Rules also provides that before any order of penalty or confiscation is passed the adjudicating authority shall follow the principles of natural justice. In other words a notice explaining the reasons why penalty should not be imposed or goods confiscated has to be given to the person. Thereafter, reasonable opportunity shall be given to such person to explain or defend his case. The adjudicating Officer shall pass a reasoned order, incorporating the defence arguments given by such person or his authorised representative.

Confiscated property to vest in Central Government [Rule 28]: As per rule 28 of the said Rules, when any goods are confiscated under these rules, such thing shall thereupon vest in the Central Government. Accordingly, the Central Excise Officer adjudging confiscation shall take and hold possession of the things confiscated, and every Officer of Police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession.

Disposal of confiscated goods [Rule 29]: Provisions for disposal of goods confiscated are contained in Rule 29 of the said Rules. Goods of which confiscation has been adjudged and in respect of which the option of paying a fine in lieu of confiscation has not been exercised, shall be sold, destroyed or otherwise disposed of in such manner as the Commissioner may direct.

Storage charges in respect of goods confiscated and redeemed [Rule 30]: Rule 30 provides that if the owner of the goods, the confiscation of which has been adjudged, exercises his option to pay fine in lieu of confiscation, he may be required to pay such storage charges as may be determined by the adjudicating officer.

Applicability of provisions of Customs Act in respect of confiscation to excise laws: Provisions of section 115, section 118(a), section 119, section 120, section 121, section 124 and section 150 of the Customs Act relating to confiscation of conveyances, confiscation of packages containing goods, confiscation of goods used for concealing goods, confiscation of goods even if form changes, confiscation of sale proceeds of contravening goods, issue of show cause notice before confiscation of goods and procedure for sale of goods and application of sale proceeds respectively are applicable to the Central Excise Act [*Refer Chapter 12 - Provisions Relating to Illegal Import, Confiscation, Penalty and Allied Provisions of Part C of this Study Material for the above sections of the Customs Act, 1962*]

8.6 OFFENCES

8.6.1 Meaning of offence : The term “offence” is not defined in the Central Excise Act, 1944 (the Act for short). The Constitution of India also does not define the term. According to Article 367 of the Constitution of India, the General Clauses Act, 1897 shall apply for the interpretation of not only the Constitution but also to any enactment of the Legislature in India. However, this is subject to the enactment itself. For example, specific definitions in the Act will override the definition of the same term in the General

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Clauses Act, 1897. The General Clauses Act, 1897 in 3(38) defines an offence to mean any Act or omission made punishable by any law for the time being in force. Therefore, not only a positive act but also inaction where action is required can constitute an offence.

8.6.2 Offences under section 9: The provisions of section 9 of the Act enumerate what will constitute an offence under the Act. The following type of acts will constitute an offence:

- (i) contravening any of the provisions of Section 8, dealing with restriction on possession of certain goods specified in the Second Schedule [Section 9(1)(a)]
- (ii) contravening any of the provisions of Section 37(2)(iii) which relates to transit of excisable goods to any part of India and Section 37(2)(xxvii) relates to registration of persons [Section 9(1)(a)]
- (iii) evading payment of duty [Section 9(1)(b)]
- (iv) removing or concerning himself in removing any excisable goods in contravention of the Act or Rules made thereunder [Section 9(1)(bb)]
- (v) acquiring possession of or otherwise dealing (includes possession, transporting, storing, keeping, selling purchasing etc.) in excisable goods which he knows or has reason to believe are known to be liable for confiscation [Section 9(1)(bbb)]
- (vi) contravening any of the provisions of this Act or the rules in relation to credit of any duty allowed to be utilized towards payment of excise duty on final products [Section 9(1)(bbbb)]
- (vii) failing to supply information which is required under the Act or supplying false information [Section 9(1)(c)]
- (viii) attempting or abetting the commission of any of the acts mentioned in clauses (a) and (b) of this section [Section 9(1)(d)]

The punishment for the above offences is prescribed in the section itself as

- upto 7 years imprisonment and/or fine where the offence relates to duty exceeding one lakh of rupees. However, the Court for special and adequate reasons to be recorded may restrict the term of imprisonment for not less than six months.
- in any other case, with imprisonment for a term upto three years with or without fine.

If any person is convicted of an offence more than once, for the second and subsequent offences, he shall be liable for imprisonment for a term which may extend to seven years and with fine. The Court trying the offence is given powers to restrict the term of imprisonment for not less than six months but while doing so must record the reasons which shall be special and adequate [Section 9(2)].

Section 9(3) lists out following matters which would not constitute to be special and adequate reasons for the purpose sub-section (2) and (3):

- (i) the fact that the accused has been convicted for the first time for an offence under this Act;
- (ii) the fact that in any proceeding under this Act, other than a prosecution, the accused

has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;

(iv) the age of the accused.]

8.6.3 Offences under rule 25: Rule 25 also deals with certain type of offences which result in confiscation and penalty. These offences include removing any excisable goods in contravention of any rule, non-accountal of manufactured goods, engaging in the production/manufacture without registration, irregular availment of credit, falsification of documents; and contravening any rule with an intent to evade duty. The penalty prescribed is not exceeding the duty amount or Rs.2,000, whichever is higher. Also, the goods are liable for confiscation under these Rules.

8.6.4 Certain offences to be non-cognizable: As per Section 9A, offence under section 9 are non-cognisable within the meaning of the Code of Criminal Procedure, 1973. According to Section 2(1) of the Code of Criminal Procedure, 1973 a non-cognisable offence means an offence where the arrest of a person can be made with a warrant only. It will be pertinent to note that offences under Central Excise come under what is termed "warrant case". Warrant case according to Section 2(x) of the Code of Criminal Procedure, 1973 means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Other offences are called as "summons case" under Section 2(w) of the Code of Criminal Procedure, 1973.

8.6.5 Compounding of offences: Sub-section (2) of section 9A provides for compounding of offences, either before or after the institution of prosecution, under Chapter II of the Central Excise Act by Chief Commissioner of Central Excise on payment of the prescribed compounding amount *in the prescribed manner*. Such amount shall be paid to the Central Government by the person accused of the offence. Section 37 empowers Central Government to make rules for specifying the amount to be paid for compounding *and the manner of compounding* of offences under section 9A.

However, in the case of following persons the provisions relating to compounding of offences will not apply: -

- (a) *a person who has been allowed to allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of section 9(1);*
- (b) *a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985.*
- (c) *a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore.*
- (d) *a person who has been convicted by the court under this Act on or after 30.12.2005.*

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8.6.6 Burden of proof : The Supreme Court in *Gian Chand v. State of Punjab*, 1983 (13) E.L.T. 1365 has held the burden of proof is on the prosecution to prove that the person is guilty of an offence. That means to say that the person who points the finger must also prove that the other person is guilty.

8.6.7 Retrospective applicability of offences : A question that arises is whether offences can be made applicable retrospectively. Article 20(1) of the Constitution specifically says that no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Therefore, if at the time of commission of the act, there was no offence, by a subsequent legislative amendment, that very act cannot be made an offence. In *J.K. Spinning and Weaving Mills Ltd. v. UOI* - 1987 (32) E.L.T. 234, the Supreme Court has held that it would be against principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law.

8.7 CIVIL AND CRIMINAL PROCEEDINGS

8.7.1 Introduction : One look at the Act and the Rules and we would often wonder whether the person is being charged again and again with the same offences. For example, removal of goods without payment of duty is an offence under Section 9 as well as Rule 25 but it must be understood that the same act can provide for civil as well as criminal proceedings. Central Excise being a taxing statute must necessarily provide for measures to safeguard the revenue. This would mean that the property of persons is going to be affected. Therefore, confiscation and penalty proceedings are proceedings in rem and not in personam. However, arrest of a person is a proceeding in personam since it curtails the individual's freedom of movement. A Central Excise Officer is empowered to confiscate and impose penalty and by virtue of Section 13 also has the power to arrest. However, on arrest, he has to forthwith take the person to the police station or to the designated Central Excise Officer under Section 19 who shall forthwith release him or produce him before a Magistrate. Thereafter, the proceedings in personam can be held only by the court. This is the reason why we find an apparent duplication but in actuality, it is so made to recognise the nature of proceedings. Moreover, section 34A of the Act clearly spells out that confiscation and penalty will not attract other punishments under the act or under any other law. Therefore, we are faced with the question whether we can face different consequences for the same offence.

8.7.2 Principle of "Autrefois convict" or "Double Jeopardy" : This concept is enshrined in Article 20(2) of the Constitution of India which reads as under:

"No person shall be prosecuted and punished for the same offence more than once".

Basically, this means that for the same offence, the person must not be put to peril more than once.

The conditions for application of this Article, as enumerated by the Supreme Court in *State of Bombay v. Apte* AIR 1961 (SC) 578, *Kalawati v. State of HP* (1953) SCR 548, *Thomas Dana v. State of Punjab*, AIR 1959 (SC) 375 are :

(a) there must have been a previous proceeding before a Court of law or judicial

Tribunal.

- (b) the person must have been prosecuted in such proceeding.
- (c) the person must have been punished in such proceeding.
- (d) the offence in both the proceeding must be the same.
- (e) the subsequent proceeding must be a fresh proceeding and not a mere continuation of the previous proceeding.

Prosecution means an initiation or starting of proceeding of a criminal nature before a court of law or a judicial Tribunal in accordance with the statute.

In *Maqbool Hussain v. State of Bombay*, 1983 (13) E.L.T. 1284, the Supreme Court held that customs authorities are not judicial tribunals or courts while adjudging confiscation and penalty. Therefore the principle of double jeopardy cannot be invoked by the person proceeded against. In that case, the prosecution proceeding under the Foreign Exchange Regulation Act consequent to confiscation under the Customs Act, 1962 was held not to constitute double jeopardy. It would be odd to note that the Supreme Court in another case *Sewpujanrai Indrasanarai Ltd. v. Collector of Customs*, 1983 (13) E.L.T. 1305 had held that penalty, confiscation and fine were judicial acts and not executive acts but had made a distinction between proceedings *in rem* and *in personam*.

8.7.3 Plea of Limitation : We often take the plea of limitation when issues are time barred and this constitutes a convenient escape route for otherwise legitimate demands made. In fact, Chapter XXXVI of the Code of Criminal Procedure, 1973 talks about limitation for taking cognizance of offences by the Courts trying the offence. The limitation is contained in section 468 of the Code. However, the Parliament has enacted The Economic Offences (Inapplicability of Limitation Act, 1974) which makes the provisions of the Code of Criminal Procedure inapplicable to economic offences. Central Excise Law and Customs law figure in this Act to which the Code will not apply. Therefore, the Parliament has chosen to stick to the maxim "*nullum tempus occurrit regi*" – lapse of time does not bar the right of the Crown. It must also be noted that section 473 of the Code specifically empowers the Court to take cognizance of offence barred by limitation if the delay is properly explained and it is necessary in the interests of justice.

8.7.4 Scope of section 482 of Code of Criminal Procedure, 1973 : As can be seen from the above analysis, the proceedings are taken before the Magistrate's Court. However, in certain circumstances the party to the proceeding can approach the High Court under section 482 of the Code of Criminal Procedure, 1973. Section 482 reads as under :

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

The scope of this provision has been discussed by the Supreme Court in *Madhu Limaye v. Maharashtra*, AIR 1978 (SC) 47 wherein it has been held that:

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- (i) the power is not to be restored to if there is a specific provision in the Code of redressal of the grievance
- (ii) it should be used sparingly and for preventing abuse of the process of the Court or to secure the ends of justice.
- (iii) It should not be exercised against express bar of the law.

This provision, therefore, enables the prosecution to be quashed at the process stage itself. In *Sharadchandra Shripad Marathe v. Gurushant Kamble*, 1989 (44) E.L.T. 11, and *Bhalchandra Keshav Gadre v. Gurushant Kamble*, 1989 (43) E.L.T. 617, the Bombay High Court held that if ex-facie reading of the complaint shows that no grounds have been made for substantiating the complaint, then the process will be quashed. In the latter case, a proceeding against an Ex-Director of the company was quashed since prima facie, a Director who had quit on 29-7-1983 could not have been held responsible for offences arising from 30-9-1983. The Supreme Court has also held in several cases that in invoking Section 482, normally appreciation of evidence cannot be done by the High Court since that would mean going into the merits which has to be done by the lower courts.

Therefore, as can be seen from the above, for the sake of preventing abuse of the process of the Court and for securing the ends of justice, it is possible to approach the High Court directly without undergoing trial before the lower courts.

8.7.5 Presence of culpable mental state [Section 9C]: Section 9C of the Act presumes that a culpable mental state was present at the time the offence was committed unless proved otherwise. The word "Culpable" means "faulty or criminal". It implies that the offence was committed with a criminal state of mind. The section includes within the meaning of culpable mental state the intention, motive, knowledge of a fact and belief or reason to believe a fact. That means when an offence is committed, the law presumes that the person did it intentionally with a motive and he had sufficient knowledge or reason to believe that it was an offence. However, the fact has to be proved beyond reasonable doubt. As held by the Madras High Court in *Lakshmichand v. GOI - 1983 (12) E.L.T. 322*, penal proceedings should not be allowed to be proceeded with on vague and camouflaged hypothesis. The Supreme Court in *Asstt. Collector v. Sayed Mohammed 1983 (12) E.L.T. 193* held that the accused cannot be convicted on mere conjectures and surmises and the prosecution must prove the guilt beyond reasonable doubt.

One may be tempted to think that while the burden of proof lies on the person accusing, however culpable mental state is presumed. What this means that once the burden of proof is discharged, the onus will be on the accused to prove that he had no culpable mental state.

8.7.6 Offences by companies [Section 9AA]: This concept is known as the principle of vicarious liability. Section 9AA of the Act makes every person responsible to and every person in charge of the business of the company at the time of commission of the offence to be guilty of offence besides the company itself. However it will be a defence for such a person that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of the offence.

The section also deems any director, manager, secretary or other officer to be guilty where the offence is attributable to their consent or connivance or neglect. The term “company” includes a firm and association of individuals and the term “director” will mean a partner in relation to a firm.

The Delhi High Court has held in *Vidya Wati v. State - 1988 (37) E.L.T. 341* that the term “incharge of and responsible to the company” would mean that the person was in overall control of the day-to-day affairs of the company. Only if this can be proved, can the person be deemed guilty of offence.

8.7.7 Attempt/abet to commit an offence: In the earlier paragraph on the scheme of offences under Excise Law, it was pointed that attempting or abetting the commission of certain offences under section 9 also amounts to an offence. Lexically, the term “abet” would mean to assist, to cause and would include a positive act in aid of the commission of an offence. The meaning of the word “attempt” has been brought out by the Supreme Court in *State of Maharashtra v. Mohd. Yakub*, 1983 (13) E.L.T. 1637 wherein the Supreme Court has held that to constitute an attempt, there must be an intention to commit an offence and some act must also be done which is having close proximity with and is necessary towards the commission of the offence. The Supreme Court made a thin distinction between preparation and attempt and held that attempt starts where preparation ends. It was also held that to constitute an attempt the act need not be the penultimate act towards the commission of the offence but must be an act during the course of committing the offence. Thus, it will be seen that even an attempt may amount to an offence under the Act.

8.7.8 Offence and age [Section 9E]: Section 9E of the act makes it clear that the provisions of section 562 of the Code of Criminal Procedure, 1989 (section 360 of the new code) shall not be applicable unless the person is under eighteen years of age. Section 360 of the code of criminal procedure allows the court to relax the rigours in certain circumstances for persons below 21 years. Instead of sentencing him, an option is given to prove good conduct and behaviour. However, in central excise cases, only persons below 18 years of age can take shelter under this provision of the code. Moreover, as per section 9E, this provision will form a special circumstance wherein the court under section 9(3) can take cognisance of the fact that the person is below 18 years of age and sentence him to a lesser term of imprisonment or not to sentence him at all.

8.8 PROSECUTION

Besides the Departmental adjudication, prosecution may also be launched under section 9 of the Central Excise Act, 1944 for the offences under section 9(1) of the Act. As per provisions of section 9AA prosecution may be launched against any person, Director, Manager, Secretary or other officers of a company or partner/ proprietor of the firm, who is responsible for the conduct of the business of the company/firm and is found guilty of the offences under the Central Excise Act/Rules.

Section 9 of the Central Excise Act, 1944, provides for prosecution of offenders in a court of law and prescribes a minimum imprisonment of six months. However, in cases where

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the duty involved is more than one lakh or the offender has been convicted previously under this section, the court can award maximum imprisonment for a term not exceeding seven years.

Prosecution proceedings in a Court of Law are generally initiated after departmental adjudication of an offence has been completed. However, prosecution may be launched even where adjudication is not complete.

Generally, the adjudicator should indicate whether a case is fit for prosecution, though this is not a necessary pre-condition.

Confiscation and penalty in departmental adjudication and prosecution in criminal proceedings are independent and do not amount to double jeopardy.

Prosecutions are launched in cases of serious nature and where sufficient evidence to prove fraudulent intention is available. Under executive instructions the Chief Commissioner of Central Excise or in specified cases the Director General of Central Excise Intelligence, has power to sanction prosecution.

8.9 MISCELLANEOUS

8.9.1 Information in respect of persons in certain cases to be published [Section 37E]

This provides for publishing the name of any person and particulars of any proceedings in relation to such person, in public interest. The provisions are discussed below in detail:

- (1) The Central Government may publish name of any person and any other particulars relating to any proceedings in respect of such person if it is of the opinion that it is necessary or expedient in the public interest to do so. The Government can do the publication in such manner as it thinks fit.
- (2) The publication shall be made in relation to any penalty only after the time for presenting an appeal to the Commissioner (Appeals) or the Appellate Tribunal expires without an appeal being presented or the appeal, if presented, gets disposed of.
- (3) In the case of a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Central Government, circumstances of the case justify it.

8.9.2 Obligations of persons who have collected excise duty from buyers [Section 11D]

1. Section 11D(1) makes it obligatory on every person who is liable to pay duty and has collected any amount from the buyer of any goods in any manner as representing duty of excise to pay the amount so collected to the credit of the Central Government. Sec.11D gets attracted only when goods are sold and not otherwise (Eternit Everest Ltd vs UOI 1996 (89) ELT 28 (Mad)).

2. Every person, who
 - has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or
 - has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty;from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government [Sub-section 1A].
3. Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1A) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government [Sub-section (2)].
4. The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amounts so determined [Sub-section (3)].
5. The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3) shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1) or sub-section (1A) [Sub-section 4].
6. Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount [Sub-section 5].

It should be noted that section 11D will operate only if any amount has been collected from the buyer as representing duty of excise. If the duty collected is not deposited it becomes an offence. It may also be interesting to note that excess duty retained is addable to assessable value as per decision in *Pravara Pulp & Paper Mills vs CCE 1997 (96) ELT 497 (SC)*.

The Larger Bench of the Tribunal in the case of Unison Metals Ltd. Versus Commissioner of Central Excise, Ahmedabad-I [2006(2004) E.L.T. 323 (Tri.-LB)] has held that in case of payments made under erstwhile rule 57CC(1) (Rule 6 of the CENVAT Credit Rules, 2004), section 11D is not applicable since the amount of 8% or 10% (now 5%) has already been paid to the revenue and no amount is retained by the assessee. Circular No.

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870/08/2008-CX dated 16.05.2008 has also clarified that as long as the amount of 8% or 10% (now 5%) is paid to the Government in terms of erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the CENVAT Credit Rules, the provisions of section 11D shall not apply even if the amount is recovered from the buyers. However, it may be noted that the CENVAT credit of the said amount of 8% or 10% (now 5%) cannot be taken by the buyer since such payment is not a payment of duty in terms of rule 3(1) of the CENVAT Credit Rules, 2004. Therefore, the said 10% (now 5%) amount should be shown in the invoice as "10% amount paid under rule 6 of the CENVAT Credit Rules, 2004".

8.9.3 Interest on the amounts collected in excess of the duty [Section 11DD]

In the following circumstances, interest shall be payable on the amount determined under sub-section (3) of section 11D:

- (a) where the amount of duty collected from the buyer exceeds the amount of duty assessed or determined under this Act or
- (b) where the amount of duty collected from any person exceeds the amount of duty assessed or determined under this Act or
- (c) where a person has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty

Such interest shall be payable by the person who is liable to pay the amount determined under sub-section (3) of section 11D in addition to the said amount.

The rate of interest shall be notified by the Central Government which would be in the range of 10% to 36% per annum. The interest shall be payable from the first day of the month succeeding the month in which the amount ought to have been paid under this Act, till the date of payment of such amount [Sub-section (1)]. Currently the rate is 15% as notified vide *Notification no. 68/2003 C.E. dated 12.09.2003*.

However, in cases where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole amount, including the amount already paid.

The provisions of sub-section (1) shall not apply to cases where the amount had become payable or ought to have been paid before 14.05.2003. Where the amount determined under section 11D(3) is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, the interest payable thereon shall be on such reduced or increased amount respectively.

8.9.4 Provisional attachment of property pending adjudication [Section 11DDA]

- (1) During the pendency of any proceeding under section 11A or section 11D, the Central Excise Officer may provisionally attach any property belonging to the person on whom notice is served under sub-section (1) of section 11A or sub-section (2) of section

11D, as the case may be, in accordance with the rules made in this behalf under section 142 of the Customs Act, 1962.

(2) Such an attachment shall be done only when the Central Excise Officer is of the opinion that the attachment is necessary for the purpose of protecting the interests of revenue. However, a previous approval of the Commissioner of Central Excise, by order in writing, is a prerequisite for such provisional attachment.

(3) Such an attachment can be done for a period of 6 months. This period will commence from the date of the order of the Commissioner of Central Excise permitting such provisional attachment.

(4) However, this period may be extended by the Chief Commissioner of Central Excise by such further period or periods as he thinks fit. The reasons for such an extension shall be recorded in writing. It is to be noted that the total period of extension in any case shall not exceed 2 years.

(5) If an application for settlement of a case under section 32E is made to the Settlement Commission, the period commencing from the date on which such an application is made and ending with the date on which an order under section 32F(1) is made shall be excluded from the extended period mentioned in point (4).

Guidelines for provisional attachment of property: Circular No. 874/12/2008-CX dated 30.06.2008 has provided the following guidelines to implement section 11DDA of the Act:-

- (a) *The types of offences which may be considered for provisional attachment of property (resorted only when the duty or CENVAT Credit alleged is more than Rs. 25 lakhs) are as follows:*
1. *When the goods are removed without the cover of an invoice and without payment of duty, or without declaring the correct value.*
 2. *CENVAT Credit has been taken without receipt of goods or on the basis of Excise duty invoices or other documents which a person has a reason to believe as not genuine.*
 3. *Excise duty invoice is issued without delivery of goods.*
 4. *Refund or rebate is claimed in a fraudulent manner.*
- (b) *The property which is attached is immovable property/ properties which is/ are used for commercial purpose. If immovable property is not sufficient to protect the interest of revenue then movable property can be attached*
- (c) *The property provisionally attached shall be of value as nearly as may be equivalent to that of the amount demanded in the proceedings under section 11A or Section 11D of the Act.*
- (d) *Provisional attachment of the property shall be made only between sunrise and sunset.*
- (e) *After attachment, the proper officer shall prepare an inventory and specify in it the place where it is lodged or kept and shall hand over a copy of the same to the defaulter or the person from whose charge the property is distrained.*

8.26 Central Excise

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

8.9.5 Duty of excise not levied or short-levied as a result of general practice not to be recovered [Section 11C]

Sometimes it may happen that goods may be liable to excise duty but on account of generally prevalent practice no excise duty is charged on them or a lower rate of duty than the applicable rate is levied on the excisable goods. In such cases, the Central Government has the power to direct by notification that such not-levied excise duty or short levied excise duty shall not be required to be paid in respect of such goods.

When such a notification in respect of any goods is issued, the whole of the excise duty (in case of non-levy) or excess excise duty (in case of short levy) which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of section 11B(2).

The person claiming the refund of such duty or the excess duty has to make an application to the Assistant/Deputy Commissioner of Central Excise in the prescribed form (same form for making a refund claim under section 11B) before the expiry of six months from the date of issue of the said notification.

Self-examination questions

1. Can a manufacturer make *suo moto* payment of duty short paid? Discuss.
2. Explain briefly whether the penalty can be attracted on short levy of duty. When can the penalty be reduced?
3. Discuss the provisions regarding issue of duty demand notice under section 11A.
4. A sum of Rs.50,00,000.00 is due from 'A' towards his excise duty liability. How does the Central Excise Act, 1944 provide for recovery of such money? Will it make any difference if 'A' transfers his whole business to 'B'? Discuss.
5. Write a note on search and seizure.
6. ABC Ltd. has removed the goods manufactured by it by paying excise duty @ 20% ad valorem. However, in the invoice for sale of goods, ABC Ltd. shows an amount, which is 25% of the value of the goods as excise duty and collects it from the buyer as part of the total sale price. Can the Department ask ABC Ltd. to pay the amount so collected by him to the credit of the Central Government? Discuss the related legal provisions in detail.

Answers/Hints

4. Refer section 11D