

Case laws on indirect taxes relevant for May, 2011 and November, 2011 examinations

EXCISE

Rule 2(l) of the CENVAT Credit Rules, 2004

- 1. Whether the manufacturers of concentrates are eligible to avail credit of the service-tax paid on advertising services, sales promotion, market research etc. availed by them and utilize such credit towards payment of excise duty on the concentrate?**

Coca Cola India Pvt Ltd. v. CCE (2009) 15 STR 657 (Bom)

The appellants manufactured non-alcoholic beverage bases also known as concentrates. This concentrate was sold by the appellants to bottling companies, who in turn sell the aerated beverages manufactured from the concentrates to distributors and who in turn sell it to retailers for the ultimate sale to the consumer. The advertisement and sales promotion activities including market research were undertaken by the appellant.

The concentrate manufacturer claimed the credit of service tax on the advertising service used for marketing of soft drink removed by bottlers. However, the credit was denied on the ground that the advertisements did not relate to concentrates manufactured by the appellants.

Bombay High Court held that though the contents of advertisements made by the appellants (the manufacturer of 'concentrates') essentially featured the 'bottle of aerated waters' (the bottles being the final products manufactured by bottlers and not by the appellants), the credit on advertising services received by the appellant could not be denied on the ground that the advertisement was not of the final product of the appellants (viz., 'concentrates'), but of the final product of the bottlers (viz. 'aerated waters').

The High Court laid down the following propositions –

(i) Five limbs of definition of 'input service' under rule 2(l)

The definition of 'input service' under rule 2(l) can be conveniently divided into the following five independent limbs:

- Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products.
- Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal.
- Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory.
- Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs.
- Services used in relation to activities relating to business and outward transportation upto the place of removal.

Each of the aforementioned limbs of the said definition is an independent benefit/concession. If an assessee satisfies any one of the above limbs, then credit on input service would be admissible even if the assessee does not satisfy the other limbs.

(ii) Interpretation of certain expressions used in the definition of "input service"

(a) Expression “means” and “includes”

Above two expressions are exhaustive. By the word “**includes**”, services which may otherwise have not come within the ambit of the definition clause are covered and by the word “**means**”, these are made exhaustive.

(b) Expression “such as”

The words “**such as**” are illustrative and not exhaustive. In the context of business, it refers to those services which are related to the business.

(iii) Interpretation of the phrase “activities relating to business”

The phrase “**activities relating to business**” are words of wide import.

- (a) The word ‘**business**’ is of wide import and cannot be given a restricted definition to say that business of a manufacturer is to manufacture final products only. In the present case, the business of the appellant would include, apart from manufacture of concentrates, entering into franchise agreements with bottlers, permitting use of brand name, promotion of brand name, etc.
- (b) The expression ‘**relating to**’ further widens the scope of the expression ‘activities relating to business’.
- (c) The expression ‘**activities**’ further widens the scope of the aforesaid expression. Rule making authority has not employed any qualifying words before the word ‘activities’, like main activities or essential activities etc. It implies that all activities (essential or not) in relation to a business would fall within the ambit of input service. Hence, in the present case all activities having a relation with the manufacturer of the concentrate would fall within the definition of input service.

(iv) Input services forming part of value of final product eligible for CENVAT credit

Service tax is a value added tax and a consumption tax and the burden of service tax must be borne by the ultimate consumer and not by any intermediary i.e. the manufacturer or service provider. In order to avoid the cascading effect, CENVAT credit on input stage goods and services must be allowed as long as a connection between the input stage goods and services is established. Conceptually as well as a matter of policy, any input service that forms a part of value of final product should be eligible for the benefit of CENVAT credit. In the present case, since the advertising cost forms part of the assessable value, the assessee is eligible to take credit of tax paid on advertising services.

(v) Credit allowed in case of existence of relationship between input service and final product

So long as the manufacturer can demonstrate that the advertisement services availed have an effect or impact on the manufacture of the final product and establish the relationship between the input service and the manufacture of final product, credit must be allowed. In the present case, the Court held that the advertisement of soft-drink enhanced the marketability of the concentrate.

Rule 2(k) of the CENVAT Credit Rules, 2004

2. Whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution?

Maruti Suzuki Ltd. v CCE (2009) 240 ELT 641 (SC)

The assessee was engaged in the manufacture of electricity using naphtha as fuel for generation of electricity. The electricity was partly used captively and partly sold outside to its joint ventures, vendors or given to the grid for distribution. The assessee claimed the CENVAT credit on the naphtha used in the manufacture of the electricity. However, Department denied the credit on the ground that CENVAT credit on naphtha could not be admitted because part of the electricity was cleared outside the factory to the joint ventures, vendors etc

The Court observed that the statutory definition of the word “input” in rule 2(g) in the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) in the CENVAT Credit Rules, 2004], can be divided into three parts, namely :

- (i) Specific part
- (ii) Inclusive part
- (iii) Place of use

All the three parts of the definition, namely, specific part, inclusive part and place of use, are required to be satisfied before an input becomes an eligible input.

(I) SPECIFIC PART

“Input” is defined to **mean** all goods, except light diesel oil, high speed diesel oil and petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not.

Therefore, the crucial requirements, as per this part, are as follows:-

- (a) All goods “used in or in relation to the manufacture” of final products qualify as “input”.
- (b) Presupposition that the element of “manufacture” must be present.

On account of the use of the expression “used in or in relation to the manufacture of final product”, use of input in the manufacturing process, be it direct or indirect and the absence of the input in the final product become irrelevant.

Electricity may not have any concern with the manufacture of the finished product, but it is an ancillary activity which is anterior to the process of manufacture of the final product. It is on account of the use of the above expression “used in relation to manufacture” that such an activity of electricity generation comes within the ambit of the definition.

(II) INCLUSIVE PART

Input **includes**:

- (a) Lubricating oils, greases, cutting oils and coolants;
- (b) Accessories;
- (c) Paints;

- (d) Packing materials;
- (e) Input used as fuel;
- (f) Input used for generation of steam or electricity.

The Court elucidated that, in each case, it has to be established that inputs mentioned in the inclusive part is "used in or in relation to the manufacture of final product". Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input.

Hence, Supreme Court held that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose.

The excess electricity cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale), electricity generated cannot be said to be "used in or in relation to the manufacture of final product, within the factory".

Hence, it could be inferred that the assessee was entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they were using the produced electricity within their factory (for captive consumption). They were not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which was sold at a price.

Explanation to section 2(d) of the Central Excise Act, 1944

3. Whether aluminium dross and skimmings have become excisable in view of the insertion of Explanation to section 2(d) of the Central Excise Act, 1944 by the Finance act, 2008?

Hindalco Industries Ltd. UOI 2009 (243) E.L.T. 481 (All.)

The assessee submitted that insertion of the explanation to section 2(d) would not change the position established in law that 'aluminium dross and skimming,' were neither processed or manufactured, or were marketable commodities. The High Court observed that effect of the explanation is to get over the judgment of the Apex Court in case of *Commissioner, Central Excise v. Indian Aluminium Co. Ltd.* 2006 (203) E.L.T. 3 (S.C.) wherein the Supreme Court held that everything that can be sold is not necessarily marketable.

The High Court elucidated that, *prima facie*, the insertion of the explanation under section 2(d) providing for a fiction in law by a deeming clause in definition of "goods" to include any article, material or substance which is capable of being bought and sold for a consideration, and to treat such goods as marketable, would make the 'aluminium dross and skimming' liable to excise duty. Where the goods are specified in the Tariff, they can be subjected to duty, if they are produced, or manufactured by the person on whom duty is 'proposed'. The High Court noted that the expression has been explained by the Supreme Court to mean that the goods so produced must satisfy the test of marketability. The excise duty is levied on production and manufacture which means bringing out a new commodity, substance, and it is implicit that such goods must be usable, saleable and marketable. If the goods are marketable or are deemed to be marketable, as on now by the explanation added to section 2(d), such goods included in the Tariff would attract excise duty.

Section 11A(2B) and section 11AB of the Central Excise Act, 1944

4. Is the assessee liable to pay interest under section 11AB on the differential duty paid on the difference between price at date of removal and enhanced price at which goods are ultimately sold?

CCE v. International Auto Ltd. 2010 (250) E.L.T. 3 (S.C.)

The Apex Court, following the decision made in the case of *CCE v. S.K.F. India Limited 2009 (239) E.L.T. 385 (S.C.)*, observed that sub-section (2B) of section 11A provides that the assessee in default may make payment of the unpaid duty *on the basis of his own ascertainment* or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the demand notice under section 11A(1) of the Act.

However, Explanation 2 to the sub-section (2B) of section 11A makes it clear that such payment would not be exempt from interest chargeable under section 11AB of the Act. What is stated in Explanation 2 to section 11A(2B) is reiterated in section 11AB of the Act, which deals with interest on delayed payment of duty.

From the scheme of section 11A(2B) and section 11AB of the Act, it becomes clear that interest is levied for loss of revenue caused on any count. In the present case, the price, on the date of removal/clearance of the goods, was not correct i.e. it was understated. The enhanced duty was leviable on the corrected value of the goods on the date of removal. When the differential duty was paid after the date of clearance, it indicated short-payment/short-levy on the date of removal, hence, interest which was for loss of revenue, became leviable under section 11AB of the Act.

Note: Relevant portions of section 11A(2B), explanation 2 to section 11A(2B) and section 11AB read as follows:

Section 11A(2B)

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid.

Explanation 2 to section 11A(2B)

For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

Section 11AB

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty.

Section 2(f) of the Central Excise Act, 1944

- 5. Whether the fabrication, assembly and erection of waste water treatment plant amounts to manufacture?**

Larsen & Toubro Limited v. UOI 2009 (243) E.L.T. 662 (Bom.)

The assessee was engaged in fabrication, assembly and erection of waste water treatment plant. As per the assessee, the plant could not function as such until it was wholly built including the civil construction. Since, after being completely built, waste water treatment plant became immovable, duty could not be levied on it.

However, the Department alleged that the assessee had fabricated/manufactured the waste water treatment plant. It further alleged that waste water treatment plant came into existence in an unassembled form before the same was installed and assembled to the ground with civil work. It became operational after it was embedded in the civil work and, therefore, the excise duty was payable on it.

The High Court opined that mere bringing of the duty paid parts in an unassembled form at one place, i.e. at the site does not amount to manufacture of a plant. Simply collecting together at site the various parts would not amount to manufacture unless an excisable movable product (say a plant) comes into existence by assembly of such parts. In the present case, as the petitioner had stated that the waste water treatment plant did not come into existence unless all the parts were put together and embedded in the civil work. Waste water treatment plant did not become a plant until the process which included the civil work, was completed. Thus, the Court held that no commercial movable property came into existence until the assembling was completed by embedding different parts in the civil works.

- 6. Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?**

Bata India Ltd. v. CCE 2010 (252) ELT 492 (SC)

The Apex Court observed that marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The question is not whether there is a hypothetical possibility of a purchase and sale of the commodity, but whether there is sufficient proof that the product is commercially known. The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold. Theory and practice will not go together when one examines the marketability of a product.

The Supreme Court further ruled that the burden to show that the product is marketed or capable of being bought or sold is entirely on the Revenue. Revenue, in the given case, had not produced any material before the Tribunal to show that the product was either been marketed or capable of being marketed, but expressed its opinion unsupported by any relevant materials.

Note: The above judgment is in conformity with the explanation to section 2(d) of the Central Excise Act, 1944 inserted by the Finance Act, 2008.

- 7. Whether the machine which is not assimilated in permanent structure would be considered to be moveable so as to be dutiable under the Central Excise Act?**

CCE v. Solid & Correct Engineering Works and Ors 2010 (252) ELT 481 (SC)

The assessee was engaged in the manufacture of asphalt batch mix and drum mix/hot mix plant by assembling and installing its parts and components. The Court observed that as per the assessee, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine.

The Court opined that an attachment where the necessary intent of making the same permanent is absent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently.

Hence, the Supreme Court held that the plants in question were not immovable property so as to be immune from the levy of excise duty. Consequently, duty would be levied on them.

Rule 3(1) of the CENVAT Credit Rules, 2004

- 8. Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice?**

CCE v. Bhuwalka Steel Industries Ltd. 2010 (249) ELT 218 (Tri-LB)

The large bench of the Tribunal held that each case had to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages. Decision to allow or not to allow credit under rule 3(1), in any particular case, will depend on various factors such as the following:-

- (i) Whether the inputs/capital goods have been diverted en-route or the entire quantity with the packing intact has been received and put to the intended use at the recipient factory.
- (ii) Whether the impugned goods are hygroscopic in nature or are amenable to transit loss by way of evaporation etc.
- (iii) Whether the impugned goods comprise countable number of pieces or packages and whether all such packages and pieces have been received and accounted for at the receiving end.
- (iv) Whether the difference in weight in any particular case is on account of weighment on different scales at the despatch and receiving ends and whether the same is within the tolerance limits with reference to the Standards of Weights and Measures Act, 1976.
- (v) Whether the recipient assessee has claimed compensation for the shortage of goods either from the supplier or from the transporter or the insurer of the cargo.

Tolerances in respect of hygroscopic, volatile and such other cargo has to be allowed as per industry norms excluding, however, unreasonable and exorbitant claims. Similarly, minor variations arising due to weighment by different machines will also have to be ignored if such variations are within tolerance limits.

Section 2(f) of the Central Excise Act, 1944

- 10. Does the activity of packing imported compact discs in a jewel box along with inlay card amount to manufacture under section 2(f) of the Central Excise Act, 1944 ?**

CCE v. Sony Music Entertainment (I) Pvt. Ltd. 2010 (249) E.L.T. 341 (Bom.)

The appellant imported recorded audio and video discs in boxes of 50 and packed each

individual disc in transparent plastic cases known as jewel boxes. An inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole thing was then shrink wrapped and sold in wholesale. The Department contended that the said process amounted to manufacture.

The High Court observed that none of the activity that the assessee undertook involved any process on the compact discs that were imported. It held that the Tribunal rightly concluded that the activities carried out by the respondent did not amount to manufacture since the compact disc had been complete and finished when imported by the assessee. They had been imported in finished and completed form.

Classification of goods under excise

11. Whether the product “Scrabble” is classifiable under sub-heading 9503.00 or sub-heading 9504.90 of the First Schedule to the Central Excise and Tariff Act, 1985?

Pleasantime Products v. CCE 2009 (243) E.L.T. 641 (S.C.)

According to the assessee, “Scrabble” was a puzzle or in the alternative it was an educational toy falling under sub-heading 9503.00. However, Revenue alleged that “Scrabble” was not a puzzle, it was not a toy but a game. Moreover, since “Scrabble” has board(s) and pieces it was classifiable under sub-heading 9504.90.

The Court opined that “Scrabble” was not a puzzle/crossword. The difference between a “game” and a “puzzle” is brought out by three distinct features, viz., outcome, clue-chance and skill. In a puzzle, the outcome is fixed or pre-determined which is not there in “Scrabble”. In a “Scrabble” there are no clues whereas in crossword puzzle, as stated above, words are written according to clues. Hence, the essential characteristic of crossword to lay down clues and having a solution is absent from “Scrabble”. Thus, “Scrabble” would not fall in the category or class mentioned in sub-heading 9503.00, namely, “puzzles of all kinds”.

As per the dictionary meaning, “Scrabble” is a board game in which players use lettered tiles to create words in a crossword fashion. Applying the dictionary meaning, the Apex Court held that “Scrabble” was a board game. It was not a puzzle. In the circumstances, it would fall under heading 95.04 and not under sub-heading 9503.00 of the CETA.

Note - The headings cited in the case law mentioned above may not co-relate with the headings of the present Excise Tariff as it relates to an earlier point of time.

Rule 15(1) of the CENVAT Credit Rules, 2004

12. Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company?

Ashok Kumar H. Fulwadhya v. UOI 2010 (251) E.L.T. 336 (Bom.)

It was held that words “any person” used in rule 13(1) of the erstwhile CENVAT Credit Rules, 2002 [now rule 15(1) of the CENVAT Credit Rules, 2004] clearly indicate that the person who has availed CENVAT credit shall only be the person liable to the penalty. The Court observed that, in the instant case, CENVAT credit had been availed by the company and the penalty under rule 13(1) [now rule 15(1)] was imposable only on the person who had availed CENVAT credit [company in the given case], who was a manufacturer. The petitioners-directors of the company could not be said to be manufacturer availing CENVAT credit.

13. Is the Settlement Commission empowered to grant the benefit under the proviso to section 11AC in cases of settlement?

Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (251) E.L.T. 162 (Del.)

The Court ruled that benefit under the proviso to section 11AC could not be granted by the Settlement Commission in cases of settlement.

It elucidated that the order of settlement made by the Settlement Commission is distinct from the adjudication order made by the Central Excise Officer. The scheme of settlement is contained in Chapter-V of the Central Excise Act, 1944 while adjudication undertaken by a Central Excise Officer is contained in the other Chapters of the said Act. Unlike Settlement Commission, Central Excise Officer has no power to accord immunity from prosecution while determining duty liability under the Excise Act.

Once the petitioner has adopted the course of settlement, he has to be governed by the provisions of Chapter V. Therefore, the benefit under the proviso to section 11AC, which could have been availed when the matter of determination of duty was before a Central Excise Officer was not attracted to the cases of a settlement, undertaken under the provisions of Chapter-V of the Act.

14. Does the Settlement Commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the Revenue?

Union of India v. Cus. & C. Ex. Settlement Commission 2010 (258) ELT 476 (Bom.)

The above question was the issue for consideration in a writ petition filed by the Union of India to challenge an order passed by the Settlement Commission in respect of a proceeding relating to recovery of drawback. The Commission vide its majority order overruled the objection taken by the Revenue challenging jurisdiction of the Commission and vide its final order settled the case. The aforesaid order of the Settlement Commission was the subject matter of challenge in this petition.

The contention of the Revenue was that the recovery of duty drawback does not involve levy, assessment and collection of customs duty as envisaged under section 127 A(b) of the Customs Act, 1962. Therefore, the said proceedings could not be treated as a case fit to be applied before the Settlement Commission. However, the contention of the respondent was that the word "duty" appearing in the definition of "case" is required to be given a wide meaning. The Customs Act provides for levy of customs duty as also the refund thereof under section 27. The respondent contended that the provisions relating to refund of duty also extend to drawback as drawback is nothing but the return of the customs duty and thus, the proceedings of recovery of drawback would be a fit case for settlement before the Commission.

The High Court noted that the Settlement Commission while considering the aforesaid question of its jurisdiction for taking up the cases relating to drawback had considered the definition of "drawback" as defined in rules relating to drawback as also the definition of the word "case" as defined in section 127A(b) and after referring to the various judgments of the Tribunal came to the conclusion that the Commission had jurisdiction to deal with the application for settlement. The High Court stated that the reasons given by the Settlement Commission in support of its order are in consonance with the law laid down by the Supreme Court in the case of *Liberty India v. Commissioner of Income Tax* (2009) 317 ITR 218 (SC) wherein the Supreme Court has observed that drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India.

The High Court thus, concluded that the duty drawback or claim for duty drawback is nothing but a claim for refund of duty may be as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act. Thus, the High Court held that the Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue.

15. Can CENVAT credit be taken on the basis of private challans?

CCEx. v. Stelko Strips Ltd. 2010 (255) ELT 397 (P & H)

The issue under consideration before the High Court in the instant case was that whether private challans other than the prescribed documents are valid for taking MODVAT credit under the Central Excise Rules, 1944.

The High Court placed reliance on its decision in the case of *CCE v. M/s. Auto Spark Industries CEC No. 34 of 2004 decided on 11.07.2006* wherein it was held that once duty payment is not disputed and it is found that documents are genuine and not fraudulent then the manufacturer would be entitled to MODVAT credit on duty paid on inputs.

The High Court also relied on its decision in the case of *CCE v. Ralson India Ltd. 2006 (200) ELT 759 (P & H)* wherein it was held that if the duty paid character of inputs and their receipt in manufacturer's factory and utilization for manufacturing a final product is not disputed, then credit cannot be denied.

Thus, the High Court held that MODVAT credit could be taken on the strength of private challans as the same were not found to be fake and there was a proper certification that duty had been paid.

Note: Though, the principle enunciated in the above judgement is with reference to erstwhile Central Excise Rules, 1944, the same may apply in respect of CENVAT Credit Rules, 2004.

CUSTOMS

Section 125 of the Customs Act, 1962

- 1. Whether, under section 125 of the Customs Act, 1962, discretion vests with the Adjudicating Authority to give option to redeem the goods even though the said goods are liable to absolute confiscation (since the importation of said goods is prohibited)?**

CCus v. Alfred Menezes 2009 (242) E.L.T. 334 (Bom.)

The High Court observed that section 125(1) deals with two situations:-

- (1) Importation and exportation of prohibited goods and
 - (2) Importation and exportation of any other goods
- (1) Importation and exportation of prohibited goods**

In case of importation or exportation of prohibited goods, where the goods were confiscated, the word used is "may". Hence, in case of prohibited goods, there is discretion in the officer to release the confiscated goods in terms as set out therein.

(2) Importation and exportation of any other goods

In the case of any other goods, which are confiscated, the word used is "shall". Thus, in case of other goods, the officer is bound to release the goods.

The High Court held that in the instant case, the adjudicating officer's action was justified. He had exercised his discretion and had given an option to redeem the goods even though the said goods were liable for absolute confiscation as the importation of said goods was prohibited.

Section 111 and 125 of the Customs Act, 1962

2. In case the imported goods are confiscated, and goods are not redeemed by paying fine, whether the importer is bound to pay the customs duty?

Poona Health Services v. CCus. 2009 (242) E.L.T. 335 (Bom.)

The primary question, in the instant case, was that in case where the imported goods were confiscated, and goods were not redeemed by paying fine, whether the appellant is bound to pay duty. The High Court answered the question in affirmative.

The appellant contended that once the imported goods were confiscated under section 125 of the Customs Act, 1962, and the option to release them was not exercised, no duty was payable. He placed reliance on section 23 which provides that if the owner of imported goods relinquishes his title to the goods, he shall not be liable to pay the duty thereon.

The High Court elucidated the distinction between section 23 and section 125. Under section 23, the person who imports the goods, surrenders his title in the goods. By surrendering title in the goods, the person importing the goods or the owner of the goods ceases to have a right to claim the goods.

On the other hand, the order of confiscation is passed in respect of the person who has claimed to import or export the goods. It implies that he claims title or right in the property. The fine under section 125 is payable by the person who seeks redemption of the goods. If the goods are not redeemed, then they vest in the State. The person however, who had imported the goods does not cease to have liability for payment of duty because he continues to be the person who had imported the goods and claims title of the goods. The two sections therefore, operate in two different situations and are mutually exclusive. Therefore, section 23 cannot be considered for the purpose of interpreting section 111.

Section 111 confers the power to confiscate and applies only when the goods are improperly imported and or the other provisions are satisfied. The fine payable to get possession of the goods under section 125 is distinct and different from the duty of goods which are to be imported or exported. The fine is the nature of recompensation to the state for goods which are vested in it and on sale would have realized the value of the goods and from that to recover the duty which is unpaid as also fine.

Section 111 and section 125 of the Customs Act, 1962

3. Whether the goods held to be improperly imported are liable for confiscation under section 111 of the Customs Act, 1962, even though the same are cleared and not available for seizure? Whether redemption fine can be imposed with regard to such goods?

CCus v. Finesse Creation Inc. 2009 (248) E.L.T. 122 (Bom.)

The Court opined that the concept of redemption fine arises in the event when the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods.

Under section 125, a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed, no fine can be imposed.

Consequently, the Court held that in the absence of the goods being available no fine in lieu of confiscation could have been imposed.

Section 27 of the Customs Act, 1962

4. Can a refund claim be filed under section 27 of the Customs Act, 1962 if the payment of duty has not been made pursuant to an assessment order?

Aman Medical products Ltd. v. CCus., Delhi 2010 (250) ELT 30 (Del.)

The assessee filed a Bill of Entry and paid the higher duty in ignorance of a notification which allowed him the payment of duty at a concessional rate. There was no assessment order for being challenged in the appeal which was passed under section 27(1)(i) of the Act. The Revenue contended that a refund in appeal can be asked for under section 27 of the Customs Act, 1962 only if the payment of duty had been made pursuant to an assessment order.

The High Court, referring to the language of section 27, interpreted that it is not necessary that the duty paid by the importer must be pursuant to an order of assessment. The duty paid by the importer can also be 'borne by him'. Clauses (i) and (ii) of sub-section (1) of section 27 are clearly in the alternative because the expression 'or' is found in between clauses (i) and (ii). The object of section 27(i) and (ii) is to cover those classes of case where the duty is paid by a person without an order of assessment.

The High Court held that the refund claim of the appellant was maintainable under section 27 and the non-filing of the appeal against the assessed bill of entry did not deprive the appellant to file its claim for refund under section 27 of the Customs Act, 1962. The refund claim, in the case on hand, would fall under clause (ii) of sub-section (1) of section 27.

Note: Section 27 of the Customs Act, 1962, inter alia, provides as follows:-

Any person claiming refund of any duty and interest, if any, paid on such duty -

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs.

Section 27 of the Customs Act, 1962

5. **Can the assessee be denied the refund claim only on the basis of contention that he had produced the attested copy of TR-6 challan and not the original of the TR-6 challan?**

Narayan Nambiar Meloths v. CCus. 2010 (251) E.L.T. 57 (Ker.)

In the instant case, the refund application filed by the assessee was not entertained on the ground that the petitioner had not produced original of the TR-6 Challan and what was produced was only an attested copy. According to respondents, production of original of the TR-6 challan was a mandatory requirement for processing the refund application.

The Kerala High Court decided that the petitioner could not be denied the refund claim on account of following mentioned grounds:-

Firstly, the Court opined that the only contention raised against the petitioner was that TR 6 Challan he produced was only an attested copy, which was purely a technical contention and could not be accepted.

Secondly, as per clarification issued vide *F.No. 275/37/2K-CX. 8A, dated 2-1-2002*, a simple letter from the person who made the deposit, requesting for return of the amount, along with the appellate order and attested Xerox copy of the Challan in Form TR-6 would suffice for processing the refund application. Evidently, in the instant case, the petitioner had fully complied with the requirement laid down in this clarification.

Section 110 and 124 of the Customs Act, 1962

6. **In case of the goods liable to confiscation under section 111, issuing of a notice to the owner-original importer of the goods is enough or whether notice is also required to be issued to the person from whose custody the goods are seized?**

Gawar Construction Ltd. v. UOI 2009 (243) E.L.T. 484 (Bom.)

The High Court held that customs authorities are empowered to seize goods in custody of person other than importer without notice, but show cause notice proposing confiscation is required to be issued within 6 months or extended period.

The word “or” used in the expression “the owner of the goods **or** such person” in section 124 has been used conjunctively and not disjunctively. Hence, the notice for confiscation is required to be issued to owner when owner is in possession of goods and goods are seized from his custody. In case of seizure of goods from the custody of person other than importer, notice must also be given to person from whose custody goods were seized. Opportunity must be given to the person in possession of the goods because their confiscation would affect his civil right to possess the goods which were seized from his custody. Thus, the person from whose custody goods are seized is also entitled to notice and hearing before order of confiscation is passed.

7. **Is the want of evidence from foreign supplier enough to cancel the confiscation order of goods undervalued?**

CCus. v. Jaya Singh Vijaya Jhaveri 2010 (251) E.L.T. 38 (Ker.)

In the instant case, the High Court held that in a case of confiscation of goods because of their under valuation, Tribunal could not cancel the confiscation order for the want of evidence from the foreign supplier. The Court considered it be illogical that a person who was a party to undervaluation would give evidence to the Department to prove the case that the invoice raised by him on the respondent

was a bogus one and that they had received underhand payment of the differential price. Resultantly, the Court upheld the confiscation order.

Classification of goods under customs

- 8. Whether classification of the imported product changes if it undergoes a change after importation and before being actually used?**

Atherton Engineering Co. Pvt. Ltd. v. UOI 2010 (256) E.L.T. 358 (Cal.)

The Court noted that it was the use of the product that had to be considered in the instant case. If a product undergoes some change after importation till the time it is actually used, it is immaterial, provided it remains the same product and it is used for the purpose specified in the classification. Therefore, in the instant case, it examined whether the nature and character of the product remained the same.

The Court opined that if the embryo within the egg was incubated in controlled temperature and under hydration, a larva was born. This larva did not assume the character of any different product. Its nature and characteristics were same as the product or organism which was within the egg.

Hence, the Court held that the said product should be classified as feeding materials for prawns under the heading 2309. These embryos might not be proper prawn feed at the time of importation but could become so, after incubation.

Section 127B of the Customs act, 1962

- 9. In case of a Settlement Commission's order, can the assessee be permitted to accept what is favourable to them and reject what is not?**

Sanghvi Reconditioners Pvt. Ltd. V. UOI 2010 (251) ELT 3 (SC)

The Apex Court held that the application under section 127B of the Customs Act, 1962 is maintainable only if the duty liability is disclosed. The disclosure contemplated is in the nature of voluntary disclosure of concealed additional customs duty. The Court further opined that having opted to get their customs duty liability settled by the Settlement Commission, the appellant could not be permitted to dissect the Settlement Commission's order with a view to accept what is favourable to them and reject what is not.

Section 127M of the Customs Act, 1962

- 10. Can the order of the Settlement Commission be considered to be a judicial proceeding?**

UOI v. East and West Shipping Agency 2010 (253) E.L.T. 12 (Bom.)

The Custom House Agent License of the respondents was suspended on the ground that authorised agent of the respondents had committed misconduct by taking active part in the act of smuggling and has thus violated the Custom House Agent Licensing Regulations, 2004. During pendency of the misconduct proceedings, respondents approached Settlement Commission. The Settlement Commission after hearing all the parties held that Revenue had failed to prove that the authorised agent of the respondent Custom House Agent (CHA) had a conscious knowledge of mis-declaration of goods. On the basis of said order of the Settlement Commission, Tribunal decided the case in favour of the respondents and dropped the misconduct proceedings against them. The appellants challenged

the Tribunal's order alleging that the order passed by the Settlement Commission was ab-initio, null and void being without jurisdiction.

The High Court observed that as per section 127M of the Customs Act, 1962, the order passed by the Settlement Commissioner is in judicial proceedings and it is a judicial order. Further, the appellants had not challenged the said order. Hence, the order passed by the Settlement Commissioner could not be brushed aside considering the scheme of Chapter XVIA. It must be held good in law so long as it is not set aside. Considering the facts and circumstances of the case, the High Court answered the question of law in affirmative in favour of the respondents and against the appellant.

11. Whether Revenue can prefer an appeal in case of a consent order?

CCus v. Trilux Electronics 2010 (253) E.L.T. 367 (Kar.)

High Court held that if an order was passed by CESTAT based on consent and the matter was remanded at the instance of Revenue, then Revenue could not pursue an appeal against such order in a higher forum.

In the instant case, the Tribunal had remanded the matter in order to re-compute the duty payable by the assessee on the basis of representation of Revenue. Thereafter, the Revenue filed an appeal against the said order.

The assessee contended that the appeal filed by the Revenue was not maintainable since the order had been passed by the Tribunal on the submission of the representative of the Revenue. Further, since it is a consent order, no appeal would lie. The High Court held that an appeal against the consent order cannot be filed by the Revenue.

Note: A consent order is a judicial decree expressing a voluntary agreement between parties to a suit, especially an agreement by a defendant to cease activities alleged by the Government to be illegal in return for an end to the charges.

SERVICE TAX

1. Can a commission agent also acting as a consignment agent be covered under the definition of 'clearing and forwarding agent'?

CCE v. Mahaveer Generics 2010 (17) S.T.R. 225 (Kar.)

The assessee contended that activity carried on by him came within purview of 'commission agent' and not under the 'clearing and forwarding agent'. The Court elucidated that assessee in question had not restricted its activities to business of commission agency, but had also carried on business as consignment agent. Since the consignment agent had been brought under statutory definition of 'clearing and forwarding agent' by inclusive clause, the High Court held that the assessee falls under the definition of 'clearing and forwarding agent' after considering the following points:-

- Agreement itself termed the assessee as a consignment agent.
- Price was mutually decided by the principal and the agent (assessee). Had the assessee been merely a commission agent, price determination would not have been within his domain.
- Since assessee had been given the authority and power to appoint dealers, stockists and distributors, it implied that it was not merely a commission agent.
- Mere procurement of purchase orders was not involved, but stored goods were also cleared

and forwarded to stockists and dealers by the assessee.

Section 65(12) of the Finance Act, 1994

2. **Whether the levy of service tax on hire purchase and leasing transactions falling under section 65(12) of the Finance Act, 1994 is constitutionally valid?**

Madras Hire Purchase Association v. UOI 2009 (16) S.T.R. 3 (Mad.)

The High Court, in the impugned judgment, had upheld the constitutional validity of service tax levy on hire purchase and lease services after noting that service charge @ 1% was admitted as collected and service tax was levied on service and not on sale or purchase of goods.

The High Court rejected the plea that levy of service tax on hire purchase/leasing transaction is violative of Articles 14 and 19(1)(g) of the Constitution after observing that a taxing statute was not *per se*, a restriction of the freedom under Article 19(1)(g) and policy of a tax, in its effectuation, might, bring in some hardship in some individual cases but that was inevitable.

3. **Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?**

Infotech Software Dealers Association (ISODA) v. Union of India 2010 (20) STR 289 (Mad.)

The High Court observed that the law as to whether the software is goods or not is no longer res integra as it has been settled by the Supreme Court ruling in TCS case [2004 (178) ELT 22 (SC)]. The High Court reiterated that software is goods as per Article 366(12) of the Constitution. A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. Goods could be tangible property or an intangible one. A software, whether customized or non-customised, would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed.

On the issue as to whether the transaction would amount to sale or service, the High Court was of the view that it would depend upon the nature of individual transaction. The High Court stated that as a transaction could be exclusive sale or exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax. The High Court explained that when a statute, particularly a taxing statute is considered with reference to the legislative competence, the nature of transaction and the dominant intention on such transaction would be relevant.

In the instant case, the terms of EULA indicated the dominant intention of parties whereby the developer retained the copyright of each software, be it canned, packaged or customised, and only the right to use with copyright protection was transferred to the subscribers or the members. The High Court opined that in the transactions taking place between the members of ISODA with its customers, the software is not sold as such, but only the contents of the data stored in the software are sold which would only amount to service and not sale. Further, the High Court was of the view that such transactions could also not be treated as deemed sale under Article 366(29A)(d) of the Constitution of

India as that requires a transfer of right to use any goods and in the instant case, the goods as such are not transferred.

As regards constitutional validity of service tax levy on information technology software service, the High Court did not agree with the contention of the assessee that since software is goods, all transactions between the members of ISODA and their customers would amount to sales and be liable to sales tax/VAT and that State Government alone would be competent to enact law therefor. The High Court observed that though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA. The High Court stated that the relevant test for this purpose would be whether section 65(105)(zzzz) of the Finance Act, 1994 can be brought under Entry 97 of List I of Schedule VII of Constitution as the Parliament has the legislative competence to make laws for service tax in terms of the said entry. Entry 97 is a residuary entry and relates to taxable service. The High Court referred to the case of *Tamil Nadu Kalyana Mandapam Association v. Union Of India* 2006 (3) STR 260 (SC) wherein it was held by the Apex Court that the Parliament is empowered to make law for service tax under said residuary powers in the absence of entry under List II. Thus, the High Court held that amended provisions to levy service tax on IT software service are not unconstitutional by virtue of the residuary power available to the Parliament under Entry 97.

- 4. Whether the value of SIM cards sold by the mobile phone companies to their subscribers has to be included in value of taxable service under 'telecommunication service' or it is taxable as sale of goods under the Sales Tax Act?**

CCE v. Idea Mobile Communications Ltd. 2010 (19) STR 18 (Ker.)

The High Court, while examining the functioning of a SIM card, admitted that SIM card is a computer chip having its own SIM number on which telephone number can be activated. SIM card is a device through which customer gets connection from the mobile tower. Unless the SIM card is activated, service provider cannot give service connection to the customer because signals are transmitted and conveyed through towers and through SIM card communication signals reach the customer's mobile instrument. Hence, it can be inferred that it is an integral part required to provide mobile service to the customer.

Further, SIM card has no intrinsic value or purpose other than use in mobile phone for receiving mobile telephone service from the service provider. Thus, the Court accepted the view that SIM cards were not goods sold or intended to be sold to the customer, but supplied as part of service. Consequently, it held that the value of SIM card supplied by the assessee would form part of the value taxable service on which service tax was payable by the assessee.

- 5. Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar, under the category of 'storage and warehousing services'?**

CCE v. Nahar Industrial Enterprises Ltd. 2010 (19) STR 166 (P & H)

The assessee was engaged in the manufacture of sugar. The Central Government directed him to maintain buffer stock of free sale sugar for the specified period. In order to compensate the assessee, the Government of India extended buffer subsidy towards storage, interest and insurance charges for the said buffer stock of sugar.

Revenue issued a show cause notice to the assessee raising the demand of service tax alleging that amount received by the assessee as buffer subsidy was covered within the definition of 'storage and warehousing services'.

The High Court noted that apparently, service tax could be levied only if service of 'storage and warehousing' was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance to directions of Government of India issued under Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. Hence, the act of assessee could not be called as rendering of services.

The High Court upheld the Tribunal's decision that just because the storage period of free sale sugar had to be extended at the behest of Government of India, neither the assessee becomes 'storage and warehouse keeper' nor the Government of India becomes their 'client' in this regard. Therefore, the storage of specific quantity of free sale sugar could not be treated as providing 'storage and warehousing' services to the Government of India.