

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

It can be seen from the earlier chapters that the mechanism employed by the Ministry of Finance to effect changes in excise law and rules is through the issuance of Notifications. Further, the procedural requirement of the various provisions of the Central Excise Rules are laid down from time to time through issuance of Trade Notices by the individual Commissionerates.

14.1 POWER OF THE CENTRAL GOVERNMENT TO MAKE RULES

Section 37 of the Central Excise Act, empowers the Central Government to make rules to carry into effect the purposes of this Act. The rules may lay down the procedures governing several specific situations. A total of 38 different situations have been explicitly enumerated under section 37(2). Such rules may

1. provide for determining under section 4 the nearest ascertainable equivalent of the normal price;
2. having regard to the normal practice of the wholesale trade, define or specify the kinds of trade discount to be excluded from the value under section 4 including the circumstances in which and the conditions subject to which such discount is to be so excluded;
3. provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid;
4. provide for charging or payment of interest on the differential amount of duty which becomes payable or refundable upon finalisation of all or any class of provisional assessments;
5. provide for the remission of duty of excise leviable on any excisable goods, which due to any natural cause are found to be deficient in quantity, the limit or limits of percentage beyond which no such remission shall be allowed and the different limit

14.2 Central Excise

or limits of percentage for different varieties of the same excisable goods or for different areas or for different seasons;

6. prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;
7. prohibit absolutely, or with such exceptions, or subject to such conditions, as the Central Government thinks fit, the transit of excisable goods from any part of India to any other part thereof;
8. regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a registered person, or a bonded warehouse, or to a market;
9. regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, or of any other excisable goods, or of any component parts or ingredients or containers thereof;
10. provide for the employment of officers of the Government to supervise the carrying out of any rules made under this Act;
11. require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation;
12. provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses;
13. provide for the distinguishing of goods which have been manufactured after registration, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act;
14. impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified;

15. require that excisable goods shall not be sold or offered or kept for sale in India except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;
16. provide for the issue of registration certificates and transport permits and the fees, if any, to be charged therefor:

provided that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely:—

	Rs.
Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining	50
Licence to manufacture saltpetre	2
Licence to manufacture sulphate of soda (Kharinun) by solar heat in evaporating pans	10
Licence to manufacture sulphate of soda (Kharinun) by artificial heat ...	2
Licence to manufacture other saline substances ...	2

17. provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connection with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed and the disposal of goods so detained or confiscated;
18. authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods;
19. authorise and regulate the composition of offences against, or liabilities incurred under this Act or the rules made thereunder;
20. provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India including interest thereon (such power shall include the power to give retrospective effect to rebate of duties on inputs used in the export goods from a date not earlier than the changes in the rates of duty on such inputs);]
21. provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods;

14.4 Central Excise

22. provide for the giving of credit of sums of money with respect to raw materials used in the manufacture of excisable goods;
23. provide for charging and payment of interest as the case may be, on credit of duty paid or deemed to have been paid on the goods used in, or in relation to the manufacture of excisable goods where such credit is varied subsequently;
24. exempt any goods from the whole or any part of the duty imposed by this Act;
25. provide incentives for increased production or manufacture of any goods by way of remission of, or any concession with respect to, duty payable under this Act;
26. define an area no point in which shall be more than one hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area;
27. define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area;
28. authorise the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) or Commissioners of Central Excise appointed for the purposes of this Act to provide by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section;
29. provide for the publication, subject to such conditions as may be specified therein of names and other particulars of persons who have been found guilty of contravention of any of the provisions of this Act or of any rule made thereunder
30. provide for the charging of fees for the examination of excisable goods intended for export out of India and for rendering any other service by a Central Excise Officer under this Act or the rules made thereunder;
31. specify the form and manner in which application for refund shall be made under section 11B;
32. provide for the manner in which money is to be credited to the Fund;
33. provide for the manner in which the Fund shall be utilised for the welfare of the consumers;
34. specify the form in which the account and records relating to the Fund shall be maintained;
35. specify the persons who shall get themselves registered under section 6 and the manner of their registration.;
36. provide for the lapsing of credit of duty lying unutilised with the manufacturer of specified excisable goods on an appointed date and also for not allowing such credit to be utilised for payment of any kind of duty on any excisable goods on and from such date.

37. provide for credit of service tax paid or payable on taxable services used in, or in relation to, the manufacture of excisable goods.
38. provide for the amount to be paid for compounding *and the manner of compounding* of offences under section 9A.

Sub-section 3 of section 37 provides that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding Rs.5000.

The Central Government, without prejudice to the provisions of section 9, in making rules may provide that if any manufacturer, producer or licensee of a warehouse:

- (a) removes any excisable goods in contravention of the provisions of any such rule, or
- (b) does not account for all such goods manufactured, produced or stored by him, or
- (c) engages in the manufacture, production or storage of such goods without having applied for the registration required under section 6, or
- (d) contravenes the provisions of any such rule with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or Rs.2,000 whichever is greater [Section 37(4)].

The Central Government may make rules to provide for the imposition of penalty upon any person who acquires possession of, or is in any way concerned in

- (i) transporting,
- (ii) removing,
- (iii) depositing,
- (iv) keeping,
- (v) concealing,
- (vi) 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. Such penalty shall not exceed the duty leviable on such goods or Rs.2,000 whichever is greater [Section 37(5)].

14.2 POWER OF THE CENTRAL GOVERNMENT TO EMPOWER CENTRAL EXCISE AUTHORITIES

In addition to section 37, section 37A authorises the Central Government, by issuance of a notification, to empower any of the excise authorities, from the Board to the Asst. Commissioner, to exercise such of those powers as may be delegated by the Central

14.6 Central Excise

Government. In other words, the Central Government has unfettered power to delegate its powers to the authorities specified in section 37A.

14.3 EMERGENCY POWER OF THE CENTRAL GOVERNMENT UNDER CENTRAL EXCISE TARIFF ACT, 1985 TO INCREASE THE DUTY

The Tariff Act with its two schedules is an Act of Parliament and can be amended only by Parliament. This is usually done through the Finance Bill in the Annual Budget. Any increase in the duties proposed in the Finance Bill will have immediate effect (from the midnight of the Budget Day). Any decrease will have effect only after the bill is enacted. However, the Government has the power to grant exemption from the whole or part of the duty, by notification as per Section 5A of the Central Excise Act, 1944. So whenever duty is reduced in the Budget, it is normally given effect to by an exemption notification.

Generally, the Government increases the duty only through the Finance Bill. However, as per Section 3 of the Central Excise Tariff Act, the Government also has emergency powers to increase the duty by amending the rates in the First and Second Schedules, subject to certain conditions. This is only an emergency power and is rarely used. Section 3 of CETA provides that:

Where, in respect of any goods, the Central Government is satisfied that the duty leviable thereon under section 3 of the Central Excise Act, 1944 should be increased and that circumstances exist which render it necessary to take immediate action, the Central Government may, by notification in the Official Gazette, direct an amendment of the First Schedule and the Second Schedule to be made so as to substitute for the rate of duty specified in the First Schedule and the Second Schedule in respect of such goods, -

- (i) in a case where the rate of duty as specified in the First Schedule and the Second Schedule as in force immediately before the issue of such notification is nil, a rate of duty not exceeding fifty per cent *ad valorem* expressed in any form or method;
- (ii) in any other case, a rate of duty which shall not be more than twice the rate of duty specified in respect of such goods in the First Schedule and the Second schedule as in force immediately before the issue of the said notification.

However, the Central Government shall not issue any notification for substituting the rate of duty in respect of any goods as specified by an earlier notification issued under these provisions by the Government before such earlier notification has been approved with or without modifications.

Explanation. – “Form or method”, in relation to a rate of duty of excise, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty may be levied.

Every notification under the above provisions shall be laid before each House of

Parliament, if it is sitting, as soon as may be after the issue of the notification. However, if the Parliament is not sitting the notification shall be placed within seven days of its re-assembly. The Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People. However, if the Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

It has been clarified that any notification issued under the above provisions including any such notification approved or modified may be rescinded by the Central Government at any time by notification in the Official Gazette.

14.4 EXEMPTION NOTIFICATIONS IN CENTRAL EXCISE

Central excise legislation is driven by exemption notifications. Under section 5A, 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 the excisable goods manufactured in FTZ/SEZ/100% EOU and brought to any other place in India, unless otherwise specified. This is because the goods manufactured in such units are exempted under other notifications issued specially for them.

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.

Sub-section (2A) empowers the Central Government, if it considers it necessary or expedient so to do, to insert an explanation in such notification or order, by notification in the official gazette at any time within one year of issue of the notification under Section 5A (1) or (2), for the purpose of clarifying the scope or applicability of such notification. This enables the Central Government to issue clarifications retrospectively.

In *Kasinka Trading v. U.O.I.* 1994 (74) E.L.T. 782, the Supreme Court held that the power to exempt includes the power to modify or withdraw in terms of Section 21 of the General Clauses Act, 1897. It was held that even a time bound exemption notification issued under section 5A of the Central Excise Act, 1944, or section 25 of the Customs Act, 1962 can be modified and revoked if it is in public interest and the doctrine of Promissory

14.8 Central Excise

Estoppel cannot be invoked since a notification cannot be said to be making a representation or a promise to a party getting benefit thereof.

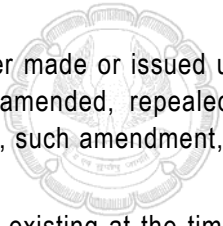
Date of effect of Notification - Section 5A provides that the date of effect of the notification will be the **date of its issue**. It also provides for statutory obligation on the part of the Department to publish and sell the notifications to the public through Directorate of Publicity and Public Relations on or before the date on which the notification will be effective.

Notification to be treated as a part of the enactment itself - *CCE v. Parle Exports P. Ltd.* 1998 (38) ELT 741 (SC). Interpretation given at the time of enactment or issue to be given weight - *CCE v. Parle Exports P. Ltd.* 1988 (38) E.L.T. 741 (S.C.)

In *ITC Ltd. v. CCE* 1996 (86) E.L.T. 477 the Supreme Court said that non-availability of the Gazette on the date of issue of the notification will not affect the operation and enforceability of the notification particularly when there are radio announcements and press releases explaining the changes on the very day.

14.5 EFFECT OF AMENDMENTS, ETC., OF RULES, NOTIFICATIONS OR ORDERS [SECTION 38A]

Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not –

- 
- (a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or
 - (b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or
 - (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

14.6 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).

14.7 BINDING NATURE OF BOARD CIRCULARS

It is well settled in law today that Board Circulars are not binding on the Supreme Court, High Court or the Tribunal. Departmental clarifications are also not binding on the assessee. These judicial bodies as well as the assessee can take a view different from that taken in the Board Circular. Since Board Circulars are for the purpose of administration, it cannot be binding on an officer who is exercising quasi-judicial function as is seen from proviso to Sec. 37B as also the decision of the Supreme Court in *Orient Paper Mills Ltd. v. U.O.I.* 1978 (2) E.L.T. J345 (SC).

However, from the recent Supreme decisions, which are emanating, it seems as if the Departmental officers cannot take a stand contrary to beneficial Board Circulars.

In *Ranadey Micronutrients v. CCE* 1996 (87) E.L.T. 19, the Supreme Court held that even if it be contended that a circular is not issued under section 37B, circulars issued have to be treated as if issued under the said Section and the Department will be estopped from arguing that the circular is not valid.

The Supreme Court also held that such circulars are not advisory in character but binding on central excise officers. The Supreme Court went on to add that the Department cannot take a plea that the circular is contrary to the statute since consistency and discipline is more important than winning or losing a case. This far reaching decision seems to suggest that in a given case even if the Tribunal wants to take a different view from a circular, it would be difficult for the Department to justify its stand since a beneficial Board Circular exists.

14.8 CAN DEPARTMENTAL AUTHORITIES OF ONE REGION REFUSE TO ACCEPT A CIRCULAR ISSUED BY ANOTHER REGION?

It was the customary practice of the Departmental authorities of one region to contend that the circulars issued by another region or Commissionerate do not bind them.

It is important to note that the Supreme Court has held in *Steel Authority of India v. CC* 2000 (115) E.L.T. 42 that authorities cannot take different stand in different states and

14.10 Central Excise

that trade notice issued by customs house will bind all customs authorities.

14.9 CAN DEPARTMENTAL CIRCULARS BE INCONSISTENT WITH THE LAW ?

In the context of section 119 of the Income Tax Act, 1961 which provides for the Board to issue circulars for the proper administration of the Act, the three member Bench of the Supreme Court in *UCO Bank v. CIT* (1999) 237 ITR 889 has held the law as laid down in 210 ITR 129 as bad and reverted back to the old position that circulars can be issued to relax the rigor of the law and just because they do so, it should not be presumed that they are inconsistent with the law.

14.10 CAN A BOARD CIRCULAR BE CONTRARY TO A TRIBUNAL DECISION?

The Gujarat High Court has held in *Raymon Glues and Chemicals v. UOI* 2000 (117) E.L.T. 29 (Guj.) that the Board is not empowered to issue circulars contrary to Tribunal decisions and instead has to take up the matter in appeal.

14.11 DATE FROM WHICH BOARD CIRCULARS ARE EFFECTIVE

The Supreme Court has held in *HM Bags v. CCE* 1997 (94) E.L.T. 3 that Board Circulars are effective from the date of their issue and demands prior to such circular are not valid.

Self-examination questions

1. Explain the emergency power of the Central Government under Central Excise Tariff Act, 1985 to increase the duty.
2. Write a note on exemption notifications in central excise.
3. Describe the effect of amendments, etc. of rules, notifications or orders.
4. Can Central Government delegate its powers to the excise authorities? Discuss.
5. Enumerate any five matters in respect of which the Central Government can make rules.