

The Suggested Answers for Paper – 8 : Indirect Taxes are based on the provisions applicable for A.Y. 2004-05, which is the assessment year relevant for November 2004 exams.

PAPER – 8 : INDIRECT TAXES

Question Nos. 1, 6 and 9 are compulsory.

*Answer any **two** questions from PART - A and **one** question from PART – B.*

PART – A

Question 1

- (a) *State briefly the provisions of the CENVAT Credit Rules, 2002 in respect of removal of inputs and capital goods on which CENVAT credit has been availed in any **two** of the following cases:*
- (i) *Capital goods removed in good condition after being put to use for a period of two years, in respect of which period, depreciation under the Income-tax Act, 1961 was claimed.*
 - (ii) *An input becomes a waste and is sold as scrap.*
 - (iii) *Sale of the factory along with the said inputs and capital goods. (2 x 2 = 4 marks)*
- (b) *Briefly explain the provisions of the Central Excise Act, 1944 pertaining to "Related persons". (4 marks)*
- (c) *Write a brief note on the following with reference to Notification Nos.8/2003-CE and 9/2003-CE dated 1.3.2003 relating to small scale units:*
- (i) *determination of 'value' for the purposes of the said notifications;*
 - (ii) *availability of CENVAT Credit on capital goods under the said notifications;*
 - (iii) *treatment in respect of 'Clearances of excisable goods without payment of duty' as specified in the said notifications. (1 + 2 + 3 = 6 marks)*
- (d) (i) *Discuss briefly with reference to the provisions of the Central Excise Act, 1944 whether the following process would amount to 'manufacture' :*
- XYZ Corporation is engaged in the process of mixing aluminium paste, metal lacquer and thinner resulting in the production of aluminium paint having a shelf life of 8-10 hours. (3 marks)*
- (ii) *Explain briefly whether duty liability under the Central Excise Act, 1944 will be attracted in the following case:*
- MN & Co. engaged in the manufacture of Vanaspati oil used activated clay for deodorizing, bleaching and decolouring of oil. As a result of this processing the activated clay was transformed into "spent earth" which was nothing but the residue of activated clay. The activated clay residue lost its absorbent character during the course of refining and bleaching of oil. Excise Department sought to classify the*

"spent earth" under Central Excise Tariff Chapter Heading No. 1507, which reads as:

"residues resulting from treatment of fatty substances or animal or vegetable waxes".
(3 marks)

Answer

- (a) (i) As per Rule 3(4) of the Cenvat Credit Rules, 2002 when capital goods on which Cenvat credit has been taken are removed *as such* from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such capital goods and such removal shall be made under the cover of an invoice. However, the rule does not provide for a situation where capital goods are removed in good condition after being put to use for some time. Therefore, provisions of Rule 3(4) of the Cenvat Credit Rules, 2002 will hold equally good in these situations also. Thus, where the capital goods are removed in good condition, the manufacturer of the final products shall pay an amount equal to the credit availed.
- (ii) If inputs becomes waste and sold as scrap, it cannot be said that input is cleared 'as such' [Rule 3(4) of the Cenvat Credit Rules 2002]. What is cleared is 'waste' and duty will be payable as if waste has been removed.
- (iii) If factory is sold, it does not amount to removal of inputs and capital goods. In such case, no duty is payable on inputs and capital goods [*Metzeller Automotive vs. CCE 2004 (167) ELT 208(Tri.)*].
- (b) Section 4(3)(b) of Central Excise Act, 1944 contains the provisions pertaining to related person. As per the provisions of this section persons shall be deemed to be "related" if-
- (i) they are inter-connected undertakings;
 - (ii) they are relatives;
 - (iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributors; or
 - (iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation - In this clause –

- (i) "inter-connected undertakings" shall have the meaning assigned to it in clause (g) of Section 2 of the Monopolies and Restrictive Trade Practices Act, 1969; and
 - (ii) "relative" shall have the meaning assigned to it in clause (41) of Section 2 of the Companies Act, 1956;
- (c) (i) The value for the purposes of the two notifications would mean the value fixed under section 4 or section 4A or the tariff value fixed under section 3(2).

- (ii) The units availing the benefit of Notification No.8/2003 (i.e. full exemption) cannot avail Cenvat credit on inputs. However, they can avail Cenvat credit on capital goods but the same can be utilized for payment of duty on final products only after the turnover reaches Rs. 100 lakhs.

The units availing the benefit of Notification No.9/2003 (opting for payment of 60% of normal duty) are allowed to avail and utilize Cenvat credit both on inputs and capital goods.

- (iii) As per paragraph 3A of Notification Nos. 8/2003 and 9/2003, "clearances of excisable goods without payment of duty" in the following cases only shall be excluded for the purpose of determining the aggregate value of clearances of excisable goods for home consumption:

- (a) to a unit in the Free Trade Zone
- (b) to a unit in the Special Economic Zone
- (c) to a 100% Export Oriented Undertaking
- (d) to a unit in the Electronic Hardware or Software Technology Park
- (e) supplies to United Nations or an international organization for their official use or supplied to projects funded by them on which exemption of duty is available in terms of Notification No.108/95-CE dated August, 28, 1995.

- (d) (i) The facts of the case are similar to the facts in the case of *T.N. State Transport Corporation Ltd. v. Contractor of Central Excise Madurai 2004 (166) ELT 433 (SC)*. In this case the Supreme Court had held that mixing of aluminum paste lacquer and thinner in exact proportions resulted in the formation of a separate and distinct product with an identity of its own and was known in the market as aluminum paint. It was held by the Court that the shelf life of 8-10 hours of the product was sufficient to market it. Therefore the mixing process would amount to manufacture.

- (ii) The facts of the given case are similar to the facts of the case of *CCEx. v. Markfed Vanspathi & Allied Industries 2003 (153) ELT 491(SC)* wherein the Supreme Court has held that merely because goods fall in a chapter heading under the Central Excise Tariff they do not become excisable unless there is manufacture and the goods are marketable. It was observed by the Apex Court that merely because the goods fell in the said tariff heading it could not be said that there was 'deemed manufacture'. The burden to prove that there was manufacture and what was manufactured was on the revenue. No evidence was placed to show that there was manufacture. Spent earth was earth on which duty had been paid. It remained earth even after the processing. Thus, if duty was to be levied again it would tantamount to levy of double duty on the same product, which was not permissible.

Question 2

- (a) (i) *PQR Ltd. who are in the manufacture of excisable goods had the practice of providing full reimbursement to all its dealers towards the value of damaged goods. The company used to charge a certain sum towards the cost of freight in the return of the damaged goods to it. No other consideration was received by the company. The Central Excise Department has issued a show cause notice that the return freight in respect of damaged goods has to be included in the assessable value for purposes of duty. Examine briefly the correctness in law of the show cause notice.*
(2 marks)
- (ii) *State briefly whether "damage discount" is permissible as a deduction for purpose of arriving at the assessable value under Section 4 of the Central Excise Act, 1944.*
(2 marks)
- (b) *Write a brief note on the following powers exercised through exemption notifications issued under the Central Excise Act, 1944:*
- (i) *Power not to recover duty of excise not levied or short-levied as a result of general practice, under Section 11C;*
- (ii) *Power to grant exemption from duty of excise under Section 5A. (2 + 3 = 5 marks)*
- (c) *Briefly enumerate the specified categories of persons/premises that have been exempted in terms of Rule 9(2) of the Central Excise Rules, 2002 from obtaining registration under Section 6 of the Central Excise Act, 1944.*
(6 marks)

Answer

- (a) (i) The facts in this case are similar to the facts in *Neelkamal Plastics Ltd., v. CCE, Noida (2004) 164 ELT 197 (Tribunal-Delhi)*. In this case the CESTAT had held that the amount collected by the company was related to the cost of return freight on the damaged goods and hence did not in any way represent the value of the goods. The assessee company did not receive any additional consideration for the sale nor were any clearances effected towards replacement without payment of duty. Therefore, the return freight was not liable to be added to the assessable value.
- (ii) It has been decided by the Supreme Court in *CCE v Vikram Detergent Ltd. 2001 (127) ELT 641 (SC)* that "damage discount" is in the nature of a refund or benefit to the buyer by way of compensation for damage, breakage or losses suffered by the goods after removal from the factory and is not eligible for deduction.
- (b) (i) Under section 11C, if the Central Government is satisfied
- (a) that a practice was, or is, generally prevalent regarding levy of duty of excise (including non-levy thereof) on any excisable goods; and
- (b) that such goods were, or are, liable

- (i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or
- (ii) to a higher amount of duty of excise than what was, or is being, levied, according to the said practice,

then, the Central Government may, by notification in the Office Gazette, direct that the whole of the duty of excise payable on such goods or as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.

- (ii) 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 100% EOU/FTZ/SEZ unless otherwise specified. This is because such units are exempted under other notifications issued specially for them.

The Central Government in public interest can issue a special order under circumstances of an exceptional nature stating reasons thereof and exempting excisable goods from payment of duty. The date of effect of the notification will be the date of its issue.

The Central Government, if it considers it necessary or expedient so to do, can 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 for the purpose of clarifying the scope or applicability of such notification.

- (c) Rule 9(2) empowers the Board to issue notification for giving exemption from registration subject to conditions and safeguards. Accordingly the Central Board of Excise and Customs by Notification no. 36/2001 C.E. (N.T.) dated 26.6.2001 has exempted the following specified categories of persons/premises from obtaining registration:
 - (i) Persons who manufacture the excisable goods, which are chargeable to nil rate of excise duty or are fully exempt from duty by a notification.
 - (ii) Small-scale unit availing the slab exemption based on value of clearances under a notification.
 - (iii) In respect of final products falling under chapter 61 or 62 the job-worker need not get registered if the principal manufacturer undertakes to discharge the duty liability.
 - (iv) Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to the following conditions:
 - a. the said excisable goods and any intermediary or by-product including the waste and refuse arising during the process of manufacture of the said goods under the Customs Bond are either destroyed or exported out of the country to

the satisfaction of the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, in charge of the Customs Bonded Warehouse;

- b. the manufacturer shall file a declaration in the specified form in triplicate for claiming exemption under this notification;
- c. no drawback or rebate of duty of excise paid on the raw materials or components used in the manufacture of the said goods, shall be admissible.
- (v) The person who carries on wholesale trade or deals in excisable goods (except first and second stage dealer, as defined in CENVAT Credit Rules, 2002).
- (vi) A 100% EOU, or a unit in FTZ or SEZ including STP/EHTP licensed or appointed, as the case may be, under the provisions of the Customs Act, 1962.
- (vii) Persons who use excisable goods for any purpose other than for processing or manufacture of goods availing benefit of concessional duty exemption notification.

Question 3

- (a) *Briefly explain the procedure with respect to "Provisional Assessment" under the Central Excise Rules, 2002.* (4 marks)
- (b) *Write a brief note on "Export under bond to Nepal where payment is in freely convertible foreign currency" with reference to the Central Excise Act, 1944 and the Rules. (5 marks)*
- (c) *With reference to Rules 12 and 17(3) of the Central Excise Rules, 2002 and Rule 7(5) of the CENVAT Credit Rules, 2002 explain in brief the main contents of the Returns to be filed with the Central Excise Department by an assessee in Form E.R. -1, E.R.-2 and E.R.-3.* (6 marks)

Answer

- (a) As per Rule 7 of the Central Excise Rules, 2002, provisional assessment can be resorted to when the duty cannot be determined at the point of clearance of the goods. The rule read with the guidelines issued by the Board on 1.9.2001, sets out the procedure for provisional assessment as follows:

The assessee should make a detailed request to Divisional Assistant/Deputy Commissioner of Central Excise, indicating:-

- (a) Specific grounds and documents and information for want of which final assessment cannot be made.
- (b) Periods for which provisional assessment is required.
- (c) Rate of duty or the value or both, as the case may be, proposed to be applied by assessee for provisional assessment; and
- (d) Undertaking to appear before Assistant/Deputy Commissioner within 7 days or such date fixed by him, and furnish all relevant information and documents within the time specified by the Assistant/Deputy Commissioner in his order, so as to enable the proper

officer to finalize the provisional assessment.

On receipt of such application, the Assistant/Deputy Commissioner will examine it to ascertain whether provisional assessment is necessary at all. If the reasons/ grounds are not sufficient, he may ask the assessee to appear before him on an appointed day and time, and if he is satisfied that provisional assessment is not necessary, he may pass a reasoned order rejecting the same and also ordering the rate of duty or the value, to be applied by the assessee.

Where the Deputy/Assistant Commissioner of Central Excise is satisfied with the genuineness of the assessee's request he will issue a specific order directing provisional assessment clearly stating:-

- a. The grounds on which Provisional Assessment has been ordered.
 - b. The rate and /or value, as the case may be, at which duty has to be provisionally paid.
 - c. The amount of differential duty for which bond is to be executed covering the period, if any, during which assessee paid duty provisionally under the deeming provisions, after applying the rate and/ or value specified in (b) above.
 - d. The amount of security or surety as may be fixed by Assistant Commissioner keeping in view the instructions issued by the Board from time to time.
- (b)** Export under bond to Nepal where payment is in freely convertible currency, shall be subject to following conditions, namely:-
- (i) The importer in Nepal, shall open an irrevocable letter of credit in favour of the exporter in India, before the export takes place. However, this is not necessary in the case of export of –
 - (a) All excisable goods other than consumer goods and
 - (b) Motor vehicles,
 if they are exported without payment of duty as-
 - (i) supplies to projects financed by any United Nations agency, the International Bank for Reconstruction and Development, International Development Association, the Asian Development Bank or any other multilateral agency of like nature; and
 - (ii) to all diplomatic missions in Nepal provided the Indian Embassy or the Ministry of External Affairs certifies that the import is for the personnel of the diplomatic community;
 - (ii) the exporter shall furnish a bond in the prescribed form before the Deputy/Assistant Commissioner of the Central Excise having jurisdiction over the factory, warehouse, or the approved premises or such other officer as authorized by the Board in this behalf, from where the goods are removed for export to Nepal,

- (iii) After the exports are effected the exporter shall furnish a certificate of remittances from the Reserve Bank of India or an authorized bank in India, showing that full payment for the goods has been duly received in freely convertible currency. On receipt of such a certificate and on the satisfaction that the goods have been exported in terms of the bond, the bond accepting authority shall discharge the exporter of his liabilities under the bond.
- (c) Rule 12 of Central Excise Rules, 2002 provides that every assessee shall submit to the Superintendent of Central Excise a monthly return in Form ER-1, of production and removal of goods and other relevant particulars, within ten days after the close of the month to which the return relates. However, an assessee availing exemption under a notification based on the value of clearances in a financial year (SSI), and textile units in textile sector manufacturing yarn, unprocessed fabrics and readymade garments falling under Chapter 50, 51, 52, 53, 54, 55, 58, 60, 61 or 62 shall file a quarterly return in Form ER-3, of production and removal of goods and other relevant particulars, within twenty days after the close of the quarter to which the return relates.

Rule 7(5) of Cenvat Credit Rules, 2002 requires the manufacturer to submit within ten days from the close of each month, a monthly return in the prescribed form to the Superintendent of Central Excise. In case of a manufacturer availing of an exemption based on the value of clearances, the form has to be submitted within twenty days of the close of every quarter.

Under Rule 17(3), 100% EOU units, units in FTZ or SEZ are required to submit a monthly return in the Form ER 2 in respect of the goods manufactured in, and receipt of inputs and capital goods, in the unit. The return is to be submitted to the Superintendent of Central Excise within 10 days from the close of the month to which the return relates.

Following are the requirements of returns:

- (i) The return should be on basis of 6 digit Tariff Heading. If same product attracts different rates of duty, all rates should be mentioned separately, even if such different rates are within the same month.
- (ii) If goods are cleared for export under bond, these should be indicated separately.
- (iii) Quantity should be indicated by relevant abbreviations i.e. kg. Mt etc.
- (iv) Value indicated should be as per section 4, 4A or tariff value as applicable. In case of exports, ARE-1/ ARE-2 invoice value should be indicated.
- (v) If duty on some invoices is paid on provisional basis, the details are required to be given in the ER-1 return.
- (vi) Details of CENVAT Credit availed and utilised has to be provided in Form ER-1 and ER-3.

Question 4

- (a) *State briefly against whom prosecution may be launched in the case of "offences by companies" under Section 9AA of the Central Excise Act, 1944.* (3 marks)

- (b) Write short notes on the following with reference to the Central Excise Act, 1944 and the Rules made thereunder:
- (i) Duty payment "under protest"
 - (ii) "Refund claim" under Section 11B. (3 x 2 = 6 marks)
- (c) State in brief the provisions relating to "Invoice" under Rule 11 of the Central Excise Rules, 2002. (6 marks)

Answer

- (a) As per provisions of section 9AA prosecution may be launched against any person, director, manager, secretary or other officers of a company, who is responsible for the conduct of the business of the company/firm and is found guilty of the offence under the Central Excise Act/Rules.

The provision makes every person in charge of the business of the company at the time of the commission of the offence to be guilty of the 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 has 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 term "in charge of and responsible to the company" would mean that the person was in overall control of the day to day affairs of the company.

- (b) (i) **Duty payment under protest:**

Section 11B of the Central Excise Act, 1944 provides that the time limit of one year for claiming of refund of Central Excise duty shall not apply where the duty has been paid under protest.

As per the Supplementary Instructions issued by Central Board of Excise and Customs, any assessee who desires to pay duty under protest, may do so by following the procedure mentioned below:

- (a) The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and dated acknowledgement will be given to him.
- (b) The assessee shall mark invoices or monthly/quarterly returns indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account, CENVAT Account and the Daily Stock Account.

- (c) If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, he shall not have any right to pay duty under protest.

(ii) Refund Claim

Any person claiming refund of excise duty may make an application for refund of such duty to the Assistant/Deputy Commissioner of Central Excise before the expiry of one year from the relevant date. The meaning of the term “relevant date” has been set out in the Explanation (B) to Section 11B. The application shall be accompanied by such evidence to establish that the excise duty in relation to which such refund is claimed has been paid by the applicant and the incidence of such duty has not been passed on by him to any other person. However, the limitation of one year shall not apply if duty has been paid under protest.

If the Assistant/Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund. However, the excise duty as determined by the Assistant/Deputy Commissioner of Central Excise shall be paid to the applicant, instead of being credited to the Fund, if such amount is relatable to—

- (a) 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;
 - (b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;
 - (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules or any notifications;
 - (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
 - (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;
 - (f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify.
- (c)** (1) No excisable goods shall be removed from a factory or a warehouse except under invoice signed by the owner or his authorized agent.
- (2) However, textile yarns, fabrics and readymade garments can be cleared on proforma invoice. In case of cigarettes, which are under physical control, invoice should be countersigned by the Excise officer.

- (3) The invoice shall be serially numbered and shall contain the registration number, name of the consignee, description, classification, time and date of removal, rate of duty, quantity and value, of goods and the duty payable thereon.
- (4) The invoice should be prepared in triplicate in the following manner:
 - (i) The original copy being marked as ORIGINAL FOR BUYER
 - (ii) The duplicate copy being marked as DUPLICATE FOR TRANSPORTER
 - (iii) The triplicate copy being marked as TRIPLICATE FOR ASSESSEE
- (5) Only one copy of invoice book shall be in use at a time, unless otherwise allowed by the Assistant/Deputy Commissioner of Central Excise.
- (6) The owner or working partner or the Managing Director or the Company Secretary or any person duly authorized for this purpose shall authenticate each foil of the invoice book, before being brought into use.
- (7) Before making use of the invoice book, the serial numbers of the same shall be intimated to the Superintendent of Central Excise having jurisdiction over the factory of the assessee.
- (8) The provisions of rule 11 shall apply in all respects to goods supplied by first stage dealer or a second stage dealer.

Question 5

- (a) *State briefly as to who can make an application for "Advance Ruling" under Section 23A of the Central Excise Act, 1944.* (3 marks)
- (b) *Discuss briefly the power of the Appellate Tribunal to order "rectification of mistake" under Section 35C of the Central Excise Act, 1944.* (3 marks)
- (c) *Explain briefly the provisions relating to "Special Audit" in certain cases under section 14A of the Central Excise Act, 1944.* (4 marks)
- (d) *State the provisions of Rule 17 of the Central Excise Rules regarding removal of goods by a 100% Export Oriented Undertaking for Domestic Tariff Area.* (5 marks)

Answer

- (a) The following persons can be "applicants" under section 23A(c) of the Central Excise Act, 1944:
 - (i) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or
 - (ii) a resident setting up a joint venture in India in collaboration with a non-resident; or
 - (iii) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who proposes to undertake any business activity in India and makes application for advance ruling.

- (b) As per section 35C(2), the Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend, any order passed by it and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal.

However, an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made unless the Appellate Tribunal has given notice to the other party of its intention to do so and has allowed him a reasonable opportunity of being heard.

- (c) If at any stage of enquiry, investigation or any other proceedings before him, any Central Excise Officer not below the rank of an Assistant/Deputy Commissioner of Central Excise having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person, he may, with the previous approval of the Chief Commissioner of Central Excise, direct such manufacturer or such person to get the accounts of his factory, office, depots, distributors or any other place, as may be specified by the said Central Excise officer, audited by a Cost Accountant, nominated by the Chief Commissioner of Central Excise in this behalf.

The Cost Accountant shall submit the audit report duly signed and certified to the said Central Excise Officer within the period specified by him or the period further extended on an application made to him. However, in any case the aggregate of the original and the extended period cannot exceed 180 days. The manufacturer shall be given an opportunity of being heard in respect of any material gathered on the basis of audit and proposed to be utilized in any proceedings.

- (d) Where any goods are removed from a 100% Export Oriented Undertaking to domestic tariff area, such removal shall be made under an invoice by following the procedure specified in rule 11, and on payment of appropriate duty before removal of goods by debiting the account current required to be maintained for this purpose.

The unit shall maintain in the prescribed form, an appropriate account relating to production, description of goods, quantity removed, and the duty paid.

The unit shall submit a monthly return in the prescribed form (Form E.R.-2) to the Superintendent of Central Excise within ten days from the close of the month to which the return relates, in respect of excisable goods manufactured in, and receipt of inputs and capital goods in the unit.

PART B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 any **two** of the following :
- (i) Goods
 - (ii) Person in charge
 - (iii) Foreign going vessel. (2 x 2 = 4 marks)
- (b) (i) C & Co. imported second hand machinery and declared the transaction value in the Bill of Entry filed for purposes of assessment of import duty. The Assistant Commissioner of Customs ignored the transaction value and based on Chartered Engineer' s certificate showing that the machinery was in working condition and had a residual life of 10 years he completed the assessment under Rule 8 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 after allowing maximum depreciation of 70%.
- Discuss briefly giving reasons whether the action of the Assistant Commissioner is valid in law. (3 marks)
- (ii) Due to congestion in the ports or non-availability of deep draught all ports are not navigable unto the jetty. Goods have to be discharged or transshipped at the outer anchorage with the help of barges. The charges associated with the delivery of cargo at outer anchorage are called "barging/lighterage charges". State giving reasons whether such charges have to be included for purposes of determination of assessable value under the Customs Valuation (Determination of price of Imported Goods) Rules, 1988. (3 marks)
- (c) Explain briefly the provisions of Rule 3 of the General Rules for the Interpretation of the First Schedule to the Customs Tariff Act, 1975. (4 marks)
- (d) State briefly the provisions of the Customs Act, 1962 relating to filing of "Import Bill of Entry". (6 marks)

Answer

- (a) (i) As per Section 2(22) of the Customs Act, 1962:
- "goods" include –
- (a) vessels, aircrafts and vehicle;
 - (b) stores;
 - (c) baggage;
 - (d) currency and negotiable instruments; and
 - (e) any other kind of movable property.

(ii) As per Section 2(31) of the Customs Act, 1962:

“person-in-charge” means,-

- (a) in relation to a vessel, the master of the vessel;
- (b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;
- (c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;
- (d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance.

(iii) “foreign-going vessel or aircraft” means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India to any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes-

- (i) any naval vessel of a foreign Government taking part in any naval exercise;
- (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India;
- (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.

(b) (i) The facts in this case are similar to the facts in *Tolin Rubber Pvt. Ltd. v. COC, Cochin* (2004) 163 ELT 289 (SC). In this case the Supreme Court stated that the value of the goods has to be determined as per Rule 4(1) of the Customs Valuation Rules, 1988 and only in circumstances specified under Rule 4(2) the transaction value as per Rule 4(1) has to be rejected and further determination has to be made as per Rule 8. The assessing authority had not provided any reasons for rejecting the transaction value. It was held by the Supreme Court that the Bill of Entry as made by the company and the transaction value as declared by it had to be accepted by the Department.

Applying the same ratio to the given situation, it could be said that the action of the Assistant Commissioner in the instant case is not valid in law.

(ii) As per *M.F. (D.R.) Circular No. 29/2004-Cus., dated 13.04.2000*, the barging/lighterage charges borne by the importer in bringing the goods from the outer anchorage to the landmass should be included in the assessable value as “extended cost of transportation” under Rule 9(2)(a) of the Customs Valuation Rules, 1988. The value of the goods is deemed to be the price at which such goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade. The importation gets completed when the goods reach the landmass of the country and not at the outer anchorage point. Therefore, all the expenses incurred by the importer in bringing the goods to the landmass of the country will be includible in the assessable value.

- (c) Rule 3 is to be applied when classification cannot be decided by Rules 1 and 2.

Rule 3 of General Rules for the Interpretation of Customs Tariff provides that when by application of Rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides most specific description shall be preferred to the heading providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale which cannot be classified by reference to (a), shall be classified as if they consisted of material which gives them their essential character, in so far as this criterion is applicable.
- (c) When the goods cannot be classified by reference to (a) or (b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.
- (d) It is the duty of the importer of any goods to make an application to the proper officer for clearance of the goods. The goods may be cleared for home consumption or for deposit in a warehouse or for transit or transshipment. Therefore, there are three types of bills of entries prescribed for these three different purposes.

Form I (white) - for home consumption

Form II (yellow) - for warehousing

Form III (green) - for ex-bond clearance for home consumption

The form, of the bill of entry is governed by Bill of Entry (Forms Regulations, 1976). Normally the Bill of Entry is in four copies:

- (a) Original meant for the customs authorities for assessment and collection of duty;
- (b) Duplicate, indented as an authority to the custodian of the cargo to release cargo;
- (c) Triplicate, as a copy for record for the importer; and
- (d) Quadruplicate, as a copy to be presented to the bank

A facility has now been provided for clearance of the goods by making an electronic declaration to the Customs Computer System through network facility. The bill of Entry (Electronic Declaration) Regulations, 1995, provide the details.

The importer is required to declare in the Bill of Entry amongst other things –

- the particulars of packages,
- the descriptions of the goods, in terms of the description given in the Customs Tariff.

According to Section 46(3) a bill of entry is to be normally filed after the delivery of the import manifest (vessel/aircraft)/import report (vehicle). However, the bill of entry can be presented even before the delivery of the import manifest if vessel is expected to arrive within 30 days from the date of such presentation.

Question 7

- (a) State whether the principle of "unjust enrichment" applies to refund of export duty under the Customs Act, 1962. (2 marks)
- (b) Write short notes on the following with reference to the Customs Act, 1962:
- Duty on pilfered goods
 - Reimportation of goods. (2 x 2 = 4 marks)
- (c) XYZ Co., the assessee, has claimed before the Customs Authority that since the exports of goods in its case attracted no duty, the value, for purposes of Customs Act, 1962, to be declared shall be the value of the goods, which he expects to receive on sale of goods in the overseas market.
Briefly discuss giving reasons whether the stand taken by XYZ Co. is correct. (3 marks)
- (d) State in brief the features of "Special Economic Zone" with reference to the Customs Act, 1962. (6 marks)

Answer

- (a) The Tribunal in the case of *Commissioner of Customs, Bangalore v. Ken Agritech Pvt. Ltd.* 2004 (166) E.L.T 339 (Tri. – Bang.) has held that the provisions relating to unjust enrichment introduced in section 27 by way of amendment in the Customs Act could only apply to refund of import duty under the said section. Since refund of export duty is dealt with under section 26 of the Act and the same has not been amended by the Parliament, the provisions relating to unjust enrichment introduced under section 27 could not be made applicable to refund of export duty under the said section 26.
- (b) (i) **Duty on pilfered goods**
As per section 13 of Customs Act, 1962, if any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods. However, where such goods are restored to the importer after pilferage, the importer becomes liable to pay duty.
- (ii) **Re-importation of goods**
As per section 20, if goods are imported into India after exportation therefrom, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.

- (c) This issue has been addressed to by the Supreme Court in the case of *M/s. Om Prakash Bhatia v. Commissioner of Customs, Delhi 2003 (155) E.L.T. 423*. The Apex Court observed that for finding the true export value of the goods, section 14 of the Customs Act, 1962 has to be read along with section 2(41) which defines the word 'value'. Value in relation to any goods means the value thereof determined in accordance with the provisions of section 14(1). Section 14 specifically provides that in case of assessing the value for purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade where the seller and buyer have no interest in the business of each other and the price is the sole consideration for the sale. Therefore, for determining the export value of the goods, the method of determining the value under section 14 has to be followed even if no duty is leviable on the export of goods. Hence, the contention of XYZ Co. in the instant case will be rejected.

(d) Features of Special Economic Zone

The main features of SEZ are as follows :

- (a) SEZ may be set up in the public, private, joint sector or by State Government as notified by the Ministry of Commerce and Industry.
- (b) The Central Government is empowered to make rules regarding the requirements relating to goods or class of goods admissible to SEZ, nature of operations and the conditions to be fulfilled and the procedure to be followed.
- (c) Any goods admitted to a special economic zone from the domestic tariff area shall be chargeable to export duties at such rates as are leviable on such goods when exported. However, this would be subject to the rules made in this regard under Section 76F.
- (d) Any goods removed from special economic zone for home consumption shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under Customs Tariff Act, 1975 as leviable on such goods when imported.
- (e) SEZ units may be set up for :
 - (i) Manufacture of goods,
 - (ii) Rendering of services,
 - (iii) Production,
 - (iv) Processing,
 - (v) Assembling,
 - (vi) Trading,
 - (vii) Repair, re-making, re-conditioning, and re-engineering,

- (viii) Making of gold/silver/platinum jewellery and articles thereof or in connection therewith.
- (f) Goods going into the SEZ area from Domestic Tariff Area (DTA) shall be treated as deemed exports.
- (g) Goods coming from the SEZ area into DTA shall be treated as if the goods are being imported.

Question 8

- (a) *Explain briefly the procedure for clearance of warehoused goods for home consumption under Section 68 of the Customs Act, 1962.* (3 marks)
- (b) *State in brief with reference to the provisions of Section 129A of the Customs Act, 1962 the matters relating to which no appeal shall lie before the Appellate Tribunal.* (3 marks)
- (c) *Enumerate briefly the penalties under Section 114 of the Customs Act, 1962 for attempt to export goods improperly.* (4 marks)
- (d) *Explain the manner of filing drawback claim under the Duty Drawback Rules pursuant to Section 74 of the Customs Act, 1962.* (5 marks)

Answer

- (a) The importer of any warehoused goods may clear them for home consumption under section 68 of the Customs Act, 1962, if-
 - (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;
 - (b) the import-duty leviable on such goods and all penalties, rent, interest, and other charges payable in respect of such goods have been paid; and
 - (c) an order for clearance of such goods for home consumption has been made by the proper officer.

However, the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of rent, interest, other charges and penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.
- (b) As per section 129A, no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order passed by the Commissioner (Appeals) under section 128A; if such order relates to, -
 - (a) any goods imported or exported as baggage;
 - (b) any goods located in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such

goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

- (c) payment of drawback as provided in Chapter X, and the rules made thereunder.
- (c) The person involved in commission or omission, in relation to any goods, which renders such goods liable to confiscation under section 113, or abets the same, shall be liable to penalties under section 114 in different types of cases as follows :
 - (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is greater;
 - (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or 5000/-, whichever is greater;
 - (iii) in the case of any other goods, to a penalty not exceeding the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater.
- (d) (i) In the case of exports other than by post, a formal drawback claim, in the prescribed form, should be filed with the proper officer of Customs, within three months of the date of let export order (under section 51) and claim should be accompanied by
 - (a) triplicate copy of the Shipping Bill or Bill of Export in proof of export;
 - (b) Bill of entry or other document in proof of payment of import duty
 - (c) Export invoice and packing specification
 - (d) Bill of lading or airway bill as proof of effective export
 - (e) Permission of RBI etc.
 - (f) Import invoice and packing specification
 - (g) Any other document necessary
- (ii) The drawback department shall scrutinize these documents and issue a deficiency memo for further details or documents required and the exporter shall furnish them forthwith.
- (iii) The customs department shall pay to the exporters, or an agent specially authorized by the exporter to receive the drawback amount, the eligible drawback and interest if any.
- (iv) If there is any erroneous or excess payment of drawback, it shall be demanded and if the exporters fail to pay the demand, it can be recovered in the manner prescribed under section 142.

- (v) The Central Government can relax the provisions of these rules, in appropriate cases, on sufficient cause being shown by the exporter in individual cases.

In the case of exports by post, the outer cover should bear in bold letters an inscription "Drawback Export"; a declaration/claim in the prescribed form should be submitted along with parcel; and the date of receipt of this claim in the Customs department from the postal authorities, will be deemed to be the date of filing of the drawback claim.

PART C

Question 9

- (a) Answer any **four** of the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:

- (i) One professionally qualified engineer with one non-professionally qualified engineer rendering engineering consultancy services under the name and style of ABC Consultancy Pvt. Ltd.
- (ii) Business Auxiliary services provided by a Commission Agent.
- (iii) An institute providing pre-school coaching and training.
- (iv) Ship repair services including dry docking within port premises.
- (v) Blood test and analysis services provided by a commercial pathology laboratory.

(2 x 4 = 8 marks)

- (b) Answer any **two** of the following with reference to the provisions of the Finance Act, 1994 as amended relating to service tax:

- (i) Services rendered after 1.7.2003 under a maintenance contract of machinery entered into prior to the effective date i.e., 1. 7 .2003 and in respect of which the bill has been raised and the value in full received from the customer prior to 1.7.2003.
- (ii) What is the date of payment of service tax where the amount of service tax is paid by cheque and is presented to the designated bank on April 25, 2004 and realised by the bank on April 27, 2004? Whether any interest and penalty is attracted in this case?
- (iii) Whether service tax credit availed on input services during the period April 1, 2004 to April 24, 2004 can be utilized for the payment of service tax on the output services provided for the month/quarter ended March, 2004, which is due for payment on April 25, 2004.

(2 x 2 = 4 marks)

- (c) Briefly discuss the provisions of the Finance Act, 1994 as amended relating to service tax with respect to any **one** of the following taxable services:

- (i) Event Management
- (ii) Video Tape Production Services.

(3 marks)

Answer

- (a) (i) Service tax shall be applicable on ABC Consultancy Pvt. Ltd. as consulting engineer includes self-employed, professionally qualified engineer who may or may not employ others to assist him or it could be an engineering firm whether organized as a sole proprietorship, partnership, a private or public limited company [Commissioner of Central Excise, New Delhi, Trade Notice No. 53 – C.E. (Service Tax)/97, dated 04.07.1997].
- (ii) Service tax shall not be attracted as the business auxiliary service provided by commission agent has been exempted vide *Notification no. 13/2003-S.T. dated 20.6.2003 w.e.f. 1.7.2003*.
- (iii) An institute providing pre-school coaching and training has been specifically excluded from the definition of Commercial training or coaching center under clause (27) of section 65 of the Finance Act, 1994. Thus, service tax shall not be attracted on it.
- (iv) As per *CBE&C Circular No. 67/16/2003-ST dated 10.11.2003* ship repair services including dry docking within port premises come within the ambit of port services and thus are chargeable to service tax.
- (v) Any testing or analysis services provided in relation to human being or animals are specifically excluded from the definition of technical testing and analysis under clause (106) of section 65 of the Finance Act, 1994. Thus, service tax will not be attracted on this service.
- (b) (i) *Notification no. 11/2003 S.T. dated 20.6.2003* exempts the service rendered in relation to maintenance or repair under a contract which was entered in to prior to 1.7.2003, if the bill for the service is raised prior to 1.7.2003 and the value of the service is received prior to 1.7.2003. Thus, in this case no service tax will be charged.
- (ii) As per sub-rule 2A of Rule 6 of the Service Tax Rules, 1994 the date of presentation of cheque to the designated bank, subject to realization is the date of payment. Thus, in this case the date of payment will be 25th April, 2004 as the cheque has been realized on 27th April, 2004.
- The cheque is deposited before due date and has been realized a day or two after. In such a case the date of presentation of cheque is the date of payment i.e. 25.4.2004. Hence, no interest and penalty is chargeable as there is no delay in payment of service tax [*Eicher Consultancy Services vs. CCE 2003 (157) EL T 432*].
- (iii) The proviso to sub-rule 1 of Rule 4 of the Service Tax Credit Rules, 2002 provides that while paying service tax on the output service, the service tax credit shall be utilized only to the extent such credit is available on the last day of a month/quarter, for payment of service tax relating to the month/quarter, as the case may be. Hence,

the credit availed in the month of April 2004 cannot be utilized for paying service tax for the month of March 2004.

(c) (i) Event Management

Event management means any service provided in relation to planning, promotion, organising or presentation of any arts, entertainment, business, sports or any other event and includes any consultation provided in this regard [Section 65(40)]. The scope of the taxable service includes any service provided to a client by an event manager in relation to event management. [Section 65(105)(zu)]

Event Manager means any person who is engaged in providing any service in relation to event management in any manner. [Section 65(41)] The value of the taxable service shall be the gross amount charged by the service provider for such service rendered by him.

(ii) Video Tape Production Services

The taxable service shall include any service provided to a client by a video production agency in relation to video tape production, in any manner [Section 65(105)(zi)]. Video production agency means any professional videographer or any commercial concern engaged in the business of rendering services relating to video tape production. [Section 65(119)]

Video tape production means the process of any recording of any programme, event or function on a magnetic tape and includes editing thereof in any manner. [Section 65(120)]. The value of the taxable service shall be the gross amount charged by the service provider for the service rendered by him but does not include the cost of unrecorded magnetic tape or such other storage devices if any sold to the client during the course of providing the service.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by Finance (No.2) Act, 2004 and Notifications/Circulars issued up to 31.10.2004 which are relevant for May 2005 examinations.

PAPER – 8 : INDIRECT TAXES

Question Nos. 1, 6 and 9 are compulsory.

*Answer any **two** questions from PART - A and **one** question from PART – B.*

PART – A

Question 1

(a) *Briefly explain any **two** of the following with reference to the provisions of Cenvat Credit Rules, 2002 :*

(i) *Exempted goods*

(ii) *Final products*

(iii) *First stage dealer.* (2 x 2 = 4 marks)

(b) *What are the situations where transaction value under Section 4 of the Central Excise Act does not apply?* (4 marks)

(c) *A trader supplies fabrics to independent processor. Cost of fabrics is Rs.1,150. The processor charges Rs.450 which includes Rs.350 as processing charges and Rs.100 as his profit. After processing, goods are sent back to the trader who sells them at Rs.1,800. Transport charges for receiving goods at the premises of the processor is Rs.50 and the transport charges for sending goods after processing is Rs.60.*

Please determine the assessable value of the goods under Section 4 of the Central Excise Act. (6 marks)

(d) *Before 1.3.2003, light diesel oil was one of the input as per the definition of input given in Cenvat Credit Rules. M/s. Rim purchased duty paid light diesel oil in January, 2003 and availed of Cenvat Credit on 4.1.2003. When input definition was amended to exclude LDO, department asked the company Rim to reverse the amount of Cenvat Credit in respect of the stock of LDO with them as on 1.3.2003.*

Advise M/s. Rim as to whether they have to reverse the credit? (6 marks)

Answer

(a) As per Cenvat Credit Rules, 2002

(i) As per Rule 2(d) of the Cenvat Credit Rules, 2002, “exempted goods” means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to “Nil” rate of duty.

- (ii) As per Rule 2(e) of the Cenvat Credit Rules, 2002, "final products" means excisable goods manufactured or produced from "inputs".
- (iii) As per Rule 2(f) of the Cenvat Credit Rules, 2002, "first stage dealer" means a dealer who purchases the goods directly from, -
 - (i) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or
 - (ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice;

As per Cenvat Credit Rules, 2004:

- (i) As per Rule 2(d) of the Cenvat Credit Rules, 2004, "exempted goods" means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty.
 - (ii) Rule 2(h) of Cenvat Credit Rules, 2004 defines "final products" as excisable goods manufactured or produced from input, or using input service.
 - (iii) As per Rule 2(ij) of Cenvat Credit Rules, 2004, a "first stage dealer" means a dealer who purchases the goods directly from-
 - (a) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or
 - (b) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice.
- (b) As per section 4 of the Central Excise Act, assessable value shall be the transaction value if the following conditions are fulfilled –
- (i) there is a sale of goods,
 - (ii) the sale of goods is for delivery at the time and place of the removal,
 - (iii) the assessee and the buyer are not related persons, and
 - (iv) the price is the sole consideration for the sale.

If any one of the above conditions is not satisfied, the transaction value will not be taken as the assessable value. The value in such a case shall be determined on the basis of

the Central Excise (Determination of Price of Excisable Goods) Rules, 2000 notified under section 4(1)(b) of the Central Excise Act.

- (c) In case of *Ujagar Prints v. Union of India* 1989 (39) E.L.T. 493 (S.C), the Supreme Court has held that in respect of valuation of goods produced on job work basis, the assessable value shall include cost of material, processing charges and profit of processor. However, the trader's profit (customers' profit who got the goods processed) being post-manufacturing profit shall not be included in the assessable value. The Apex Court has clarified that the processor's factory gate shall be treated as deemed factory gate as if the processed fabrics were sold at processor's factory gate.

Therefore, applying the ratio of the abovementioned decision of the Supreme Court, the assessable value in this case shall be the aggregate of cost of fabrics, processing charges, processor's profit and cost of transportation for receiving goods at the premises of the processor. Thus, the assessable value shall be Rs.1650 [1150+350+100+50] and not Rs.1800 at which the trader sells the goods. Cost of transportation of Rs.60 from the processor's place to the trader's premises shall not be included in the assessable value as the place of the processor is deemed to be the place of removal of goods.

- (d) Rule 2(g) of the Cenvat Credit Rules, 2002 was amended w.e.f. 01.03.2003 to exclude light diesel oil (LDO) from the definition of inputs vide *Notification No. 13/2003-C.E. (N.T.)*, dated 1-3-2003. The Karnataka High Court in *Grasim Industries Ltd v. C.B.E.C.* 2004 (163) E.L.T. 10 (Kar) has held that credit on LDO, lying in stock on 28-2-2003, should not be reversed, as it would amount to taking away of vested right which have already accrued to the assessee in terms of the excise laws. The Supreme Court also conformed to the view taken by the Karnataka High Court and dismissed the appeal filed by the Government – 2004 (170) E.L.T. A 306 (S.C.)

In view of the above judgement, M/s Rim need not reverse the Cenvat credit in respect of the opening stock of LDO with them as on 1.3.2003 as L.D.O. was one of the specified inputs in January 2003 when Cenvat credit of the duty paid on it was availed.

Note: The principle enunciated by the abovementioned case law holds equally good for Cenvat Credit Rules, 2004 as well.

Question 2

- (a) Explain briefly with reference to the provisions of the Central Excise Act the term "Deemed Manufacture". (3 marks)
- (b) Discuss the provisions of the Central Excise Act relating to collection of amount by a person from his buyer in excess of the duty assessed or determined and paid on any excisable goods. (4 marks)
- (c) When shall a person be deemed to be a related person for the purpose of valuation under the Central Excise Act? (4 marks)

(d) Describe power to summon persons under the Central Excise Act. (4 marks)

Answer

(a) As per section 2(f) of the Central Excise Act, 1944 "manufacture" includes any process-

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

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

The processes that qualify to be manufacture as per clause (ii) and (iii) of section 2(f) are termed as deemed manufacture.

Thus, if any process which is specified in the Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture is carried out, goods will be deemed as manufactured, even if as per Court decisions, the process may not amount to manufacture. For instance, Note 2 of Chapter 9 provides that in case of tea, or tea waste, blending, sorting, packing or re-packing into smaller containers shall amount to manufacture. Similarly, if any of specified processes (like re-packing, re-labelling, alteration of retail sale price etc.) is being carried out on goods covered in Third Schedule to the Central Excise Act, 1944, the process will be deemed to be as that of manufacture.

(b) Section 11D of the Central Excise Act governs the provisions relating to collection of amount by a person from a buyer in excess of the duty assessed or determined and paid on any excisable goods in the following manner:

- (1) Every person who is liable to pay duty and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government. This provision is notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulations made there under.
- (2) The Central Excise officer may serve on the person who is liable to pay the amount

under sub-section (1) a notice if such amount has not been paid to the credit of the Central Government. The notice requires such person to show cause why he should not pay the amount, as specified in the notice to the credit of the Central Government.

- (3) The Central Excise officer shall, after considering the representation, if any, made by the person on whom the notice is served, determine the amount due from such person (not being in excess of the amount specified in the notice). Thereupon such person shall pay the amount so determined.
 - (4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (3) shall be adjusted against the duty 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).
 - (5) Where any surplus is left after the adjustment made 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. Such person may make an application under section 11B 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.
- (c) Section 4(3)(b) of Central Excise Act, 1944 states that persons shall be deemed to be related if:
- (i) they are inter-connected undertakings;
 - (ii) they are relatives;
 - (iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or
 - (iv) they are so associated that they have interest, directly or indirectly, in the business of each other.
- “Inter-connected undertakings” shall have the meaning assigned to it in clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 and “relative” shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956.
- (d) Section 14 of the Central Excise Act deals with the power to summon persons. As per this section any Central Excise Officer empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary for:
- (i) giving evidence, or
 - (ii) producing a document or any other thing

in any enquiry which he is making for any of the purposes of this Act.

All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct. Further, these persons shall be bound to state the truth upon any subject in respect of which they are examined and produce documents and other things as may be required. Exemptions under sections 132 and 133 of the Code of Civil Procedure shall be applicable to requisitions for attendance under this section. Every inquiry under this section shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code.

Question 3

- (a) *Is there any exception to the rule that central excise duty is payable by a producer or manufacturer of goods on removal thereof from the factory and duty is payable by someone else?* (2 marks)
- (b) *What are the dates for determination of rate of central excise duty under Central Excise Rules, 2002?* (3 marks)
- (c) *Please discuss the manner of payment of duty under Central Excise Rules, 2002. [Rule 8 only]* (4 marks)
- (d) *M/s. SYL purchases film from the manufacturer thereof on payment of appropriate central excise duty. They undertake the processes of lamination/metallisation of the said film. The department directs them to pay central excise duty as the processes undertaken by them amount to manufacture.*

Please offer your comments with the help of decided case law. (6 marks)

Answer

- (a) As per rule 4(1) of the Central Excise Rules, 2002, excise duty is payable by a person who produces or manufactures excisable goods, or who stores such goods in a warehouse. However sub-rule (2) of Rule 4 lays down that in respect of molasses produced in a khandsari sugar factory, *the person who procures such molasses*, whether directly from such factory or otherwise, pays duty leviable on such molasses in the same manner as if such molasses have been produced by him.
- (b) The dates for determination of rate of duty have been prescribed in Rule 5 of Central Excise Rules, 2002 as under:
 - (i) in case of excisable goods other than khandsari molasses, the relevant date for determination of rate of duty shall be the date when goods are removed from the factory.
 - (ii) in case of khandsari molasses, the relevant date for determination of rate of duty shall be the date of receipt of molasses in the factory of the procurer.

- (iii) in case of excisable goods being used within the factory, the relevant date for determination of rate of duty shall be the date on which goods are issued for such use.
- (c) Rule 8 of the Central Excise Rules, 2002 prescribes the manner of payment of duty as under:
 - (i) The duty on the goods shall be paid by the 5th day of the month following the month of removal except for the month of March.
 - (ii) In case of removal of goods during the month of March, the duty shall be paid by the 31st day of March.
 - (iii) If an assessee is availing the exemption under a notification based on the value of clearances in a financial year, the duty shall be paid by the 15th day of the following month except in case of removal of goods in March for which the duty shall be paid by the 31st day of March.
 - (iv) The duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.
 - (v) If the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise & Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to the realisation of that cheque.
- (d) As per section 3 of the Central Excise Act, 1944 a duty of excise is levied on goods produced or manufacture in India. For understanding the concept of manufacture, the Indian Courts have been relying on the famous paragraph from an American judgment which defines manufacture. The paragraph *inter alia* provides that as a result of manufacture, a new and different article must emerge having a distinctive name and character or use.

The issue in the problem has been considered by the Supreme Court in the case of *Meltex (I) Pvt. Ltd. v. C.C.E. 2004 (165) E.L.T. 129 (S.C)* wherein it has held that laminating/metallising of duty paid films does not amount to manufacture as:

- (i) no new and distinct product comes in to existence, and
- (ii) the product which is a film at the onset remains a film, even after lamination or metallisation.

Therefore, applying the ratio of the abovementioned decision to the present problem, it can be inferred that the stand taken by the department is not tenable in law.

Question 4

- (a) Does the maxim "*Latter the Better*" apply in classifying the excisable goods? (3 marks)

- (b) *Mention briefly the provisions regarding export under bond to Nepal where payment of duty is in freely convertible currency.* (6 marks)
- (c) *Deputy Commissioner of Central Excise passes an adjudication order classifying the goods manufactured by MTZ under heading 85.42 and charges duty @ 16% ad valorem. MTZ pays the duty without challenging the adjudication order. After 4 months they realise that partial exemption under a notification was available to goods manufactured by them. They file a claim for refund of duty paid in excess on the ground that benefit of exemption can be claimed at any time.*

Are MTZ entitled to the refund of duty claimed in time?

(Note : Presume that principle of unjust enrichment does not apply). (6 marks)

Answer

- (a) The Central Excise Tariff Act, 1985 incorporates five Rules of Interpretation. Rule 3(c) of the Rules for the Interpretation provides that when goods cannot be classified by reference to rule 3(a) or rule 3(b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration.

Thus the maxim "Latter the Better" applies in determining the classification of the excisable goods.

- (b) Export to Nepal under bond where payment is in freely convertible currency is governed by *Notification No. 45/2001-C.E. (N.T.) dated 26.6.2001* as amended. The provisions are as under:

- (1) The importer in Nepal before the export of goods takes place shall:
 - (i) make full payment to the exporter by furnishing Foreign Inward Remittance Certificate from any bank authorized to deal in foreign exchange by Reserve Bank of India, or
 - (ii) open an irrevocable letter of credit in favour of the exporter in India.
- (2) This condition does not apply if the excisable goods other than consumer goods but excluding motor vehicles, are exported without payment of duty as:
 - (a) supplies to projects financed by any United Nations Agency, the International Bank for Reconstruction and Development, International Development Association, the Asian Development Bank or any other multilateral agency of like nature;
 - (b) to all diplomatic missions in Nepal provided the Indian Embassy or the Ministry of External Affairs certifies that the import is for the personnel of the diplomatic community.
- (3) The exporter shall furnish a bond before the Assistant/Deputy Commissioner of

Central Excise having jurisdiction over the factory, warehouse, or the approved premises or such other officer as authorised by the Board on this behalf from where the goods are removed, for export to Nepal.

- (4) Where the export is against an irrevocable letter of credit, the exporter shall furnish a certificate from the Reserve Bank of India or any other bank authorized to deal in foreign exchange by the Reserve Bank of India showing that full payment has been received in freely convertible currency.
 - (5) On receipt of such a certificate and on the satisfaction that the goods have been exported in terms of bond, the bond accepting authority shall discharge the exporter of his liabilities under the bond.
- (c) It has been held by the Supreme Court in the case of *CCE v. Flock India Ltd. 2000 (120) E.L.T. 285 (S.C)* that where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund. If this position is accepted then the provisions for adjudication and appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant.

In the given question, the classification dispute has been decided by the Deputy Commissioner after passing an adjudication order and no appeal has been filed thereafter. Therefore, the order has attained finality. Thus, applying the ratio of the above decision, MTZ cannot claim refund by filing a claim for the same.

Question 5

- (a) *In what circumstances additional evidence can be produced by an appellant before the Commissioner (Appeals) of Central Excise?* (5 marks)
- (b) *M/s. RKR manufactures footwear bearing the brand name "Lotus" which is owned by M/s. Lotus Industries Ltd. for manufacture of detergent powder. When the department disallowed the benefit of small scale exemption under Notification No. 9/2003-C.E. on the ground that their goods are bearing brand name of another person, M/s. R.K.R. contended that M/s. Lotus Industries Ltd. owns brand name 'Lotus' only for detergent power and not for footwear.*
Decide the case with reasons and mention case law, if any. (5 marks)
- (c) *"Mere selling of a commodity does not mean it is marketable". Elucidate.* (5 marks)

Answer

- (a) Rule 5 of the Central Excise (Appeals) Rules, 2001 provides that the appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, in addition to evidence produced by him during the course of the

proceedings before the adjudicating authority. However, additional evidence can be produced in the following circumstances –

- (1) where the adjudicating authority has refused to admit evidence which ought to have been admitted, or
- (2) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority, or
- (3) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal, or
- (4) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

The Commissioner (Appeals) has to record the reasons for admitting the additional evidence in writing. Further, the adjudicating authority or an officer authorized by the said authority has to be allowed a reasonable opportunity:

- (1) to examine the evidence or document or to cross examine any witness produced by the appellant; or
- (2) to produce any evidence or any witness in rebuttal of the additional evidence.

The power of the Commissioner(Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal is independent of the above provisions relating to additional evidence and his powers will not be affected by the said provisions.

- (b) Paragraph 4 of the *Notification No. 9/2003-CE dated 01.03.2003* provides that the benefit of Small Scale Industry (SSI) exemption shall not apply to the goods bearing a brand name or trade name, whether registered or not, of another person. As per Explanation (A) to the notification, brand name or trade name means:

- ◆ a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing
- ◆ which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade
- ◆ between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

Supreme Court has held in the case of *CCEx, v. Bhalla Enterprises 2004 (173) E.L.T. 225 (S.C)* that:

- (i) clause 4 of the Notification read with Explanation (A) clearly debars those persons from the benefit of the SSI exemption who use someone else's name in connection

with their goods, either with the intention of indicating, or in a manner so as to indicate a connection between their goods and such other person;

- (ii) there is no requirement for the owner of the trade mark using the name or mark with reference to any particular goods;
- (iii) The object of the Notification is clearly to grant benefits only to those industries which otherwise do not have the advantage of a brand name.

In other words, if brand name of another person is used even in respect of goods of other class or kind (different from the nature of the goods of the owner of brand name), benefit of SSI exemption shall not be available.

In view of the aforementioned provisions, M/s RKR will not be entitled to the SSI exemption as their goods bear the brand name "LOTUS" owned by M/s. Lotus Industries Ltd. The fact that M/s. RKR uses the brand name on footwear while the same is being used by M/s. Lotus Industries Ltd. on detergent powder will have no relevance.

- (c) Unless the goods are capable of being marketed, they cannot be charged to duty. Marketability is the capability of a product of being put into the market for sale. Supreme Court in *Union of India v. Delhi Cloth and General Mills Case – 1977 (1) ELT (J199)* has held that in order to become goods, it is necessary that an article must be something which can ordinarily come to the market to be bought and sold.

However, the Apex Court in *UOI v Indian Aluminium Co. Ltd. 1995 (77) ELT 268* has held that dross and skimmings are not marketable commodity even if they can be sold to recover some metal as everything which is sold is not necessarily a marketable commodity as known to the commerce and which, it may be worthwhile to trade in. The dross and skimmings arising during the manufacture of aluminium are nothing but waste or rubbish which is thrown up in the course of manufacture. They are not metal in the same class as waste or scrap. It may be possible to recover some metal from them and therefore they can be sold.

This view has been reiterated by the Supreme Court in *CCEx v. Tata Iron and Steel Co. Ltd. 2004 (165) E.L.T. 386 (S.C.)* wherein the Apex Court has held that the dross and skimming are merely the refuse, scum or rubbish produced during the process of manufacture. The Supreme Court has held that merely because the dross and skimming are sold to customers, it cannot be inferred that they are marketable commodity as even rubbish can be sold. However, that does not make rubbish a marketable commodity. Mere selling of a commodity does not mean that it is marketable since a commodity can also be sold as rubbish. Marketability means selling of a commodity which is known to the commerce and which may be worthwhile to trade in.

In view of these decisions it can be inferred that in order to be marketable an item should be capable of being bought and sold. However, the item should be something which is

worthwhile to trade in and not just refuse, scum or rubbish.

PART - B

Question 6

- (a) *Briefly explain with reference to the provisions of the Customs Act any two of the following:*
- (i) *Entry*
 - (ii) *Prohibited goods*
 - (iii) *Warehouses.* (2 x 2 = 4 marks)
- (b) *A material was imported by air at CIF price of 5,000 US\$. Freight paid was 1,500 US\$ and insurance cost was 500 US\$. The banker realized the payment from importer at the exchange rate of Rs.45 per dollar. Central Board of Excise and Customs notified the exchange rate as Rs.44.50 per US\$.*
- Find the value of the material for the purpose of levying duty.* (4 marks)
- (c) *Discuss the provisions regarding 'Transit of Goods' and 'Transshipment of goods' without payment of duty under the Customs Act.* (4 marks)
- (d) *State the circumstances under which a revision petition can be filed before the Central Government under the Customs Act.* (4 marks)
- (e) *Write a note on project import and mention eligible projects.* (4 marks)

Answer

- (a) (i) As per section 2(16) of the Customs Act, 1962 entry in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in section 82 or the entry made under the regulations made under section 84.
- (ii) As per section 2(33) of the Customs Act, 1962 prohibited goods means any goods the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.
- (iii) As per section 2(43) of the Customs Act, 1962, warehouse means a public warehouse appointed under section 57 or a private warehouse licensed under section 58. A warehouse is a place where goods after landing are permitted to be removed without payment of duty. Duty is collected at the time of clearance from the warehouse. A public warehouse is owned and managed by a Government body like Central Warehousing Corporation. A private warehouse is licensed in a place

where there is no public bonded warehouse.

(b) CIF value	5000 US \$
Less: Freight	1500 US \$
Less: Insurance	<u>500 US \$</u>
Therefore, FOB value	<u>3000 US \$</u>

Assessable value for Customs purpose:

FOB value	3000 US \$
Add: Freight (20% of FOB value)	600 US \$
Add: Insurance (actual)	<u>500 US \$</u>
CIF for Customs purpose	4100 US \$
Add: 1% for landing charges	<u>41 US \$</u>
Value for Customs purpose	4141 US \$
Exchange rate as per CBEC	Rs. 44.50 per US \$
Assessable value	= Rs. 44.50 x 4141 US \$
	= Rs. 184274.50

Notes:

- (1) As the material has been imported by air, the freight has been restricted to 20% of FOB value i.e. 600 US \$. [Second proviso to Rule 9(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988]
- (2) Landing charges have been considered as per Rule 9(2)(b) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.
- (3) Rate of exchange as notified by CBEC has been considered as per section 14(3)(a) of the Customs Act, 1962.

- (c) Transit of goods:** Section 53 provides that any goods imported in a conveyance and mentioned in the import manifest or the import report, as the case may be, as for transit in the same conveyance to any place outside India or any customs station, may be allowed to be so transited without payment of duty. However, the goods should not have been prohibited under section 11 of the Customs Act.

Transshipment of goods: This refers to transfer of goods from one conveyance to another. It may be from one port to any other major port or airport in India.

Section 54 provides that:

- (1) where any goods imported into a customs station are intended for transshipment, the person-in-charge of conveyance will have to present a bill of transshipment to the proper officer in the prescribed form;
 - (2) where any goods imported in to a customs station are mentioned in the import manifest or import report, as for transshipment to any place outside India, such goods will be allowed to be so transhipped without payment of duty. However, the goods should not have been prohibited under section 11 of the Customs Act.
 - (3) where any goods imported into a customs station are mentioned in the import manifest or import report for transshipment to any major port (as defined in the Indian Ports Act, 1908) or to customs airport or customs port (as notified by the Board) or to any other customs station and the proper officer is satisfied about the bona-fide intention for transshipment of the goods to such customs station, the proper officer may allow the goods to be transhipped, without payment of duty.
- (d) The first proviso to section 129A of the Customs Act, 1962 provides that the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order passed by Commissioner (Appeals) if such order relates to, -
- (a) any goods imported or exported as baggage;
 - (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or which are short landed at that destination;
 - (c) payment of drawback as provided in Chapter X, and the rules made thereunder.

In such cases, redressal lies with the Central Government. Section 129DD(1) enables the appellant to get the orders of Appellate Commissioner (on these three aspects) annulled or modified by the Central Government.

Sub-section 1A of section 129DD enables the Commissioner of Customs to direct the proper officer to make an application on his behalf to the Central Government for revision of an order. However, such application can be made only if the Commissioner is of the opinion that the order passed by the Commissioner (Appeals) under section 128A is not legal or proper.

- (e) Project Imports are the imports of machinery, instruments, and apparatus etc., falling under different classifications, required for initial set up of a unit or for substantial expansion of an existing unit. In a project several different items are required, each of which is importable at different rates of customs duties. Hence, it becomes very complicated to make assessment for such project imports. Therefore, one consolidated rate of customs duty has been made applicable for all items imported under a project irrespective of the nature of the goods and their customs classification.

The items eligible for project import are specified in Heading 98.01 of the Customs Tariff Act, 1975. These include all items of machinery, spare parts within prescribed limits, components or raw materials etc. for initial setting up of a unit or for substantial expansion of the same. The eligible projects or the projects for which the scheme has been made applicable are Industrial Plants, Irrigation Projects, Power Projects, Mining Projects, Projects for Oil or Mineral Exploration and other projects as may be notified by the Central Government.

Question 7

- (a) *Explain with reference to the Customs Act:*
- (i) *Conditions for filing application to Settlement Commission.* (3 marks)
 - (ii) *Service of order etc. under Section 153 of the Customs Act.* (2 marks)
- (b) *Mention the orders against which appeal lies to the Supreme Court under Section 130E of the Customs Act.* (5 marks)
- (c) *Briefly explain the time limit for issuing show cause notice for demanding customs duty short paid.* (5 marks)

Answer

- (a) (i) According to section 127B of the Customs Act 1962, the following conditions are to be fulfilled for filing an application for settlement of cases.
- (i) the applicant has filed the bill of entry or the shipping bill in respect of import or export of goods, as the case may be.
 - (ii) a show cause notice in respect of such bill of entry or shipping bill has been issued to the applicant by the proper officer.
 - (iii) the additional duty accepted is more than Rs 2 lakhs.
 - (iv) the case is not pending with CESTAT or any Court.
 - (v) the application does not relate to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 has been committed.
 - (vi) the application is not for the interpretation of the classification of the goods under the Customs Tariff Act, 1975.
- (ii) According to section 153 of the Customs Act 1962, order or decision passed or any summons or notice issued under the Customs Act, shall be served by tendering the order, decision, summons or notice or sending it by registered post to the person for whom it is intended or to his agent. In case if this is not possible, the order, decision, summons or notice shall be affixed on the notice board of the customs house.

- (b) As per section 130E of the Customs Act, an appeal shall lie to the Supreme Court from-
- (a) any judgment of High Court delivered
 - (i) in an appeal made under section 130, or
 - (ii) on a reference made under section 130 by the Appellate Tribunal before 01.07.2003, or
 - (iii) on a reference made u/s 130 A,
 if the High Court certifies the case to be fit for appeal to the Supreme Court. Such certification can be done by the High Court on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgement.
 - (b) any order of the Appellate Tribunal having relation to the determination of rate of customs duty or value of goods, among other things.
- (c) Section 28 of the Customs Act, 1962 provides that where the customs duty has been short paid, a show cause notice shall be issued-
- (i) within one year from the relevant date in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital;
 - (ii) within six months from the relevant date in any other case.
- However, if the customs duty has been short paid by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or their agent or employee, the show cause notice can be issued within five years from the relevant date.
- Relevant date means –
- (i) in a case where duty is not levied, the date on which the proper officer makes an order for the clearance of goods;
 - (ii) in the case of provisional assessment, the date of adjustment of duty after the final assessment;
 - (iii) in any other case, the date of payment of duty.

Question 8

- (a) *When the ship on its arrival from Dubai was searched by the Customs Officers, they found 2,000 biscuits of gold kept concealed in the ceiling of one of the unoccupied cabin. The Chief Cook of the ship admitted the concealing of the gold. The Captain of the ship deposed in his statement that he alongwith Chief Engineer and Chief Officer had inspected the vessel for contraband goods and inspection did not reveal anything. No evidence was also found that captain was involved in the smuggling of gold.*

Discuss whether the ship is liable to confiscation under the Customs Act. (5 marks)

- (b) *M/s. XYZ, a 100% export oriented undertaking (100% E.O.U. in short) imported DG sets and furnace oil duty free for setting up captive power plant for its power requirements for export production. They used the power so generated for export production but sold surplus power in domestic tariff area. Is customs department justified in demanding duty on DG sets and furnace oil as surplus power has been sold in domestic tariff area?*

(5 marks)

- (c) *Mention the circumstances under which goods are considered to have been removed improperly from a warehouse under the Customs Act. (5 marks)*

Answer

- (a) Section 115(2) of the Customs Act, 1962 *inter alia* provides that any conveyance used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation. However, if the owner of the conveyance proves that the conveyance was so used without the knowledge and connivance of the owner himself, his agent, and the person in charge of the conveyance, the conveyance shall not be liable to confiscation. As per section 2(31)(a) of the Customs Act, in case of a vessel, the master of the vessel is the person-in-charge.

Since, in the problem there is no evidence that the captain of the ship i.e., the master of the vessel had any knowledge about the smuggling of the gold or he had connived in the smuggling of gold, the ship shall not be liable to be confiscated.

In a similar situation, the Supreme Court has set aside the order of confiscation of a truck carrying forest produce in contravention of the provisions of the Forest Act as the authorities failed to establish that the owner of the truck had any knowledge about the truck being so used. [*Forest Conservator v. Sharad Ramachandar Kale* 2000 (121) E.L.T. 14 (S.C.)]

- (b) D.G. Sets, spare parts of D.G. Sets and consumables, such as furnace oil/lubricating oil/HSD are exempt from duty if used in connection with the production of goods meant for export by a 100% EOU vide *Notification Nos. 13/81-Cus., 53/91-Cus. and 1/95-Cus.* In *Commissioner v. Hanil Era Textile Ltd. - 2005 (180) E.L.T. A044 (S.C.)* the Supreme Court agreed to the view taken by the Tribunal that in the absence of a restrictive clause in the notifications that imported goods are to be solely or exclusively used for manufacture of goods for export, there is no violation of any condition of notification if surplus power generated due to unforeseen exigencies is sold in domestic tariff area.

Therefore, no duty can be demanded from M/s XYZ for selling the surplus power in domestic tariff area for the following reasons:

- (i) They have used the DG sets and furnace oil imported duty free for generation of

power, and

- (ii) such power generated has been used for manufacturing goods for export, and
 - (iii) only the surplus power has been sold, as power cannot be stored.
- (c) Section 72 of the Customs Act provides that in any of the following circumstances the goods shall be considered to have been removed improperly from a warehouse –
- (a) where any warehoused goods are removed from a warehouse in contravention of section 71 of the Customs Act;
 - (b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in a warehouse;
 - (c) where any warehoused good have been taken under section 64 as samples without payment of duty;
 - (d) where any goods in respect of which a bond has been executed under section 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer.

PART - C

Question 9

- (a) *Whether service tax under the provisions of Finance Act, 1994 is chargeable on the following services:*
- (i) *Use of the precincts of a religious place as a mandap*
 - (ii) *Payment of service is received in India in convertible foreign exchange*
 - (iii) *An interior decorator provides service of beautification of spaces in Srinagar*
 - (iv) *Services provided by a sub-broker to an investor.* (2 x 4 = 8 marks)
- (b) (i) *Mention the issues on which an advance ruling can be sought in service tax matters.* (5 marks)
- (ii) *When does an advance ruling on service tax become void ab initio?* (2 marks)

Answer

- (a) (i) No, as *Notification No. 14/2003 – ST, dated 20.6.2003* exempts services provided to any person by a mandap keeper for the use of the precincts of a religious place as a mandap from service tax.
- (ii) No, as *Notification No. 21/2003 - ST, dated 20.11.2003* exempts services provided to any person in respect of which payment is received in India in convertible foreign exchange from service tax.

- (iii) As per section 64(1) of the Finance Act, 1994 the provisions of Finance Act, 1994 relating to service tax are not applicable in the state of Jammu and Kashmir. Therefore, no service tax is chargeable in this case.
- (iv) Yes, service tax is chargeable on service provided by a sub-broker to an investor as Finance (No.2) Act, 2004 has amended the definition of stock broker as provided in section 65(101) of Finance Act, 1994 to include sub-broker also. Section 65(105)(a) *inter alia* states that services provided by a stock broker are taxable services.
- (b) (i) As per section 96C of Finance Act, 1994 an advance ruling can be sought in the following matters:
 - (a) classification of any service as a taxable service under Chapter V of Finance Act, 1994;
 - (b) the valuation of taxable services for charging service tax;
 - (c) the principles to be adopted for the purposes of determination of value of the taxable service under the provisions of Chapter V;
 - (d) applicability of notifications issued under Chapter V;
 - (e) admissibility of credit of service tax.
- (ii) Section 96F of Finance Act, 1994 provides that if the Authority of Advance Ruling finds, on a representation made to it by the Commissioner of Central Excise or otherwise, that an advance ruling has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void ab initio.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance (No.2) Act, 2004 and Notifications/Circulars issued up to 30.04.2005 which are relevant for November 2005 examinations.

PAPER – 8 : INDIRECT TAXES

*Question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any **two** questions from Part “A” and **one** question from Part “B”.*

PART – A

Question 1

- (a) (i) *Discuss in brief the concept of ‘Deemed Manufacture’.* (4 Marks)
- (ii) *TCL purchases duty paid metal rods and draws them into wire of a thinner gauge. Both the items fall under different tariff headings. The assessee claims that the process undertaken by it does not amount to manufacture. You are required to advise with reference to the present position of law in this regard.* (4 Marks)
- (b) *With reference to CENVAT Credit Rules, 2004, discuss giving reason whether the following statements are **true or false**:*
- (i) *Credit of duties of excise on inputs can be availed irrespective of whether payment is made or not against the invoice, whereas credit of service tax on input services can be availed only after making payment of the invoice.*
- (ii) *An input service distributor is comparable to a dealer under the CENVAT scheme of inputs and capital goods.*
- (iii) *The manufacturer shall not be allowed to transfer unutilized input credit in case of transfer of ownership of the factory by way of sale along with the inputs and capital goods.*
- (iv) *A manufacturer availing CENVAT credit on inputs without ensuring that excise duty indicated in the invoice has been paid on such inputs is liable to a penalty.* (2 x 4 = 8 Marks)
- (c) *ABC, an assessee availing the SSI exemption scheme, paid central excise duty of Rs.10,000 for the goods cleared in the month of March, 2005 on April 15, 2005. Discuss whether any interest will be charged from ABC for late payment of duty. If yes, what will be the interest liability?* (4 Marks)

Answer

- (a) (i) As per section 2(f) of the Central Excise Act, 1944 "manufacture" includes any process-
- (i) incidental or ancillary to the completion of a manufactured product; and
- (ii) which is specified in relation to any goods in the Section or Chapter Notes of

the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture, or

- (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,

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

The processes that qualify to be "manufacture" as per clause (ii) and (iii) of section 2(f) are termed as deemed manufacture.

Thus, if any process which is specified in relation to any goods in the Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture is carried out, such goods will be deemed as manufactured even if as per judicial decisions, the process may not amount to manufacture. For instance, Note 4 of Chapter 73 provides that in case of articles of iron and steel falling under Chapter 73, the process of galvanization shall amount to manufacture. Similarly, if any of specified processes (like re-packing, re-labelling, alteration of retail sale price etc.) is being carried out on goods covered in Third Schedule to the Central Excise Act, 1944, the process will be deemed to be as that of manufacture.

- (ii) The taxable event for levying excise duty is production or manufacture of the excisable goods. Section 2(f) of the Central Excise Act, 1944 *inter alia* provides that manufacture includes any process, incidental and ancillary to the completion of a manufactured product, and which is specified in relation to any goods in the Section or Chapter Notes of the Schedules of the Central Excise Tariff Act, 1985 as amounting to manufacture.

The definition stipulates that manufacture will include any process which is specified in the Section or Chapter Notes of the Central Excise Tariff as amounting to manufacture.

The Finance (No.2) Act, 2004 has inserted Note No. 10 in Section XV of the First Schedule to the Central Excise Tariff Act so as to provide that the process of drawing or redrawing a rod, wire or any other similar article, into wire shall amount to manufacture.

Therefore, in view of the above Section Note, the claim of TCL is not correct in law.

Note: *This issue had come up before the Supreme Court in the case of CCE v. Technowled Industries (2003). The Apex Court held that there was no manufacture of a new product when the gauge of the rod was made thinner and the product was*

finished a little better. Merely because there were two separate entries, it did not mean that the product became excisable.

However, in view of the above-mentioned amendment made by Finance (No.2) Act, 2004 this judgment does not hold good anymore.

- (b) (i) *True.* Credit of input services can be availed only after the output service provider makes payment of input services and the service tax payable on it, as shown in the invoice [Rule 4(7)]. However, in case of excise duty, credit is available as soon as the goods are received in the factory.

The reason for the differential treatment is that a manufacturer (input supplier) can clear the inputs from his factory only after paying the applicable duty irrespective of the time at which he receives the payment against the invoice while the input service provider pays the service tax only after he realizes the payment for taxable services (as the service tax is due upon realization only).

- (ii) *True.* The invoice issued by a dealer is acceptable under the CENVAT Credit Rules, 2004 as an eligible document for availing credit. In order to pass on the credit, the dealer has to obtain registration and file quarterly returns with the Superintendent of Central Excise. Likewise, the document/invoice issued by an input service distributor is also acceptable under the CENVAT Credit Rules, 2004 as an eligible document for availing credit. Similarly, in order to pass on the credit, the input service distributor too has to obtain service tax registration, comply with new rule 4A of Service Tax Rules, 1994 and file half yearly statement giving details of credit received and distributed, with the Superintendent of Central Excise.
- (iii) *False.* The manufacturer shall be allowed to transfer the credit lying unutilized in his accounts provided the transfer takes place with specific provision for transfer of liabilities of such factory [Rule 10(1)] and the said inputs and capital goods are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise. [Rule 10(3)]

Note: *It is also possible to answer as 'True' if it is assumed that there is no specific provision of transfer of the liabilities of such factory or the inputs and the capital goods have not been accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise.*

- (iv) *True.* Where the CENVAT credit in respect of inputs or capital goods is taken wrongly or without taking reasonable steps to ensure that appropriate duty on said inputs or capital goods has been paid as indicated in the invoice, then as per rule 15 of the CENVAT Credit Rules 2004, the person availing credit shall be liable to a penalty not exceeding duty on the inputs in question or Rs.10000/- whichever is greater.
- (c) The second proviso to rule 8(1) of the Central Excise Rules, 2002 lays down that where an assessee is availing the exemption under a Notification based on the value of clearances in a financial year, the duty on goods cleared during a calendar month shall

be paid by the 15th day of the following month. However, in case of goods removed during the month of March the duty shall be paid by the 31st day of March.

Sub-rule (3) of rule 8 provides that if the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Central Excise Act on the outstanding amount. Such interest shall be paid for the period starting from the first day after the due date till the date of actual payment of the outstanding amount. The rate of interest has been specified as 13% vide *Notification No. 66/2003 CE(NT) dated 12.09.2003*.

Therefore, since ABC has paid the duty for the month of March on 15th April, it will have to pay the duty with interest for the delay of 15 days.

The amount of interest shall be computed as follows:

$$= \text{Rs.} 10,000 \times 13/100 \times 15/365 = \text{Rs.} 53.42$$

$$= \text{Rs.} 53.00$$

Question 2

- (a) (i) Define retail sale price in the light of provisions of Section 4A of Central Excise Act, 1944. (4 Marks)
- (ii) What are the conditions under which MRP based valuation shall apply under Central Excise? (4 Marks)
- (iii) What legal/penal actions can be taken in case the retail sale price is not mentioned or is unduly tampered after the removal? (4 Marks)
- (b) Asha Ltd. supplies raw material to a job worker Kareena Ltd. After completing the job-work, the finished product of 5,000 packets are returned to Asha Ltd. putting the retail sale price as Rs.20 on each packet. The product in the packet is covered under MRP provisions and 40% abatement is available on it. Determine the assessable value under Central Excise law from the following details:

	Rs.
Cost of raw material supplied	30,000
Job worker's charges including profit	10,000
Transportation charges for sending the raw material to the job worker	3,000
Transportation charges for returning the finished packets to Asha Ltd.	3,000

(3 Marks)

Answer

- (a) (i) Explanation 1 to section 4A of the Central Excise Act, 1944 defines the retail sale price as the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight,

transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

However, in case the provisions of the Central Excise Act, rules or Standards of Weights and Measures Act, 1976 or the Rules made thereunder or under any other law for the time being in force require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

- (ii) The provisions relating to valuation of excisable goods based on MRP are dealt with in section 4A of the Central Excise Act, 1944. The conditions under which the MRP based valuation shall apply are as follows:
 - (a) the excisable goods to be valued are covered under Standards of Weights and Measures Act, 1976 or related rules or under any other law and such law requires to declare on the package the retail sale price thereof; and
 - (b) the Central Government has notified the said goods as goods in relation to which the payment of excise duty shall be on the basis of the MRP less such deductions/abatements as it may allow in the notification. However, it must be noted that if the goods have been so notified, Standards of Weights and Measures Act or the rules made thereunder must require a declaration of the retail sale price on the package of such goods.
- (iii) If the retail sale price is not mentioned on the excisable goods or is unduly tampered after the removal, then
 - (i) such goods shall be liable to confiscation and
 - (ii) the retail sale price of such goods shall be ascertained in the manner prescribed by the Central Government and such price shall be deemed to be the retail sale price.
- (b) As the product is under MRP scheme, the duty shall be payable only as per the provisions of section 4A of the Central Excise Act i.e. on the basis of MRP less abatement and not on the basis of material cost plus job charges etc. Section 4A overrides section 4 of the Central Excise Act.

Hence, assessable value in this case shall be determined as under:-

	<i>Rs.</i>
Retail sale price of 5000 packets	= 5000 x 20 = 1,00,000
Less: Abatement @ 40%	<u>40,000</u>
Assessable Value	<u>60,000</u>

Question 3

- (a) Answer in brief the following questions relating to export without payment of duty other than to Nepal and Bhutan under Rule 19 of the Central Excise Rules, 2002:
- (i) What is the type of bond to be executed? Who is exempted from furnishing such bond?
 - (ii) What is the export document for export clearance? How many copies are required to be prepared for it?
 - (iii) Is it necessary to prepare an invoice also? If yes, how should it be prepared?
 - (iv) What will be the duty payable, if goods are not exported within six months after clearance? (4 x 2 = 8 Marks)
- (b) Does the bar of unjust enrichment apply to all types of refunds? Does the refund of penalty attract such bar? (2 Marks)
- (c) State the various circumstances where goods are liable for confiscation under the Central Excise Law. Can the assessee get back the confiscated goods and if so how? (5 Marks)

Answer

- (a) Procedures and conditions for export without payment of duty to all countries except Nepal and Bhutan are specified in *Notification No.42/2001 C.E. (N.T.) dated 26.6.2001*. Part-wise answers to the questions are given below:
- (i) A bond in Form B-1 is required to be executed by a merchant exporter in case of export without payment of duty. The bond should be at least equal to the duty chargeable on the goods, with such surety or security as the excise officer may approve. Manufacturer- exporter is exempted from furnishing such bond. He can furnish an annual Letter of Undertaking (LUT) in Form UT-1.
 - (ii) ARE-1 is the export document for export clearance which shall be prepared in five copies (quintuplicate). The fifth copy is the optional copy which the assessee can use for claiming other export incentives.
 - (iii) Yes, the goods have to be cleared from the factory under an invoice which shall be prepared in terms of rule 11 of the Central Excise Rules, 2002. The invoice should be prominently marked as "FOR EXPORT WITHOUT PAYMENT OF DUTY".
 - (iv) Goods must be exported within 6 months from the date of clearance for export, unless extension is granted by Assistant Commissioner/Deputy Commissioner. If goods are not exported within 6 months from the date of clearance for export, the exporter should deposit the applicable excise duty on such goods along with the interest. As per rule 5 of the Central Excise Rules, 2002, the applicable duty shall be computed as per the rate and tariff value applicable on the date of removal of such goods from the factory.

- (b) No, the bar of unjust enrichment does not apply to all types of refunds. Only when the burden of the duty has been shifted by the manufacturer to the buyer, the refund gets hit by such bar.

No, refund of penalty does not attract bar of unjust enrichment [*CCE Chandigarh v. Shivalik Agro Poly Products Ltd. 2004 (173) ELT 64 (Tri-Del.)*].

- (c) Under Rule 25 of the Central Excise Rules, 2002, the excisable goods shall be liable for confiscation if any producer, manufacturer, registered person of a warehouse or registered dealer -

- (i) removes any excisable goods in contravention of Central Excise Rules/Notifications; or
- (ii) does not account for any excisable goods produced or manufactured or stored by him; or
- (iii) contravenes any of the provisions of Rules/Notification with an intent to evade payment of duty; or
- (iv) engages in the manufacture or production or storage of any excisable goods without registration of the factory.

Section 34 of the Central Excise Act provides that whenever confiscation is adjudged under the Central Excise Act or the rules made thereunder, 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. Therefore, the assessee can get the confiscated goods back by paying redemption fine as prescribed in the order of the officer adjudging such confiscation.

Question 4

- (a) Discuss whether remission of duty shall be granted or not, in the following cases, under the Central Excise Rules, 2002:
- (i) Excisable goods manufactured in the factory are claimed by the manufacturer as unfit for consumption or for marketing.
 - (ii) Duty paid goods were damaged due to breakage in handling.
 - (iii) Finished goods entered in Daily Stock Account (DSA) were stolen from the factory. (3 x 2 = 6 Marks)
- (b) With reference to Rule 12(2) of the Central Excise Rules, 2002, explain in brief the main provisions of the return in form E.R.-4, to be filed with the Central Excise Department by an assessee. What is the maximum penalty leviable for non-submission or late submission of E.R.-4 return? (4 Marks)
- (c) Write a brief note on power of rectification of mistakes given to Appellate Tribunal under Section 35C(2) of Central Excise Act. Whether the power of rectification includes the power to review the order also? (5 Marks)

Answer

(a) Rule 21 of the Central Excise Rules, 2002 *inter alia* provides that where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, the Commissioner may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing. With reference to the said rule, the cases under consideration are discussed as follows:-

- (i) Remission of duty shall be granted as the goods have been claimed as unfit for consumption or for marketing by the manufacturer.
- (ii) Remission cannot be granted on duty paid goods as there is no provision for granting remission of duty after removal of the goods.
- (iii) Remission of duty in case of theft is not allowed as the goods are available for consumption somewhere else [Chapter 18 Part I Para 2.6 of CBE&C's Central Excise Manual, 2001].

(b) Every assessee paying duty of Rs.1 crore or more per annum through PLA is required to file Annual Financial Information Statement for the preceding financial year to which the statement relates by 30th November of the succeeding year in Form E.R.4. The main contents of the return are as under (all information is to be in Rs.lakhs) –

- (i) Financial year to which it relates
- (ii) Registration Number
- (iii) Name of the Assessee
- (iv) Details of Expenditure
- (v) Details of Income
- (vi) CENVAT credit details

The maximum penalty for non-submission or late submission can be Rs.5,000 under rule 27 of the Central Excise Rules, 2002.

(c) Under Section 35C(2) of the Central Excise Act, 1944, the Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it. Such a rectification shall be made when the Commissioner of Central Excise or the other party to the appeal brings the mistake to the notice of the Tribunal. Where such an amendment has the effect of increasing the liability of the other party then such an amendment shall be made only after issuing a notice and giving a reasonable opportunity of being heard to the party concerned.

The Appellate Tribunal u/s 35C is not empowered to review an order passed by it. The power of review is not an inherent power and must be expressly granted – *CCE v. Steel Co. Gujarat Ltd. 2004 (163) ELT 403 (SC)*.

Question 5

- (a) Write short notes on the following:
- (i) Place of Removal
 - (ii) Interest u/s 11AB (3 x 2 = 6 Marks)
- (b) What is Personal Ledger Account or PLA? How is it maintained? (5 Marks)
- (c) Briefly explain the procedure for removal of goods by a unit which is an 100% EOU for Domestic Tariff Area. (4 Marks)

Answer

- (a) (i) As per section 4(3)(c) of the Central Excise Act, 1944, 'place of removal' means:
- (i) a factory or any other place or premises of production or manufacture of the excisable goods;
 - (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
 - (iii) a depot, premises of a consignment agent or any other place or premises from where excisable goods are to be sold after their clearance from the factory;
- from where such goods are removed.
- (ii) 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 shall, in addition to the duty, be liable to pay interest. The interest shall be payable at a rate not below 10% p.a and not exceeding 36%p.a. The Central Government may fix the rate of interest by notification in the Official Gazette. *Notification No.66/2003 dtd. 12.09.2003* has specified such rate as 13% per annum.
- The interest shall be paid from the first date of the month succeeding the month in which the duty ought to have been paid, or from the date of such erroneous refund, as the case may be, till the date of payment of such duty.
- However, in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, no interest shall be payable. The duty should be paid within 45 days from the date of issue of such order, instruction or direction, as the case may be. In other cases, the interest shall be payable on the whole of the amount, including the amount already paid.
- However, if in the appeal, the duty demand is increased or decreased, the interest is accordingly increased or decreased.
- (b) Personal ledger Account is an account with the Central Government, which is utilized for payment of duty of excise. The account is credited when the sum is deposited into the treasury and debited on payment of excise duty. Each debit and credit entry should be

made on separate lines and assigned a running serial number for the financial year. The PLA must be prepared in triplicate by writing with an indelible pencil and using double sided carbon. Original and duplicate copies of PLA shall be sent to the Central Excise Officer in charge along with the monthly/quarterly return.

The assessee may make credit in the PLA by making cash payment into the treasury or authorised bank through TR-6 challan. Copy of each such challan shall be sent by the assessee to the Central Excise Officer along with the monthly/quarterly return.

No restrictions exist with regard to any minimum amount, which should necessarily remain in balance to the credit of an assessee in his PLA. With the monthly payment system, there should be enough credit at the time of payment of duty for the month.

Mutilations or erasures of entries once made in the PLA are not allowed. If any correction becomes necessary, the original entry should be scored out and attested by the assessee or his authorized agent.

- (c) Rule 17 of the Central Excise Rules, 2002 provides that where any goods are removed from a 100% EOU to domestic tariff area, such removal shall be made under an invoice as per the procedure specified in rule 11 of the Central Excise Rules, 2002. Further, removal shall be made only after payment of appropriate duty by debiting the account current maintained for this purpose or by utilizing the CENVAT credit.

Such unit is required to maintain appropriate accounts related to production, description of goods, quantity removed and the duty paid in the prescribed form.

Such unit is required to submit a monthly return in Form E.R-2 within 10 days from the end of the month to which the return relates in respect of the excisable goods manufactured in, and receipt of inputs and capital goods in, the unit. The return should be submitted to the Superintendent of Central Excise.

PART – B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 any **two** of the following:
- (i) Adjudicating Authority
 - (ii) Customs Area
 - (iii) Smuggling. (2 x 2 = 4 Marks)
- (b) State briefly the provisions of refund on anti-dumping duty in certain cases. (2 Marks)
- (c) Assessable value of an item imported is Rs.1,00,000. Basic customs duty is 20%, additional duty of customs is 16%, and education cess is 2% on duty. Compute the amount of total customs duty payable. Also, state the amount of credit available to the importer and how it can be utilised by him. (4 Marks)
- (d) Your client loaded a machine on the vessel for export. He has paid import duty and

central excise duty on the components used in the manufacture. The vessel set sail from Mumbai, but runs into trouble and sinks in the Indian territorial waters. The customs department refuses to grant duty drawback for the reason that the goods have not reached their destination. Advise your client citing case law, if any.

(4 Marks)

- (e) India Car Co. is manufacturing passenger cars and has entered into a joint venture agreement and collaboration with Videshi Car Co. India Car Co. imported from Videshi Car Co. a shipment of 24 CKD packs (completely knocked down condition) of passenger car components. They filed Bill of Entry for clearing the goods, which were claimed to be components of motor cars. They also claimed benefit of a Notification exempting components, including components of motor cars in semi-knocked down packs and completely knocked down packs.

The Adjudicating Authority held that the imported components being complete cars in CKD packs, had the essential character of the finished product and as such the consignment were to be treated as motor cars and not components. It was also held that India Car Co. was not entitled to the benefit of the notification as the notification was only for components.

The questions for consideration are:

- (i) Whether the CKD packs imported into the country could be considered to be motor cars for the purpose of classification and clearance?
- (ii) Whether India Car Co. is entitled to the benefit of exemption notification?

(2 x 3 = 6 Marks)

Answer

- (a)
 - (i) As per section 2(1) of the Customs Act, 1962, 'adjudicating authority' means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal.
 - (ii) As per section 2(11) of the Customs Act, 1962, 'customs area' means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.
 - (iii) As per section 2(39) of the Customs Act, 1962, 'smuggling', in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113.
- (b) According to the provisions of section 9AA of the Customs Tariff Act, 1975, where an importer proves to the satisfaction of the Central Government that he has paid any anti-dumping duty imposed on any article, in excess of the actual margin of dumping in relation to such article, he shall be entitled to refund of such excess duty. However, the importer will not be entitled for refund of provisional anti-dumping duty under section 9AA as it is refundable under section 9A(2) of the said Act.

(c) Computation of customs duty payable

	<i>Rs.</i>
1. Assessable Value	1,00,000
2. Basic Customs Duty @ 20%	<u>20,000</u>
3. Sub-Total	1,20,000
4. Additional Duty of Customs (CVD)	
@ 16.32% of Rs.1,20,000 i.e. (Rs.19,200 +384)	<u>19,584</u>
(16% + 2% Education cess on 16%)	
5. Education Cess 2% on Rs.39,584 [(2) + (4)]	791.68
6. Total Customs Duty Payable	
[(2) + (4) + (5)] Rounded off	40,376

Credit of total CVD of Rs.19,584 will be available to the importer. The cess component of Rs.384 included in Rs.19,584 will be available as CENVAT credit only for paying education cess on final products or taxable services. The balance Rs.19,200 will be available as CENVAT credit for payment of excise duty or service tax as provided in CENVAT Credit Rules, 2004. Education cess of Rs.791.68 paid on imported goods will not be available as CENVAT credit.

- (d) Rule 2(a) of the Customs and Central Excise Duties Drawback Rules, 1971 provides that "drawback", in relation to any goods manufactured in India, and exported, means the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods. Rule 2(c) of the said rules *inter alia* provides that "export" means "taking out of India to a place outside India". Section 2(27) of the Customs Act, 1962 provides that 'India includes the territorial waters of India'.

In case of *CC v. Sun Industries 1988 (35) ELT (241)*, the Supreme Court held that the expression "taking out to a place outside India" would also mean a place in high seas, if that place is beyond territorial waters of India. Therefore, the goods taken out to the high seas outside territorial waters of India would come within the ambit of expression "taking out to a place outside India".

The emphasis in the aforementioned judgment was on the movement of the goods outside the territorial waters of India. It is then that an export may be said to have been taken place. In the instant case, the vessel sunk within territorial waters of India and therefore there is no export. Accordingly, no duty drawback shall be available in this case. Similar decision was given by the Supreme Court in the case of *UOI v. Rajindra Dyeing & Printing Mills Ltd. 2005 (180) ELT 433 (SC)*.

- (e) The facts of the given case are similar to the facts of the case of *CC, Bangalore v. Maestro Motors Ltd. – 2004 (174) ELT 289 (SC)* decided by the Apex Court.
- (i) As per interpretative Rule 2(a) of the General Rules of Interpretation of Customs Tariff, any reference in a heading to an article shall be taken to include a reference

to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or dis-assembled. This rule lays emphasis on the essential character of the goods. Thus goods which have the essential characteristics of finished goods will be classified under the same heading in which the final product has to be classified.

In the *Maestro Motors* case, the passenger car components were imported in CKD packs. Thus, what was imported was completely knocked down cars. The components imported had the essential character of a complete car even though presented in unassembled form. Thus, in view of Rule 2(a) of the General Rules of Interpretation of Customs Tariff, the Supreme Court held that the components in CKD packs would be classified as motor car.

Therefore, in case of India Car Co. also, the CKD packs should be classified as cars for the purpose of classification and clearance.

- (ii) In the *Maestro Motors* case, it was observed by the Supreme Court that a notification has to be interpreted in terms of its language. If in the notification, exemption is granted with reference to tariff items in the First Schedule to the Customs Tariff Act, 1975, then the Rules of Interpretation must apply. In that case even for the purposes of the notification, the goods will be classified in the same manner as they are classified for purposes of payment of customs duty. However, where the language of the notification is plain and clear effect must be given to it.

In this case the notification exempted components, including components of fuel efficient motor cars in semi-knocked down packs and completely knocked down packs. The Apex Court held that for purposes of levy of customs duty, by virtue of interpretative Rule 2(a) of the General Rules of Interpretation of Customs Tariff, the components in a completely knocked down pack would be considered to be cars. However, in view of the clear language of the Notification, the components including components in completely knocked down packs would be exempted.

Thus, in view of the abovementioned judgment, the components in CKD packs imported by India Car Co. would get the exemption under the Notification, even though for purposes of classification and clearance they may be considered to be motor cars.

Question 7

- (a) *Explain the Doctrine of unjust enrichment with respect to refund of duty. Are there any exceptions to it and if so enumerate them?* (5 Marks)
- (b) *When is redemption fine imposed? Whether this fine under Section 125 of the Customs Act, once paid, be claimed as refund, in case the importer decides to abandon the goods?* (5 Marks)

- (c) *Explain briefly the provisions regarding drawback allowable on re-export of duty paid goods as such.* (5 Marks)

Answer

- (a) When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchasers when these goods are sold by the importer. In other words, the burden of duty is passed on to the purchaser. Subsequently, if the importer makes a claim for refund of duty and on acceptance of such claim if he retains the amount of refund with himself without passing it to the purchaser, then this would be called as unjust enrichment.

Therefore, wherever there is an over assessment or excess collection of duty, the refund shall be given only to the person who at the material time of grant of refund, bears the burden of duty and interest, if any. When the person who bears the burden of duty refunded is not identifiable or has not come forward to claim the refund, the refund shall be paid into a fund called 'Consumer Welfare Fund'. The importer or the clearing agent has to prove that he has not passed the burden of duty, in order to claim refund of duty.

Section 28D provides that every person who has paid duty under the Customs Act, unless the contrary is proved by him, shall be deemed to have passed the full incidence of such duty to the buyer.

The doctrine of unjust enrichment does not apply to the refund of duty and interest, if any, paid on such duty if such amount is relatable to:

- (i) drawback of duty payable under sections 74 and 75;
 - (ii) export duty as specified in section 26;
 - (iii) the duty and interest, if any, paid on such duty paid by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest to any other person;
 - (iv) the duty and interest on imports made by an individual for his personal use;
 - (v) the duty and interest borne by the buyer, if he had not passed on the incidence of such duty and interest to any other person;
 - (vi) the duty and interest borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify. However, no notification under this clause shall be issued unless in the opinion of the Central Government the incidence of duty and interest has not been passed on by the persons concerned to any other person.
- (b) Section 125 of the Customs Act empowers a Customs Officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized to pay a fine as the said officer thinks fit, in lieu of confiscation of the imported goods. The provisions in this regard are as follows:

- (a) in case of prohibited goods, the proper officer **may** give an option to pay a fine in lieu of confiscation;
- (b) in case of other goods, the proper officer **shall** give an option of payment of fine, in lieu of confiscation;
- (c) the amount of such fine cannot exceed the market price of the goods confiscated less import duty chargeable (in the case of imported goods) thereon;
- (d) the assessee shall also be liable to pay any duty and charges payable in respect of such goods.

The provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, the redemption fine becomes liable only in lieu of confiscation. Now, where the importer has abandoned the goods, the scope for payment of any fine in lieu of confiscation comes to an end. Hence, the redemption fine, if already paid shall be liable to be refunded.

The same decision was given by the Madras High Court in the case of *Purfin Chemicals Pvt. Ltd v CEGAT, Madras (2004) (167) E.L.T. 145 (Mad.)*

- (c) For allowing duty draw back on re-export of duty paid goods, sub-section (1) of section 74 of the Customs Act, 1962 provides that:
 - (i) the goods should have been imported into India;
 - (ii) the import duty should have been paid thereon;
 - (iii) the goods should be capable of being easily identified as the goods, which were originally imported;
 - (iv) the goods should have been entered for export either on a shipping bill through sea or air or on a bill of export through land, or as baggage, or through post and the proper officer, after proper examination of the goods and after ensuring that there is no prohibition or restriction on their export, should have permitted clearance of such goods for export;
 - (v) the goods should have been identified to the satisfaction of the Assistant or Deputy Commissioner of Customs as the goods, which were imported, and
 - (vi) the goods should have been entered for export within two years from the date of payment of duty on the importation thereof.

However, in any particular case, the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period, as it may deem fit. Once these conditions are satisfied, then 98% of the import duty paid on such goods at the time of importation shall be repaid as drawback.

Question 8

- (a) What is the crucial/relevant date for determination of rate of duty under the Customs Act in the following cases?
 - (i) Clearance of Baggage

- (ii) *Goods cleared for home consumption from a warehouse under Section 68 of the Customs Act*
- (iii) *Goods entered for export under Section 50.* (3 x 2 = 6 Marks)
- (b) *Write short notes on the following with reference to the Customs Act, 1962:*
 - (i) *Interest on drawback*
 - (ii) *Power to arrest.* (2 x 3 = 6 Marks)
- (c) *Briefly discuss the provisions of the Customs Act, 1962 regarding rejection of an application for advance ruling.* (3 Marks)

Answer

- (a) (i) As per section 78 of the Customs Act, 1962, the relevant date for determination of rate of duty in case of clearance of baggage is the date on which a declaration is made in respect of such baggage under section 77.
- (ii) As per section 15(1)(b) of the Customs Act, 1962, the relevant date for determination of rate of duty in case of goods cleared from a warehouse under section 68 is the date on which a bill of entry for home consumption in respect of such goods is presented under that section.
- (iii) The relevant date for determination of rate of duty in case of goods entered for export under section 50 is the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51 - Section 16(1)(a) of the Customs Act.
- (b) (i) **Interest on drawback**
 Section 75A of the Customs Act provides for payment of interest on delayed payment of drawback. Where any drawback payable to a claimant under section 74 or 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, interest @ 6% p.a. shall be paid along with the amount of drawback. Such interest shall be paid from the date after the expiry of the said period of one month till the date of payment of such drawback [Section 75A(1)].
 Similarly, if the drawback has been paid to a claimant erroneously, the claimant is required to repay the amount of drawback within a period of two months from the date of such demand. If he fails to do so, he shall have to pay interest @ 15% p.a. along with the amount of drawback. Such interest shall be paid from the date after the expiry of the said period of two months till the date of recovery of such drawback [Section 75A(2)].
- (ii) **Power to arrest**
 Section 104 of the Customs Act, 1962 empowers a proper officer (who is empowered by general or special order of Commissioner of Customs) to arrest any person in India or within Indian customs waters, if the official has reason to believe that the person is guilty of an offence punishable under section 135.

Such a person should be informed of the grounds of his arrest and taken to the nearest Magistrate immediately. The Customs Officer is vested with the powers of an Officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The offences under this Act shall not be cognizable. An arrest can be made only as per the provisions of section 46 of the Criminal Procedure Code.

- (c) Under section 28-I(2) of the Customs Act, an application for advance ruling may be rejected on the following grounds:
- (i) if the question raised is already pending before a customs officer, Appellate Tribunal or any Court.
 - (ii) if the question raised is the same as in a matter already decided by the Appellate Tribunal or any Court.

No application shall be rejected without giving an opportunity to the applicant of being heard. On rejection, reasons for such rejection shall be given in the order.

PART – C

Question 9

- (a) (i) *Certain abatement/exemption of the gross amount charged has been notified for computing the value of some taxable services. What are the conditions to be fulfilled to avail such partial exemption?* (2 Marks)
- (ii) *What is the percentage of abatement granted in the following cases?*
- (i) *Services provided by a tour operator*
 - (ii) *Services provided by an outdoor caterer supplying food also*
 - (iii) *A commercial concern providing construction service where the gross amount charged includes the value of goods and material*
 - (iv) *Goods transport agency providing taxable service and paying service tax itself.* (4 Marks)
- (b) *Enumerate the specified services, other than accounting and auditing, provided by a practising Chartered Accountant which are liable to service tax.* (6 Marks)
- (c) *Hotel Marudhar Palace charges 10% of the bill amount as service charges and Department has asked them to pay service tax on it. The assessee has submitted that the amount @ 10% collected from customers is subsequently disbursed among the staff, therefore it is not part of their income and cannot be included in the gross amount charged by them. Examine the case and advise suitably.* (3 Marks)

Answer

- (a) (i) The partial exemption shall be available only when the service provider has not availed –
- (a) CENVAT credit of duty paid on inputs or capital goods under the provisions of CENVAT Credit Rules, 2004; and
 - (b) the benefit of exemption under *Notification No.12/2003-ST, dated 20.06.2003* in respect of value of goods and materials sold by him.
- (ii) Following abatement has been granted in the cases under consideration:
- (i) 60% of the gross amount charged in case of services provided by a tour operator. However, in cases where the tour operator solely provides services in respect of arranging or booking accommodation, an abatement of 90% from gross amount charged has been granted vide *Notification No. 40/97 ST, dated 22.08.1997* as amended by *Notification No. 12/2004 ST, dated 10.09.2004*. The gross amount charged should include the service charges for arranging or booking accommodation as well as the cost of the accommodation.
 - (ii) 50% of the gross amount charged inclusive of charges for supply of food
 - (iii) 67% of the gross amount charged
 - (iv) 75% of the gross amount charged from customer.
- (b) According to *Notification No.59/98-S.T. dated 16th October, 1998*, the following services (other than accounting and auditing) provided by a practising Chartered Accountant are liable to service tax:
- (i) certification that requirements of Schedule XIII to the Companies Act, 1956 have been complied with as regards statutory guidelines for appointment of managerial personnel and payment of managerial remuneration to them without the approval of the Central Government under section 269 and Schedule XIII, of the Companies Act, 1956;
 - (ii) certification of documents to be filed by companies with the Registrar of Companies under the Companies Act, 1956;
 - (iii) certification in Form 1 that the whole of the amount remaining unpaid or unclaimed for a period of three years from the date of transfer to the special account under sub-section (1) and sub-section (2) of section 205A of the Companies Act, 1956 has been transferred to the General Revenue Account of the Central Government under the Companies Unpaid Dividend (Transfer to General Revenue Account of the Central Government) Rules, 1978;
 - (iv) certification for exchange control purposes which a practising chartered accountant can issue as documentary evidence in support of certain applications under the Foreign Exchange Regulation Act, 1973;

- (v) certification of documents under the Exports and Imports Policy (1997-2000) of the Government of India;
 - (vi) certification in respect of valuation of instruments or assets as per rule 8A(7) of the Wealth Tax Rules, 1957;
 - (vii) verification of declarations in prescribed forms of compliances for obtaining a certificate of commencement of business or commencement of other business under section 149 of the Companies Act, 1956;
 - (vii) signing of the annual return of the listed companies under section 161 of the Companies Act, 1956.
- (c) The facts of the case are similar to the case of *Hotel Mela Plaza v. CCE Ghaziabad – 2005 (183) ELT 190 (Tri-Del.)*. The Hotel rendered mandap keeping services and charged 10% of the bill amount as service charges from its customers. It was contended by the assessee (the Hotel) that the amount @ 10% collected from its customers did not form part of its income as that amount was subsequently disbursed among the staff and hence, was not liable to service tax. In this case, the Tribunal observed that section 67 of the Finance Act, 1994 provides that the value of taxable service in relation to the services provided by a mandap keeper shall be the gross amount charged by such keeper from the client for the use of mandap, including facilities provided to the clients in relation to such use and also the charges of catering, if any. The Tribunal held that as the assessee was charging this amount from its customers for providing the service, which was taxable as above, therefore, the 10% service charges would be liable to service tax. Therefore, applying the ratio of the abovementioned judgement to the facts of the present case, it can be concluded that Hotel Marudhar Palace is liable to pay service tax on 10% service charges collected by it from its customers.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by Finance Act, 2005 and Notifications/Circulars issued up to 31.10.2005 which are relevant for May 2006 examinations.

PAPER – 8 : INDIRECT TAXES

Question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain any two of the following with reference to the provisions of Central Excise Act, 1944:*
- (i) *Wholesale dealer*
 - (ii) *Factory*
 - (iii) *Dutiability of waste and scrap* (2 x 2 = 4 Marks)
- (b) *With reference to CENVAT Credit Rules, 2004, discuss giving reason whether the following statements are true or false:*
- (i) *Credit of duties of excise on inputs will not be available if inputs are used in intermediate product, which is exempt from duty, even though the final product is dutiable.*
 - (ii) *A manufacturer can sell the inputs on which CENVAT credit has already been availed of, as they are, provided he pays the amount equal to the credit availed.*
 - (iii) *A manufacturer is eligible for CENVAT credit in the cases stated below:*
 - (1) *Inputs used in trial runs;*
 - (2) *Materials used for maintaining factory building.* (3 x 2 = 6 Marks)
- (c) *With reference to the Central Excise Act, 1944 and the rules thereunder, explain briefly whether the following persons require registration or not?*
- (i) *Persons, who manufacture excisable goods chargeable to 'nil' rate of duty;*
 - (ii) *Central Government undertakings manufacturing excisable goods;*
 - (iii) *100% EOU.* (3 x 2 = 6 Marks)
- (d) *ABC Company imported medicines in pallets with one big box containing assorted medicines in smaller units which were, then, repacked in thermocole boxes of different sizes which again were put into cardboard boxes. The cardboard boxes were in turn labelled containing, inter alia, the name of the medicine, the name of the manufacturer, the quantity, batch no., manufacturing date, expiry date and name of the marketing agency. The department relying upon note 5 to chapter 30, claimed that the activities as aforesaid amount to manufacture i.e., bulk pack to retail pack.*
- Decide whether the above activities tantamount to manufacture.* (4 Marks)

Answer

- (a) (i) As per section 2(k) of the Central Excise Act, 1944, wholesale dealer means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.
- (ii) As per section 2(e) of the Central Excise Act, 1944, factory means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on.
- (iii) The issue relating to dutiability of waste and scrap was settled by the Supreme Court by its decision in *Khandelwal Metal & Engineering Works Vs Union of India 1985 20 ELT 222* by holding that notwithstanding that process waste and scrap arose as intermediate products or by-products out of final products, such process waste and scrap, if marketable, would be chargeable to duty in view of the incorporation of the specific sub-headings in various chapters of the tariff. The Apex court has held that process waste and scrap is a commercially distinct and identifiable product and has commercial value. Hence, such waste and scrap is chargeable to duty if covered in the Tariff.
- Therefore, the position as it currently stands is that all process waste and scrap if incorporated in the Tariff and if marketable would be chargeable to duty. It is important to note here that as the excise duty is on manufacture, the waste and scrap actually generated in the course of manufacture alone is chargeable to duty and the waste and scrap generated without any process is not liable to excise duty.
- (b) (i) False. It was held in *CCEx. v. Hindustan Sanitaryware 2002 (145) ELT 3 (SC)* that CENVAT credit would be available in respect of duty paid on inputs even if intermediate product is exempt from duty but the final product is dutiable. Further, the Central Board of Excise and Customs has clarified vide *Clarification No. B-4/7/2000-TRU, dated 03.04.2000* that the CENVAT credit shall not be denied if the inputs are used in any intermediate product of the final product even if such intermediate product is exempt from payment of duty so long as the final product is dutiable. The basic idea is that CENVAT credit should be admissible so long as the inputs are used in or in relation to the manufacture of dutiable final products, whether directly or indirectly.
- (ii) True. Rule 3(5) of CENVAT Credit Rules, 2004 *inter alia* provides that a manufacturer of the final products can remove inputs on which CENVAT credit has been taken, as such, from the factory if he pays an amount equal to the credit availed in respect of such inputs and such removal is made under the cover of an invoice referred to in rule 9 of CENVAT Credit Rules, 2004.

- (iii) 1. True. Inputs used in trial runs during the production or commissioning of plant are eligible for CENVAT credit as they are considered to have been used in or in relation to the manufacture of final product [*Fertiliser Corporation of India v. CCE 1990 (50) ELT 494 CEGAT*].
2. False. Materials used for maintaining factory building only facilitate manufacture and are not integrally used in or in relation to manufacture of final products and hence are not eligible for CENVAT Credit.
- (c) (i) No, because manufacturers of goods which are chargeable to 'NIL' rate of duty are exempt from registration provided a declaration is filed.
- (ii) Yes, as the provisions of section 6 of the Central Excise Act, 1944 read with rule 9 of Central Excise Rules, 2002 apply in respect of every person who manufactures or produces excisable goods (including Central/State Government Undertakings or undertakings owned or controlled by autonomous corporations) in India.
- (iii) No, as 100% EOU is deemed to be registered under Rule 9. However, such unit shall be required to get itself registered if it removes excisable goods to domestic tariff area (DTA) or procure excisable goods from DTA.
- (d) The facts of the case are similar to the case of *CCEx., Mumbai v. Johnson & Johnson Ltd., 2005 (188) ELT 467 (SC)*. While dismissing the case, the Supreme Court observed that merely packing for being marketed does not amount to manufacture for the purpose of Note 5 to Chapter 30 of Central Excise Tariff. The products have to be repacked from *bulk packs to retail packs* so as to make them marketable to the consumer for the activity to be termed as 'manufacture'. In that case there was no evidence relied upon by the department to the effect that the cardboard boxes or the thermocole containers in which the units were placed were 'retail packs'.
- In view of the abovementioned decision, the activity of repacking described in the question would not amount to manufacture.

Question 2

- (a) *The assessee was a manufacturer of I.C. engine parts like piston and gudgeon pins. He used to procure from the market piston rings and circlips and supply them along with the items that he had manufactured, to the buyers. He was also selling these procured items separately. The department contended that those bought-out items, supplied along with the manufactured items, were part of piston assembly and therefore, their value should be included in the value of the piston assemblies cleared by the manufacturer. But the assessee contended that the piston rings and circlips were all different parts of I.C. engine and therefore they were not to be considered as parts of another item.*
- Decide whether the contention of the department is correct or not. (6 Marks)*
- (b) *Explain whether an application from an NRI for advance ruling under section 23C, regarding determination of whether a certain process would amount to manufacture, is maintainable? (4 Marks)*

- (c) State the procedure for valuing excisable goods that are to be sold from depot/branch or premises of a consignment agent under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. (5 Marks)

Answer

- (a) This problem is based on the case of *Goetze (India) Ltd. v. CCE, Chandigarh 2004 (169) ELT 274 (Tri.-Del.)*. The case was decided in favour of the assessee. The Tribunal observed that the trading practice made it clear that each of the item was bought and sold separately and not as parts of one item. The fact that they were assembled together in an I.C. engine or that each part had an integral function in an assembly was not sufficient to hold that one item formed part of another item.

The Tribunal reiterated the well settled law that excise duty was a levy on manufacture and a manufacturer would be liable to pay duty on the goods manufactured by him and not on all the goods supplied by him. Therefore, it was decided by the Tribunal that value of such items would not be included in the assessable value of the manufactured goods.

In view of the abovementioned decision, the contention of the department is not correct.

- (b) As per section 23C of the Central Excise Act, 1944, advance ruling can be sought only in respect of the following matters:
- (i) classification of any goods under the Central Excise Tariff Act, 1985.
 - (ii) notifications issued in respect of excise duty under the Central Excise Act, the Central Excise Tariff Act and duty chargeable under any other law for the time being in force.
 - (iii) applicability of exemption notification issued under section 5A having effect on rate of duty.
 - (iv) principles to be adopted for determination of value of goods.
 - (v) admissibility of credit of excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods.

Thus, a person cannot obtain an advance ruling to decide whether a process would amount to manufacture or not as such a matter is not covered by section 23C. Further, it was held in *Shonkh Technologies International Ltd. (AAR)* that an application for advance ruling cannot be maintained in respect of determination of a question as to whether a process amounts to manufacture or not.

- (c) As per rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as 'such other place') from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods

sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.

Question 3

- (a) *Explain the provisions regarding maintenance of daily stock account of stored goods under rule 10(1) of Central Excise Rules, 2002.* (4 Marks)
- (b) *Write a short note on the procedure in respect of exported goods subsequently re-imported and returned to factory.* (5 Marks)
- (c) *Comment on the following:*
 - (i) *Excise department cannot challenge the reasonability of MRP printed on the package.*
 - (ii) *If any excisable goods are exempted from duty of excise absolutely, the manufacturer of such goods will be bound to avail of the exemption.*
 - (iii) *SSI units whose turnover exceeds Rupees 90 lakhs per annum have to give a declaration in the prescribed form.*
 - (iv) *Annual Financial Information Statement (ER-4) is required to be submitted by the assesses paying duty of Rs. 4 crores or above per annum through PLA.* (4 x 1 = 4 Marks)
- (d) *What is CT-1 certificate?* (2 Marks)

Answer

- (a) As per Rule 10(1) of the Central Excise Rules, 2002 a daily stock account has to be maintained by every assessee. The records should be maintained on daily basis in a legible manner, indicating particulars regarding:
 - (a) description of goods produced or manufactured
 - (b) opening balance
 - (c) quantity produced or manufactured
 - (d) inventory (i.e. stock) of goods
 - (e) quantity removed
 - (f) assessable value
 - (g) amount of duty payable and
 - (h) particulars regarding amount of duty actually paid

The first and last page of such account book shall be duly authenticated by the producer or manufacturer or his authorized agent. All such records shall be preserved for 5 years. Separate records for different grades/qualities are to be kept.

- (b) Exported excisable goods, which are re-imported for carrying out repairs, reconditioning, refining, remaking or subject to any similar process, may be returned to the factory of manufacturer for carrying out the said processes and subsequent re-export.

Notification No. 42/2001-CE (NT) as amended prescribes the procedure in respect of exported goods subsequently re-imported and returned to the factory as under:

- (i) The manufacturer shall maintain separate account for return of such goods in the daily stock account and shall make suitable entry in the said account after the goods are processed, repaired, reconditioned, refined or remade.
 - (ii) Such re-import and re-export shall be governed by the provisions of the Customs Act, 1962.
 - (iii) Any waste or refuse arising as a result of the said processes shall be removed from the factory after the payment of appropriate duty or destroyed after informing the proper officer in writing at least 7 days in advance and after observing such conditions and procedure as may be specified by the Commissioner of Central Excise.
 - (iv) Thereafter, the duty payable on such waste or refuse may be remitted by the said Commissioner of Central Excise.
- (c) (i) True. The central excise department cannot challenge the reasonability of MRP printed on the package. It can only satisfy itself that there is a declaration of MRP in prescribed form [*ITC Ltd. v. CCEx., New Delhi 2004 (171) ELT 433 (SC)*].
- (ii) True. As per section 5A(1A) of the Central Excise Act, 1944, if any excisable goods is exempt from duty of excise absolutely, the manufacturer of such goods will be bound to avail the exemption.
- (iii) False. SSI units whose turnover exceeds Rs.40 lakhs per annum have to give a declaration in the prescribed form.
- (iv) False. Annual Financial Information Statement (ER- 4) is required to be submitted by the assessee paying duty of Rs.1 crore or above per annum through PLA.
- (d) CT-1 certificate is the document on the basis of which a merchant-exporter can procure excisable goods for export without payment of duty. Such a certificate has to be obtained from the Superintendent of Central Excise. CT-1 forms are issued to the merchant-exporter in lots of 25 covering a period of 1 to 3 months depending on his track record. The merchant-exporter has to send the CT-1 form to the manufacturer from whom the goods are to be procured for exports and should specify the estimated amount of duty liability in the said certificate. CT- 1 is valid for one year from the date of issue.

CT-1 contains the details of bond amount, quantity of goods to be received, value and duty involved.

Question 4

(a) A SSI unit has effected clearances of goods of the value of Rs. 475 lacs during the financial year 2005-06. The said clearances include the following:

- (i) Clearance of excisable goods without payment of excise duty to a 100% EOU Rs.120 lacs
- (ii) Job work in terms of Notification No. 214/86 CE, which is exempt from duty Rs.75 lacs
- (iii) Export to Nepal and Bhutan Rs.50 lacs
- (iv) Goods manufactured in rural area with the brand name of the others Rs.90 lacs

Examine with reference to the notification governing SSI under the Central Excise Act whether the benefit of exemption would be available to the unit for the financial year 2006-07. (5 Marks)

- (b) (i) Whether provisional assessment can be initiated by the department of excise?
- (ii) What is the remedy available with the department in case assessing officer does not find the self assessment filed by the assessee in order? (2 + 3 = 5 Marks)
- (c) State the provisions relating to confiscation and penalty under CENVAT Credit Rules, 2004. (5 Marks)

Answer

(a) A SSI unit shall be eligible for benefit of exemption notification only if value of clearances during preceding financial year does not exceed Rs.400 lakhs.

The item wise treatment shall be as under -

1. Clearance to 100% EOU shall be excluded for calculating the limit of 400 lakhs.
2. Clearance under Notification No. 214/86 shall be excluded for calculating the limit of 400 lakhs.
3. Export to Nepal & Bhutan is considered as home consumption and thus, it shall be included for computing limit of 400 lakhs.
4. The turnover of goods manufactured in rural area with the brand name of the others shall be included for computing limit of Rs.400 lakhs.

Calculation of clearances during financial year 2005-06:

Total value of clearances		475 lakhs
Less: Clearance to 100% EOU	120 lakhs	
Clearance under Notification No. 214/86	<u>75 lakhs</u>	<u>195 lakhs</u>
		<u>280 lakhs</u>

As the value of clearances for home consumption in financial year 2005-06 does not exceed Rs. 400 lakhs, the benefit of exemption shall be available to the SSI unit during financial year 2006-07.

- (b) (i) Rule 7 of the Central Excise Rules, 2002 gives an option to the assessee to make a request to the Assistant Commissioner/Deputy Commissioner of Central Excise for provisional assessment in case he is unable to determine the value of excisable goods or the rate of duty applicable thereto. Rule 7 does not give power to the department to order provisional assessment on its own. Thus, the excise department cannot *suo motu* issue directions for resorting to provisional assessment.

- (ii) Where the central excise officers during scrutiny or otherwise find that self-assessment is not in order, they may ask the assessee for all necessary documents, records or other information for issue of duty demand for differential duty, if any, after conducting inquiry.

If the assessee fails to provide such records or information, the department may raise the demand based on collateral evidences. In such a case, the burden will be on the assessee to provide information for appropriate re-determination of duty.

- (c) (1) If any person, takes CENVAT credit in respect of input or capital goods, wrongly or without taking reasonable steps to ensure that appropriate duty on the said input or capital goods has been paid as indicated in the document accompanying the input or capital goods specified in rule 9, or contravenes any of the provisions of these rules in respect of any input or capital goods, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed, or ten thousand rupees, whichever is greater.
- (2) In a case, where the CENVAT credit in respect of input or capital goods has been taken or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of section 11AC of the Excise Act.
- (3) If any person, takes CENVAT credit in respect of input services, wrongly or without taking reasonable steps to ensure that appropriate service tax on the said input services has been paid as indicated in the document accompanying the input services specified in rule 9, or contravenes any of the provisions of these rules in respect of any input service, then, such person, shall be liable to a penalty which may extend to an amount not exceeding ten thousand rupees.
- (4) In a case, where the CENVAT credit in respect of input services has been taken or utilized wrongly by reason of fraud, collusion, willful mis-statement, suppression of facts, or contravention of any of the provisions of the Finance Act or of the rules made thereunder with intention to evade payment of service tax, then the provider

of output service shall also be liable to pay penalty in terms of the provisions of the section 78 of the Finance Act.

- (5) Any order under points (1), (2), (3) or (4) shall be issued by the Central Excise Officer following the principles of natural justice.

Question 5

- (a) Write a note on duty payment 'Under protest' with reference to the Central Excise Act, 1944 and the rules made thereunder. (3 Marks)
- (b) What are the orders that are appealable to Supreme Court under the Central Excise Act 1944? (3 Marks)
- (c) Explain briefly the provisions relating to 'Special Audit' in certain cases under section 14A of the Central Excise Act, 1944. (5 Marks)
- (d) What is Consumer Welfare Fund? How is this fund utilized? (4 Marks)

Answer

- (a) Section 11B of the Central Excise Act, 1944 provides that the time limit of one year for claiming refund of central excise duty shall not apply where the duty has been paid under protest.

As per the Supplementary Instructions issued by Central Board of Excise and Customs, any assessee who desires to pay duty under protest, may do so by following the procedure mentioned below:

- (i) The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and a dated acknowledgement shall be given to him.
- (ii) The assessee shall mark invoices or monthly/quarterly returns indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account, CENVAT Account and the Daily Stock Account.
- (iii) If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, he shall not have any right to pay duty under protest.
- (b) As per section 35L of the Central Excise Act, 1944, an appeal shall lie to the Supreme Court from
- (a) any judgment of the High Court delivered -
- (i) in an appeal made under section 35G or
- (ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003 or
- (iii) on a reference made under section 35H

if the High Court certifies the case to be fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgement.

- (b) any order of the Appellate Tribunal having relation to the determination of rate of duty or value of goods, among other things.
- (c) If at any stage of enquiry, investigation or any other proceedings before him, any Central Excise Officer not below the rank of an Assistant/Deputy Commissioner of Central Excise having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person, he may, with the previous approval of the Chief Commissioner of Central Excise, direct such manufacturer or such person to get the accounts of his factory, offices, depots, distributors or any other place, as may be specified by the said Central Excise officer, audited by a Cost Accountant, nominated by the Chief Commissioner of Central Excise in this behalf.

The Cost Accountant shall submit the audit report duly signed and certified to the said Central Excise Officer within the period specified by him or the period further extended on an application made to him. However, in any case the aggregate of the original and extended period cannot exceed 180 days.

The manufacturer shall be given an opportunity of being heard in respect of any material gathered on the basis of audit and proposed to be utilized in any proceedings under the Central Excise Act or Rules. This special audit can be conducted notwithstanding that the accounts of the manufacturer or the person have been audited under any other law for the time being in force or otherwise.

- (d) The Consumer Welfare Fund is established by the Central Government under section 12C of the Central Excise Act, 1944 wherein the following amounts are credited:-
 - (i) the refund of duty of excise/customs, which is not to be granted to the applicant.
 - (ii) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

As per section 12D, any money credited to the fund shall be utilized by the Central Government for the welfare of the consumers in accordance with such rules framed in this behalf. The Central Government shall maintain or, if it thinks fit, specify the authority, which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor General of India.

PART - B

Question 6

- (a) *Briefly explain with reference to the provisions of the Customs Act, any two of the following:*
 - (i) *Indian customs waters*

- (ii) *Person-in-charge*
- (iii) *Foreign going vessel or aircraft* (2 x 2 = 4 Marks)
- (b) *M/s. AJ imported some inputs and paid basic customs duty Rs.5 lakhs, surcharge on customs duty Rs.50,000 and CVD Rs.1 lakh. Calculate the amount that he can claim as CENVAT credit. Would it make any difference, if the assessee is not a manufacturer but a service provider?* (3 Marks)
- (c) *Explain the meaning of:*
 - (i) *Similar goods*
 - (ii) *Identical goods* (6 Marks)
- (d) *Briefly elucidate the meaning of "Importer" under the Customs Act.* (2 Marks)
- (e) (i) *If the applicant does not co-operate or obtains order by fraud, whether the Settlement Commission is empowered to send the case back to the officer for further action as per law ? Answer in the light of amended provisions of section 127MA of the Customs Act, 1962.*
- (ii) *What is meant by 'boat notes'?* (3 + 2 = 5 Marks)

Answer

- (a) (i) As defined by section 2(28) of the Customs Act, 1962 'Indian customs waters' means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and includes any bay, gulf, harbour, creek or tidal river.
- (ii) As per section 2(31) of the Customs Act, 1962 person-in-charge means-
 - (a) in relation to a vessel, the master of the vessel;
 - (b) in relation to an aircraft, the commander or the pilot-in-charge of the aircraft;
 - (c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;
 - (d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance.
- (iii) As per section 2(21) of the Customs Act, 1962, foreign going vessel or aircraft means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes-
 - (a) any naval vessel of any foreign Government taking part in any naval exercises;
 - (b) any vessel engaged in fishing or any other operations outside the territorial waters of India;

- (c) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever.
- (b) M/s. AJ can take credit of Rs.1,00,000 i.e. of additional duty of customs (CVD). Rule 3(1) of CENVAT Credit Rules, 2004 allows the credit of additional duty of customs imposed under section 3 of the Customs Tariff Act, 1975. The credit of other two duties i.e. basic custom duty and the surcharge on customs duty is not allowed.

It will not make any difference if the assessee is a service provider as credit of additional duty of customs (CVD) can be availed both by the manufacturers and the service providers alike.

Note: It has been assumed that the additional duty of customs (CVD) referred to in the question is not the additional duty of customs (CVD) leviable under section 3(5) of the Customs Tariff Act, 1975 as in that case the service provider will not be entitled to avail the CENVAT credit.

- (c) (i) As per rule 2(e) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, similar goods means imported goods
- (a) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;
 - (b) produced in the country in which the goods being valued were produced; and
 - (c) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person,
- but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.
- (ii) As per rule 2(c) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, identical goods means imported goods-
- (i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not effect the value of the goods;
 - (ii) produced in the country in which the goods being valued were produced; and
 - (iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person,
- but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost

for use in connection with the production and sale for export of these imported goods.

- (d) As per section 2(26) of the Customs Act, 1962 importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.
- (e) (i) As per the provisions of section 127-I, if the applicant does not cooperate, the Settlement Commission can send the case back to the proper officer for further action as per law. Similarly, as per section 127C(11) read with section 127C(9), if the order is obtained by misrepresentation of facts or fraud, the order stands void and the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and proper officer may, notwithstanding anything contained in any other provision of the Customs Act, complete such proceedings at any time before the expiry of two years from the date of the receipt of communication that the settlement became void.

Section 127MA of the Customs Act, 1962 has been amended by the Finance Act, 2005 with effect from 13.05.2005 to provide for sending back of a case to the Appellate Tribunal by the Settlement Commission in the event of non-cooperation by the assessee. Section 127MA does not provide for sending back of a case to the proper officer. It must be noted that section 127MA is only of academic importance in view of the fact that it applies only in respect of the applications filed on or before 29.02.2000.

- (ii) In case the vessel arriving at the port does not get a birth, then, the import cargo is taken from the ship to the shore and the export cargo is taken from the shore to the ship in boats. Section 35 of the Customs Act, 1962 stipulates that no imported goods shall be water borne for being loaded in any vessel, and no export goods which are not accompanied by a shipping bill, shall be water borne for being shipped unless the goods are accompanied by a 'boat note' in the prescribed form.

Question 7

- (a) *What is the purpose of interpretation rules regarding Customs Tariff? Do they form part of the tariff schedule? Explain the 'Akin Rule' of interpretation.* (4 Marks)
- (b) *What do you understand by first appraisement and second appraisement systems under the Customs Act, 1962?* (4 Marks)
- (c) *State the procedure for clearance of goods imported by post.* (5 Marks)
- (d) *Can the rate of drawback be determined provisionally by the exporter? Briefly explain.* (2 Marks)

Answer

- (a) The Customs Tariff has a set of six rules for interpretation of the tariff schedule and two general explanatory notes. The six rules of interpretation and two general explanatory notes are integral part of the schedule. The purpose of their inclusion is:

- (i) to give clear direction as to how the nomenclature in the schedule is to be interpreted and
- (ii) to give statutory force to the interpretation rules and the general explanatory notes.

Rule 4 of the rules of interpretation is called as akin rule. This rule lays down that goods which cannot be classified in accordance with rules 1, 2 and 3 of the rules of interpretation shall be classified under the heading appropriate to the goods to which they are most akin.

- (b) Section 17 of the Customs Act, 1962 stipulates that after bill of entry or shipping bill has been presented, the proper officer may examine and test the goods. After such examination and testing, the proper officer assesses the duty leviable on such goods.

Under the first appraisement system, the goods are examined first and then they are assessed. The appraiser normally resorts to this method if he is not able to make assessment on the basis of declaration made in the bill of entry or shipping bill and the documents submitted along with them and deems that inspection is necessary. The importer himself may also request 'first check procedure', if he cannot give all required details regarding description/value of goods. He has to make request for first check examination at the time of filing of bill of entry.

Under the second appraisement system, the information and documents furnished by the importer are adequate to determine the correct tariff nomenclature, tariff classification and valuation of the goods for purposes of assessment. In such a situation, physical examination of the goods or their weighment or testing is only a confirmatory check. Under this system, such an examination is carried out after assessment and collection of duty.

- (c) Clearance of goods imported by post is governed by sections 82 to 84 of the Customs Act, 1962. Any label or declaration accompanying the goods showing the description, quantity and value thereof, shall be treated as "an entry for import" under the Customs Act. The rate of duty and tariff value applicable to goods imported by post shall be the rate and valuation in force on the date on which the postal authorities present to the proper officer a list containing the particulars of such goods for the purpose of assessment of duty. In case the goods are imported by a vessel and the list of the goods containing the particulars is presented before the date of the arrival of the vessel, the crucial date shall be the date of arrival of the vessel.

The procedure for clearance of imported goods by post is as under:

- (i) Post parcels are allowed to pass from port/airport to Foreign Parcel Department of Government Post Offices without payment of customs duty. The Postmaster hands over to Principal Appraiser of Customs the memo showing total number of parcels

- from each country of origin, parcel bills or senders' declaration, customs declaration and despatch notes, and other information that may be required.
- (ii) The mail bags are opened and scrutinised by Postmaster under supervision of Principal Postal Appraiser of Customs. Packets suspected of containing dutiable goods are separated and presented to Customs Appraiser with letter mail bill and assessment memos.
 - (iii) The Customs Appraiser marks the parcels which are required to be detained as (a) necessary particulars are not available or (b) mis-declaration or under-valuation is suspected or (c) goods are prohibited for import. Other parcels are assessed without opening, on the basis of details given in parcel bill or dispatch notes. The duty is assessed and is entered on parcel bill. These are then audited and returned to Postmaster. Postmaster will hand over parcel to addressee only after collecting the customs duty.
 - (iv) Parcels selected by Appraiser for examination are opened and examined. If required, details are called from addressee. After inspection, the parcels are sealed with a distinctive seal. If mis-declaration or under-valuation is noted or goods are prohibited goods for imports these will be detained and reported to Customs Commissioner. After assessment, these will be handed over to Post Master, who will hand over to addressee on receipt of payment of customs duty.
- (d) The exporter may be granted provisional duty drawback when he executes a bond binding himself to repay the entire or excess amount of drawback. Where an exporter desires that he may be granted drawback provisionally, he may make an application in writing to the Commissioner of Central Excise or Commissioner of Customs and Central Excise that a provisional amount be granted to him towards drawback on the export of such goods pending determination of the final amount or drawback. The manufacturer may be allowed provisional duty drawback of an amount not exceeding the amount claimed by him in respect of such export.

Question 8

- (a) *M/s. XYZ Ltd. were liable for the duty assessed and payable on certain import which, it paid under protest and filed a claim for refund of duty on the ground that duty had been wrongly levied. On rejection of claim for refunds, the assessee filed an appeal before Tribunal which was also dismissed on the ground that as no appeal had been filed against the assessment order, the refund claim was not maintainable. Assessee seeks your advice for remedy. Discuss whether the stand taken by the Tribunal is correct.*
(5 Marks)
- (b) *Write a note on warehousing period under section 61 of the Customs Act, 1962.*
(4 Marks)
- (c) *What is residual method of valuation? Bring out your answer with reference to the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.* (6 Marks)

Answer

- (a) The facts of the case are similar to the case of *Priya Blue Industries Ltd. v. CCus.*, 2004 (172) ELT 145 (SC). The Supreme Court has held in this case that refund claim under section 27 of the Customs Act, 1962 can be made by any person who has paid duty in pursuance of an assessment order. However, such a claim for refund cannot be made without challenging the order of assessment in appeal. It cannot be inferred that if the assessment is not correct, a party can file a claim for refund and the correctness of the assessment order can be examined while considering the claim for refund.

So long as the order of assessment stands the duty would be payable as per that order. Unless that order is modified in appeal or has been reviewed, the order of assessment stands and thus, a claim for refund contrary to such an order cannot be maintained.

A refund claim is not an appeal proceeding. The officer considering refund claim cannot sit in appeal over an assessment made by a competent officer.

Thus, in view of the abovementioned decision the stand taken by the Tribunal is correct.

- (b) Section 61(1) of the Customs Act, 1962 provides that any warehoused goods may be left in the warehouse in which they were deposited or in any warehouse to which they may be removed-

- (a) in the case of capital goods intended for use in any hundred percent export oriented undertaking, till the expiry of five years;
- (b) in the case of goods other than capital goods, intended for use in any hundred per cent export-oriented undertaking, till the expiry of three years; and
- (c) in the case of any other goods, till the expiry of one year,

after the date on which the proper officer has made an order under section 60 permitting the deposit of the goods in a warehouse.

However,

- (i) in the case of any goods which are not likely to deteriorate, the period specified in clause (a) or clause (b) or clause (c) may, on sufficient cause being shown, be extended-
 - (A) in the case of such goods intended for use in any hundred percent export oriented undertaking, by the Commissioner of Customs, for such period as he may deem fit, and
 - (B) in any other case, by the Commissioner of Customs, for a period not exceeding six months and by the Chief Commissioner of Customs for such further period as he may deem fit;
- (ii) in the case of any goods referred to in clause (c) if they are likely to deteriorate, the Commissioner of Customs may reduce the aforesaid period of one year to such shorter period as he may deem fit.

- (c) Rule 8 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 provides the residual method of valuation. According to this rule, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value should be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India.

No value should be determined under the provisions of this rule on the basis of —

- (i) the selling price in India of the goods produced in India;
- (ii) a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
- (iii) the price of the goods on the domestic market of the country of exportation;
- (iv) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of rule 7A;
- (v) the price of the goods for export to a country other than India;
- (vi) minimum customs values; or
- (vii) arbitrary or fictitious values.

PART -C

Question 9

- (a) Explain whether the following activities come under the service tax liability:
- (i) Reimbursement of expenses like cess, customs duty, port dues claimed by custom house agents;
 - (ii) Surveillance fee collected by a credit rating agency;
 - (iii) Transporters who are rendering "Express Cargo Service" for delivery.
- (3 x 2 = 6 Marks)
- (b) (i) M/s. Renu Consultants are a labour contractor of manpower to M/s. Sanu Creations. They charge to the principal employer for the wages of their labour which amounts to Rs.1,20,000 plus their service charge of 12,000 for arranging the labour. The issue is whether service tax is payable on the gross amount charged by them or only their charges for labour. Examine the case and advise suitably.
- (ii) For providing beauty treatment services, a parlour uses materials such as cosmetics and toilet preparations. Whether the cost of such materials will be included in the value of taxable service? Whether any abatement is admissible on account of the value of materials consumed in providing the service? (4 + 3 = 7 Marks)
- (c) (i) What is the time limit under Rule 4A for raising/issuing an invoice for services?
- (ii) What is the due date for monthly/quarterly payment of service Tax?
- (1+ 1 = 2 Marks)

Answer

- (a) (i) Service tax is not leviable on the reimbursement of expenses incurred by the custom house agents in respect of the statutory levies like cess, custom duty etc. [CCEx., New Delhi, Trade Notice No. 39/97-C.E., S.T.39/97, dated 11.06.1997].
- (ii) Service tax is to be paid on the surveillance fee collected by a credit rating agency [M.F. (D.R.) Letter No.11/3/98-TRU, dated 07.10.1998].
- (iii) Transporters rendering "Express Cargo Service" for door to door delivery of goods and articles are liable to service tax as the nature of service provided by them is not different from the service provided by the conventional courier agencies [Circular F. No. 341/43/96-ST (TRU) dated 31.10.1996].

- (b) (i) Section 67 states that value of any taxable service is the gross amount charged by the service provider for the taxable services rendered by him. The labour contractor charges to the principal employer for the wages of his labour plus his service charges for arranging the labour.

Further, the department has clarified vide M.F. (D.R.) Letter F.No.B1/6/2005-TRU dated 27.07.2005 that service tax is to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount.

Hence the taxable amount is the entire amount i.e. Rs1,32,000.

- (ii) It has been clarified vide M.F. (D.R.) F. No.B11/1/2002 TRU dt. 01.08.2002 that the cost of cosmetics and toilet preparations used for providing the service shall be included in the value of taxable service as they are not sold as such but are integral to the service provided. No abatement will be admissible on account of the value of material consumed in providing the service.
- (c) (i) As per Rule 4A(1) of Service Tax Rules, 1994, an invoice is to be issued within 14 days from the date of completion of the taxable service or receipt of payment towards the value of taxable service, whichever is earlier.
- (ii) The due date for monthly/quarterly payment of service tax is 5th of the following month or quarter as the case may be, except that the payment for the month/quarter ending in March will have to be made by 31st March.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2005 and Notifications/Circulars issued up to 30.04.2006 which are relevant for November 2006 examinations.

PAPER – 8 : INDIRECT TAXES

Question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain any two of the following with reference to the provisions of the CENVAT Credit Rules, 2004:*
- (i) *Job work*
 - (ii) *Principal inputs*
 - (iii) *Deemed Cenvat Credit.* (2 x 2 = 4 Marks)
- (b) *Briefly examine the correctness or otherwise of any two of the following statements with reference to the Central Excise Act, 1944 giving reasons to support your answers:*
- (i) *Parts used for repair or replacement during warranty period are excisable.*
 - (ii) *In case of samples distributed free, valuation should be adopted on the basis of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 i.e. cost of production plus 10%.*
 - (iii) *Exemption from duty does not mean exemption from registration.* (3 x 2 = 6 Marks)
- (c) *M/s Super Pipes Ltd. is engaged in the manufacture of m.s. galvanized pipes. The excise department has required the assessee to include the cost of galvanization in the assessable value of the m.s. galvanized pipes for the purposes of determination of excise duty. The assessee claims that as the process of galvanization does not amount to manufacture, the cost of galvanization is not includible in the assessable value of the said pipes made from H.R. coils.*
- Briefly discuss whether the stand taken by the assessee is correct with reference to the provisions of the Central Excise, Act, 1944.* (5 Marks)
- (d) *“Everything that is sold is not necessarily a marketable commodity chargeable to excise duty under the provisions of the Central Excise Act, 1944.” Discuss.* (5 Marks)

Answer

- (a) (i) As per rule 2(n) of the CENVAT Credit Rules, 2004, “job work” means processing or working upon of raw material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for aforesaid process and the expression “job worker” shall be construed accordingly.

Provisions for sending inputs/capital goods for further processing, testing, repair, reconditioning or any other purpose are contained in rule 4(5) of the CENVAT Credit Rules, 2004.

- (ii) As per explanation to rule 9A of the CENVAT Credit Rules, 2004, "principal inputs" means any input which is used in the manufacture of final products where the cost of such input constitutes not less than 10% of the total cost of raw-materials for the manufacture of unit quantity of a given final product.

Assessee other than the notified exempt assessee are required to submit information relating to principal inputs in form ER-5 and ER-6 to the Superintendent of Central Excise.

- (iii) According to rule 13 of the CENVAT Credit Rules, 2004, the Central Government may by a notification in the Official Gazette declare certain inputs/input services, on which "deemed CENVAT credit" at specified rates will be allowed to the manufacturer of final products or provider of output services, even if such declared inputs/input services are not directly used by such a manufacturer or provider of output service but are contained in the said final products/used in providing the output service, irrespective of the actual amount of duty/service tax paid on such declared inputs/input services.

- (b) (i) *Correct.* The Supreme Court in the case of *ECE Industries Ltd. v. CCE, 2004 (164) ELT 236 (SC)* has held that parts used for repair, replacement during the warranty period are excisable. If some spare parts are supplied as free replacements for defective parts, excise duty is payable on such spare parts.
- (ii) *Incorrect.* CBEC vide *Circular No.813/10/2005-CX dated 25.4.2005* has clarified that in case of samples distributed free, valuation should be done on basis of rule 4, i.e. valuation should be done on the basis of value of identical goods cleared at or around the same time.
- (iii) *Correct.* The goods that are exempt from duty of excise by virtue of provisions of section 5A of the Central Excise Act do not become non-excisable goods. Hence, every person who manufactures excisable goods has to obtain registration in accordance with the provisions of section 6 of the Act read with rule 9 of the Central Excise Rules, 2002.

However, persons who manufacture excisable goods which are chargeable to nil rate of excise duty or are fully exempt from duty by a notification are exempt from obtaining registration subject to the declaration to be made in the specified form.

- (c) The facts of the case are similar to the case of *Siddhartha Tubes Ltd. v. CCE, Indore – 2006 (193) ELT 6 (SC)* wherein the Apex Court has held that galvanization cost is includible in the assessable value of m.s. galvanized pipes even though 'galvanization' does not amount to manufacture. The Apex Court explained that the concepts of 'manufacture' and 'valuation' are two different and distinct concepts and the present case relates to valuation. The Supreme Court stated that m.s. galvanized pipes were manufactured out of H.R. coils after passing through various processes (including

galvanization). Such a process added to the quality of the product and increased the value of pipes. Process of galvanization was incidental to the manufacture of pipes and, therefore, cost of that process was rightly included in the assessable value.

Therefore, the stand taken by M/s. Super Pipes Ltd. is not correct in law.

- (d) Unless the goods are capable of being marketed, they cannot be charged to duty. Marketability is the capability of a product of being put into the market for sale. Supreme Court in *Union of India v. Delhi Cloth and General Mills Case – 1977 (1) ELT (J199)* has held that in order to become goods, it is necessary that an article must be something which can ordinarily come to the market to be bought and sold.

However, the Apex Court in *UOI v Indian Aluminium Co. Ltd. 1995 (77) ELT 268* has held that dross and skimmings are not marketable commodity even if they can be sold to recover some metal as everything which is sold is not necessarily a marketable commodity as known to the commerce and which, it may be worthwhile to trade in. The dross and skimmings arising during the manufacture of aluminium are nothing but rubbish which is thrown up in the course of manufacture. It may be possible to recover some metal from them and therefore they can be sold. However, they are not metal in the same class as waste or scrap.

This view has been reiterated by the Supreme Court in *CCE v. Tata Iron and Steel Co. Ltd. 2004 (165) E.L.T. 386 (S.C.)* wherein the Apex Court has held that the dross and skimming are merely the refuse, scum or rubbish produced during the process of manufacture. The Supreme Court has held that merely because the dross and skimming are sold to customers, it cannot be inferred that they are marketable commodity as even rubbish can be sold. However, that does not make rubbish a marketable commodity. Mere selling of a commodity does not mean that it is marketable since a commodity can also be sold as rubbish. Marketability means selling of a commodity which is known to the commerce and which may be worthwhile to trade in.

In view of these decisions it can be inferred that in order to be marketable, an item should be capable of being bought and sold. Even waste and scrap can be excisable goods, if they are known in commercial parlance and are marketable – *UOI v. Khandelwal Metal and Engg. Works (1985) 20 ELT 222 (SC)*. However, the item should be something which is worthwhile to trade in and not just refuse, scum or rubbish.

Question 2

- (a) Answer in brief the following questions relating to provisions made under rule 6 of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001:
- (i) What will be the consequences in case the goods received at concessional rate are not used for the intended purpose?
 - (ii) Whether a manufacturer receiving the subject goods can return such goods to the original manufacturer?

- (iii) *When will the subject goods be deemed as not having been used for the intended purpose?* (2 x 3 = 6 Marks)
- (b) *Discuss briefly whether a refund effected by the Central Excise Department, pursuant to orders of court, in respect of a bank guarantee (towards disputed excise duty) encashed by the department, would be subject to the provisions of section 11B of the Central Excise Act, 1944 relating to "unjust enrichment."* (4 Marks)
- (c) *A manufacturer of cameras sells leather cases/soft cases and instruction manuals along with cameras. The cost of such cases and manuals were being charged separately apart from the cost of the camera. The excise department has claimed that the cost of such cases and manuals should be included in the assessable value of the camera. According to the excise department, as per Rule 5 of the Interpretative Rules for Central Excise Tariff brought into force from 28-2-2005, cases for cameras, musical instruments, drawing instruments, necklaces etc. specially shaped for those articles, suitable for long-term use will be classified along with those articles, if such articles are normally sold along with such cases.*
- Examine briefly with the help of decided case law, if any, whether the stand taken by the department is correct in law.* (5 Marks)

Answer

- (a) In order to obtain excisable goods at nil or concessional rate of duty, a manufacturer is required to follow the procedure prescribed in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. The questions may be answered as under:
- (i) As per rule 6 of the said rules, if the goods received at concessional rate (subject goods) are not used for the intended purpose, the manufacturer shall be liable to pay differential duty (equivalent to the concession availed) along with interest and the provisions of section 11A and section 11AB shall apply mutatis mutandis for effecting such recoveries.
- (ii) Yes, a manufacturer may return the subject goods to the original manufacturer if the subject goods on receipt are found to be defective or damaged or unsuitable or surplus to his needs. Such returned goods shall be added to the non duty paid stock of the manufacturer of the subject goods and dealt with accordingly. (Proviso to rule 6 of the said rules).
- (iii) It has been clarified by the explanation to rule 6 of the said rules that subject goods shall be deemed as not being used for intended purpose, if the same have been lost or destroyed by natural causes or unavoidable accidents during -
- transport from the place of procurement to the manufacturer's premises, or
 - from the manufacturer's premises to the place of procurement, or
 - during handling or storage in the manufacturer's premises.

- (b) The Supreme Court in the case of *Oswal Agro Mills Ltd. v. Assistant Collector of C.Ex., Ludhiana 1994 (70) ELT 48 (SC)* has held that refund of an encashed bank guarantee for all or part of the disputed excise duty pursuant to an order of the Court is not governed by the provisions of section 11B, since furnishing of a bank guarantee is not equivalent to payment of excise duty.

The Supreme Court stated that section 11B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty.

The Apex Court explained that a bank guarantee is a security for the Revenue for recovering the dues in the event the Revenue succeeds in the dispute concerning the duty. However, if the bank refuses to honour its guarantee the revenue or the principal administrative officer of the Court (where the bank guarantee is in his favour) has to file a suit against the bank for the amount due upon the bank guarantee. Therefore, the amount of the disputed tax or duty that is secured by a bank guarantee cannot be considered as having been paid to the Revenue. Thus, there arises no question of its refund and hence provisions of section 11B would not be attracted.

- (c) The Supreme Court in the case of *CCEx.,Goa v. Phil Corporation Ltd. (2005) 180 ELT 311 (SC)* has observed that the question of includibility of the cost of instruction manual and soft case in the camera would depend on the fact that whether such articles can be considered to be the components of the camera or whether they are merely accessories. It has been held by the Apex Court that such articles are mere accessories and therefore their value should not be included in the assessable value of the camera.

Rule 5 of new Interpretative Rules for Central Excise Tariff *inter alia* provides that camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. However, here it has to be kept in mind that valuation and classification provisions are two independent provisions and thus, should not be interlinked.

Therefore, the Department's claim is not tenable.

Question 3

- (a) Briefly explain the provisions relating to compounding of offences with reference to section 9A of the Central Excise Act, 1944 and Rule 6 of the Central Excise (Compounding of Offences) Rules, 2005 dealing with the power of the Compounding authority. (3 Marks)
- (b) *M/s. Solid Cement Ltd. is engaged in the manufacture of cement. Explosives are used for blasting the mines in order to excavate limestone, which is used in the manufacture of cement/clinkers in the factory situated at some distance away from the mines.*

Cenvat credit on explosives has been denied by the excise department on the ground that the explosives are not used as inputs "within the factory of production". You are required to advise with reference to the Cenvat Credit Rules, 2004 whether the stand taken by the department is correct. (4 Marks)

- (c) *A Small Scale Industrial unit (SSI) is required to pay the following central excise duties by January 15, 2006 for clearances effected from its factory in respect of final products manufactured during the month of December, 2005:*

Basic Excise Duty (B.E.D.): Rs.36,000

Special Excise Duty (S.E.D.): Rs.18,000

National Calamity Contingent Duty (N.C.C.D.): Rs.1,000

Education Cess (E.C.): 2% of B.E.D. + S.E.D. + N.C.C.D.

Balances available as credit at the beginning of the month i.e. December, 2005 were as follows:

B.E.D. Rs.24,000, N.C.C.D. Rs.2,000, E.C. Rs.600.

No inputs were received during the month. However, certain inputs were received on January 1, 2006 on which total duty paid by the suppliers of inputs was as follows :

B.E.D. Rs.16000, E.C. Rs.320

Excise duty paid on capital goods received during the month was as follows:

B.E.D. Rs.40,000, E.C. Rs.800

For the month of December, 2005 you are required to determine :

- (i) the credit available for utilisation;*
- (ii) the permissible extent to which such available credit may be utilised against payment of B.E.D., S.E.D., N.C.C.D., and E.C.; and*
- (iii) the B.E.D., S.E.D., and E.C. payable through account current (P.L.A.).*

(4 + 2 + 2 = 8 Marks)

Answer

- (a) Section 9A(2) of the Central Excise Act provides that any offence under the Act can be compounded by the Chief Commissioner of Central Excise. The offence may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount as may be prescribed.

Rule 6 of the Central Excise (Compounding of Offences) Rules, 2005 deals with the power of Compounding authority to grant immunity from prosecution. The Chief Commissioner having jurisdiction over the place where the offence under the Act have been or alleged to have been committed is the compounding authority. As per rule 6 of the Central Excise (Compounding of Offences) Rules, 2005, the compounding authority,

if he is satisfied that any person who has made the application for compounding of offence under these rules has co-operated in the proceedings before him and has made full and true disclosure of facts relating to the case, grant to such person, subject to such conditions as he may think fit to impose, immunity from prosecution for any offence under the Central Excise Act, 1944 with respect to the case covered by the compounding of offence.

- (b) The Supreme Court has held in the case of *Vikram Cement v. CCEx., Indore 2006 (194) ELT 3 (SC)* that CENVAT credit on inputs being explosives used for blasting mines to produce limestone for use in manufacture of cement/clinkers in factory situated at some distance away from mines could not be denied on the ground that they were not used as inputs within the factory.

The above-mentioned decision overrules the contrary opinion of the Supreme Court in the case of *J.K. Udaipur Udyog Ltd. 2004 (171) E.L.T. 289 (SC)*. In this case, the credit on explosives used for blasting mines was disallowed on the ground that the same were not used within the factory but in a mine which could not qualify to be a factory. Therefore, the stand taken by the department is not correct.

Further, it may be noted that in *Vikram Cement v. CCE 2006 (197) ELT 145 (SC)*, it has been held that CENVAT credit is available only when mines are captive mines i.e. they constitute one integrated unit with the main cement factory. Credit would not be available if the supplies from the mine are made to various cement factories of different assesseees.

- (c) (i) The CENVAT credit available for December, 2005 is computed below:

<i>Particulars</i>	<i>B.E.D</i>	<i>N.C.C.D</i>	<i>E.C</i>
	<i>Rs.</i>	<i>Rs.</i>	<i>Rs.</i>
Opening Balance	24,000	2,000	600
Capital Goods received during December, 2005 (50%)	20,000	-	400
Total	44,000	2,000	1,000

- (ii) Credit of B.E.D Rs.44,000 can be utilized for B.E.D and S.E.D. However, credit of N.C.C.D and E.C can only be utilized for payment of N.C.C.D and E.C respectively.
- (iii) Duty payable through P.L.A for December, 2005 is computed as follows:

B.E.D & S.E.D: Rs.10,000 [(Rs.36,000 + 18,000) – Rs.44,000]

Education cess payable on final products manufactured during the month of December, 2005 is Rs.1,100 [2% of (Rs.36,000 + Rs.18,000 + Rs.1,000)].

E.C: Rs.100 [Rs.1,100 – Rs.1,000]

Balance credit of Rs.1,000 of N.C.C.D (Rs.2,000 – Rs.1,000) will be carried forward, which can be utilized in subsequent month(s) only for payment of N.C.C.D on final products.

Notes:

- (i) CENVAT credit on capital goods is available @ 50% in the year 2005-06 and the balance will be available in the subsequent financial year.
- (ii) CENVAT credit on inputs received upto 31.12.2005 only can be used for paying excise duty on final products manufactured during the month of December, 2005 even if duty is payable by 15.1.2006.

Question 4

- (a) *Write a brief note on the powers of review to be exercised by the Committee of Chief Commissioners under section 35B and section 35E of the Central Excise Act, 1944.*
(3 Marks)
- (b) *With regard to exports under the Central Excise Act, 1944 write a brief note on:*
 - (i) *Who is authorised to sanction rebate claim?*
 - (ii) *The time limit for the filing of such rebate claim.* (2 x 2 = 4 Marks)
- (c) *Write short note on "submission of list of records" under rule 22(2) of the Central Excise Rules, 2002.* (4 Marks)
- (d) *With reference to Rule 8(3) and Rule 8(3A) of the Central Excise Rules, 2002 explain in brief the consequences, if duty is not paid fully on the due date or within 30 days after the due date.* (4 Marks)

Answer

- (a) The Finance Act, 2005 has inserted a new sub-section (1B) in section 35B to empower the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 to constitute a Committee by notification in the Official Gazette. The Committee shall consist of two Chief Commissioners or two Commissioners of Central Excise for the purpose of giving direction to the proper officer to appeal on its behalf to the Appellate Tribunal. Accordingly sub-section (2) of section 35B has also been amended to provide that the Committee of Commissioners of Excise shall review the orders of the Commissioner of Central Excise (Appeals).

Similarly section 35E has bestowed the powers of review of orders of a Commissioner to the Committee of Chief Commissioners of Central Excise. Accordingly, now the Committee of Chief Commissioners will direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal and shall make such order within a period of six months, but not beyond a period of one year from the date of decision or order of the adjudicating authority.
- (b) (i) The rebate of excise duty paid on exported goods is granted under rule 18 of the Central Excise Rules, 2002. The rebate claim can be filed with any of the following Officers of the Central Excise:
 - (i) Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory of production of export goods or the warehouse; or

- (ii) Maritime Commissioner
- (ii) As per section 11B of the Central Excise Act, 1944, the claim must be filed within one year from the date of export.
- (c) As per rule 22(2) of the Central Excise Rules, 2002, every assessee and first stage dealer and second stage dealer should submit to the officer empowered to visit and inspect under rule 22(1) a list in duplicate, of:
 - (i) all the records prepared and maintained for accounting of transaction in regard to receipt, purchase, manufacture, storage, sale or delivery of goods including inputs and capital goods;
 - (ii) all the records prepared and maintained for accounting of transaction in regard to payment for input services and their receipt or procurement; and
 - (iii) all the financial records and statements including trial balance or its equivalent.
- (d) Rule 8(3) of the Central Excise Rules, 2002 provides that if the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount. Currently, the rate of interest is 13%.

Under rule 8(3A), if duty is not paid within 30 days after the due date, the assessee shall lose the facility to pay duty in monthly instalments. This forfeiture will commence from the date of order passed by Assistant/Deputy Commissioner of Central Excise. The forfeiture of facility will continue for a period of two months or till such date on which all dues including interest are paid, whichever is later.

Further, during the said period of two months (or till outstanding amount and interest is paid, whichever is later), the assessee shall be required to pay excise duty for each consignment by debit to the account current (i.e. without utilizing CENVAT credit). In the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow.

Question 5

- (a) *Briefly comment with reasons on any two of the following statements:*
 - (i) *Section 35C(2A) of the Central Excise Act, 1944 curtails the power of the Appellate Tribunal to grant stay beyond six months.*
 - (ii) *Two factories located in the same premises are to be considered as one factory for the purpose of arriving at the "aggregate value of clearances" in terms of Small Scale Exemption Notification No.8/2003- C.E., dated 1-3-2003.*
 - (iii) *The Central Excise Officer incharge of a warehouse may permit export without physical storage of the goods in the warehouse.*

(3 x 2 = 6 Marks)

- (b) (i) Briefly explain with reference to section 11A of the Central Excise Act, 1944 as to who is authorised to issue a show cause notice.
- (ii) A show cause notice under section 11A of the Central Excise Act, 1944 was issued by Superintendent of Central Excise and the case was adjudicated by a Deputy Commissioner. This was inspite of there being in existence a circular of the Central Board of Excise and Customs to the effect that the same ought to have been done by a Commissioner. Explain briefly whether the action in the present case is sustainable in law. (2 + 3 = 5 Marks)
- (c) Explain briefly the provisions relating to charging of interest under section 11DD of the Central Excise Act, 1944. (4 Marks)

Answer

- (a) (i) Section 35C(2A) of the Central Excise Act, 1944 provides that if an order of stay is made by the Appellate Tribunal in any proceeding relating to an appeal filed under sub-section (1) of Section 35B, the appeal shall be decided within 180 days. If appeal is not disposed of by the Tribunal within 180 days, the stay shall stand automatically vacated.

The Apex Court in the case of *CCE v. Kumar Cotton Mills Pvt. Ltd.* (2005) 180 ELT 434 (SC) has held that the amendment did not in any way curtail the powers of the Tribunal to grant stay exceeding six months. The Supreme Court observed that sub-section (2A) could not be construed as punishing the assessee for matters which might be completely beyond their control e.g. many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified.

However, it has been made clear by the Apex Court that the Tribunal could extend the period of stay only:

- (i) on good cause; and
 - (ii) if it was satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal and not for reasons attributable to the assessee.
- (ii) In the case of *Rollantainers Ltd. v. CCE*. (2004) 170 ELT 257 (SC), the Supreme Court has held that two factories located in the same premises with common boundaries could not be treated as one factory for the purpose of small scale exemption as they had separate staff, separate management, separate passage, separate entrance with separate Central Excise Registration and produced different end products. Further, the end product of one factory was not the raw material for the other, they were not subsidiary of each other and there was no commonality of purpose between the two factories. Mere common boundary did not make them as one factory even though at apex level both the factories were maintained by one company.

This case proves that situs of a factory alone should not be considered as the sole criterion for clubbing its clearances with the other factory's clearances. The clubbing of clearances is dependant upon the facts and circumstances of each case.

- (iii) The Officer-in-charge of the warehouse may permit waiver from physical warehousing (i.e. permitting export without physically storing the goods in the warehouse) where exporter so requests in writing provided all the formalities relating to record-keeping shall be completed in usual manner with suitable record in the Warehousing Register: "warehousing waived". This permission will be given in exceptional cases where delay occurred due to delayed supply from the factory or longer transit period or requirement of immediate export or any other genuine reasons, provided the entire consignment is entered for export in the original packing. Such cases of permission granted will be reported to the Superintendent-in-charge of the warehouse at the earliest.
- (b) (i) Section 11A of the Central Excise Act, 1944, specifies that show cause notice should be issued by a 'Central Excise Officer'. As per section 2(b) of the Act a 'Central Excise Officer, means the Chief Commissioner of Central Excise, Commissioner of Central Excise, or any other officer of the Central Excise Department, invested by the CBEC constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act.
- (ii) In *Pahwa Chemicals Pvt. Ltd. v. CCE (2005) 181 ELT 339 (SC)*, the Supreme Court has held that a show cause notice can be issued by any 'Central Excise Officer'. These statutory powers cannot be cut down by issuing a Circular. The Circulars issued by the Board (specifying powers of various officers) are nothing more than administrative directions. The Central Excise Officers, as a matter of propriety, should follow the directions and only deal with the work which has been allocated to them by virtue of these Circulars. However, if an officer still issues a notice or adjudicates contrary to the Circulars, it would not be a ground for holding that he has no jurisdiction to issue the show cause notice or to set aside the adjudication especially as no prejudice is caused thereby to the assessee.

Therefore, the action in the present case is sustainable in law.

- (c) Where an amount has been collected in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods, the person who is liable to pay such amount as determined under sub-section (3) of section 11D, shall, in addition to the amount, be liable to pay interest at such rate, not below 10% and not exceeding 36% p.a., as is for the time being fixed by the Central Government, by notification in the Official Gazette, 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. 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 45 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.

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.

PART - B

Question 6

- (a) *Explain briefly with reference to the provisions of the Customs Act, 1962 any two of the following:*
- (i) *Customs port*
 - (ii) *Goods*
 - (iii) *Stores.* (2 x 2 = 4 Marks)
- (b) *Examine briefly the powers of the department, if it is not satisfied with an order made under section 47 of the Customs Act, 1962 pursuant to which goods have been cleared.* (3 Marks)
- (c) *An importer imported certain inputs for manufacture of final product. A small portion of the imported inputs were damaged in transit and could not be used in the manufacture of the final product. An exemption notification was in force providing exemption in respect of specified raw materials imported into India for use in manufacture of specified goods, which was applicable to the imports made by the importer in the present case. Briefly examine whether the importer could claim the benefit of the aforesaid notification in respect of the entire lot of the inputs imported including those that were damaged in transit.* (3 Marks)
- (d) *Write short notes on the following with reference to the provisions of the Customs Act, 1962:*
- (i) *Relevant dates for submission of refund application*
 - (ii) *Prohibition and regulation of drawback* (3 x 2 = 6 Marks)
- (e) *State briefly the provisions of section 17 of the Customs Act, 1962 relating to assessment of goods.* (4 Marks)

Answer

- (a) (i) As per section 2(12) of the Customs Act, 1962, 'customs port' means any port appointed under clause (a) of section 7 to be a customs port and includes a place appointed under clause (aa) of that section to be an inland container depot.
- As per clause (a) and (aa) of section 7(1) of the Customs Act, the Board may, by notification in the Official Gazette, appoint the ports and airports and the places which alone shall be customs ports or customs airports and the inland container

depots for the unloading of imported goods and the loading of export goods or any class of such goods.

- (ii) According to section 2(22) of the Customs Act, 1962, 'goods' includes –
 - (a) vessels, aircrafts and vehicles;
 - (b) stores;
 - (c) baggage;
 - (d) currency and negotiable instruments and
 - (e) any other kind of movable property.
- (iii) As per section 2(38) of the Customs Act, 1962, 'stores' means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.

Stores are also goods but are covered by special provisions in sections 85 to 90. The definition does not cover goods for use in a vehicle.

- (b) Goods are cleared from customs after proper officer makes an order permitting clearance of the same for home consumption under section 47 of the Customs Act. Once goods are cleared after issue of such order but the department is not satisfied with the order, following action can be taken:
 - (i) Department can file a review application under section 129D(2) of the Customs Act against the order of the proper officer with the Commissioner (Appeals); or
 - (ii) Action can be taken under section 28 of the Customs Act by issuing a show cause notice.

It has been held by the Supreme Court in *UOI v. Jain Shudh Vanaspati Ltd. (1996) 86 ELT 460 (SC)* that action can be taken under section 28 of the Customs Act, even after goods are released from Customs by issuing a show cause notice etc.

- (c) The facts of the case are similar to the case of *BPL Display Devices Ltd. v. CCEx., Ghaziabad (2004) 174 ELT 5 (SC)* wherein the Supreme Court has held that the benefit of the notifications cannot be denied in respect of goods which are intended for use for manufacture of the final product but cannot be so used due to shortage or leakage.

The Apex Court has held that no material distinction can be drawn between loss on account of leakage and loss on account of damage. The benefit of said exemption cannot be denied as inputs were 'intended for use' in the manufacture of final product but could not be so used due to shortage/leakage/damage. It has been clarified by the Supreme Court that words "for use" have to be construed to mean "intended for use".

Therefore, the importer can claim the benefit of the notification in respect of the entire lot of the inputs imported including those that were damaged in transit.

- (d) (i) According to section 27 of the Customs Act, 1962, a refund claim should be lodged before the expiry of six months. However, in case of imports made by individual for personal use or by Government or by any educational, research or charitable

institution or hospital, the refund claim should be filed before the expiry of one year. Following are the relevant dates to calculate the time limit of six months or one year for the purpose of submission of refund application:

- (a) If the refund claim is lodged by the importer, the time limit should be calculated from the date of payment of duty.
- (b) If the refund claim is lodged by the buyer of imported goods, the time limit should be calculated from the date of purchase.
- (c) In case of goods which are exempt from payment of duty by an ad-hoc exemption, the limitation of one year or six months, as the case may be, should be computed from the date of issue of such exemption order.
- (d) Where any duty is paid provisionally, the time limit should be computed from the date of adjustment of duty after the final assessment thereof.

The time limit of six months or one year would not be applicable if duty is paid under protest.

- (ii) Section 76 of the Customs Act, 1962 contains the provisions in respect of prohibition and regulation of drawback. The provisions are:
 - (a) Notwithstanding anything herein before contained, no drawback shall be allowed -
 - (i) in respect of any goods, the market price of which is less than the amount of drawback due thereon,
 - (ii) where the amount of drawback in respect of any goods is less than Rs.50.
 - (b) Without prejudice to the provisions of sub-section (1), if the Central Government is of the opinion that goods of any specified description in respect of which drawback is claimed under this Chapter are likely to be smuggled back into India, it may, by notification in the Official Gazette, direct that drawback shall not be allowed in respect of such goods or may be allowed subject to such restrictions and conditions as may be specified in the notification.
- (e) Sub-section (1) of section 17 lays down that after an importer has entered any imported goods or an exporter has entered any export goods the imported goods or the export goods, without undue delay, be examined and tested by the proper officer.

Sub-section (2) provides that after such examination and testing, the duty, if any, leviable on such goods shall be assessed.

Sub-section (3) lays down that for the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods can be ascertained. The proper officer may also require the importer/exporter to furnish any information required for such ascertainment which is in his power to produce or furnish.

Sub-section (4) provides that imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3). However, if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

Question 7

- (a) *What will be the dates of commencement of the definitive anti-dumping duty in the following cases under section 9A of the Customs Tariff Act, 1975 and the rules made thereunder:*
- (i) *where no provisional duty is imposed;*
 - (ii) *where provisional duty is imposed;*
 - (iii) *where anti-dumping duty is imposed retrospectively from a date prior to the date of imposition of provisional duty.* (2 x 3 = 6 Marks)
- (b) *M/s. Pure Energy Ltd. is engaged in oil exploration and has imported software containing seismic data. The importer is entitled to exemption from customs duty subject to the condition that an "essentiality certificate" granted by the Director General of Hydrocarbons is produced at the time of importation of the goods. The certificate was not made available to the importer within a reasonable time by the Director General of Hydrocarbons. The customs department rejected the importer's claim for exemption. Examine briefly whether the department's action is sustainable in law.* (4 Marks)
- (c) (i) *Briefly explain the powers of officers of Customs under section 5 of the Customs Act, 1962.* (2 Marks)
- (ii) *With reference to section 6 of the Customs Act, 1962, examine briefly whether the Central Government could entrust any functions of the Central Board of Excise and Customs or any officer of Customs to any officer of any other department.* (3 Marks)

Answer

- (a) The Central Government has power to levy anti-dumping duty on dumped articles in accordance with the provisions of section 9A of the Customs Tariff Act, 1975 and the rules framed thereunder.
- (i) In a case where no provisional duty is imposed, the date of commencement of anti-dumping duty will be the date of publication of notification, imposing anti-dumping duty under section 9A(1), in the Official Gazette.
 - (ii) In a case where provisional duty is imposed under section 9A(2), the date of commencement of anti-dumping duty will be the date of publication of notification, imposing provisional duty under section 9A(2), in the Official Gazette.

- (iii) In a case where anti-dumping duty is imposed retrospectively under section 9A(3) from a date prior to the date of imposition of provisional duty, the date of commencement of anti-dumping duty will be such prior date as may be notified in the notification imposing anti-dumping duty retrospectively, but not beyond 90 days from the date of such notification of provisional duty.
- (b) This issue has been addressed to by the Supreme Court in the case of *Commissioner of Customs v. Tullow India Operations Ltd. (2005) 189 ELT 401 (SC)*. The Apex Court has observed that if a condition is not within the power and control of the importer and depends upon the acts of public functionaries, non-compliance of such a condition, subject to just exceptions cannot be held to be a condition precedent which would disable it from obtaining the benefit for all times to come.

In the given case also the certificate has not been granted within a reasonable time. Therefore, in view of the above-mentioned judgement, the importer M/s Pure Energy Ltd. cannot be blamed for the lapse by the authorities. The Directorate General of Hydrocarbons is under the Ministry of Petroleum and Natural Gas and such a public functionary is supposed to grant the essentiality certificate within a reasonable time so as to enable the importer to avail of the benefits under the notification.

- (c) (i) An officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act subject to such conditions and limitations as the Board may impose. He may also exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him. However, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV (Appeals and Revision) and section 108 (power to summon persons for giving evidence).
- (ii) As per section 6 of the Customs Act, 1962, the Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officers of customs under this Act.

Question 8

- (a) Write a brief note on any two of the following with reference to the Customs Act, 1962:
 - (i) Fine and Penalty
 - (ii) Rules and Regulations
 - (iii) Power to search persons under section 100 and section 101. (3 x 2 = 6 Marks)
- (b) Explain briefly if the Authority for Advance Rulings could entertain applications from residents with specific reference to section 28E(c) of the Customs Act, 1962. (3 Marks)
- (c) Write a brief note on "remission of duty in case of volatile goods" under section 70 of the Customs Act, 1962. (3 Marks)

- (d) Briefly explain "standard unit of quantity" with reference to the First Schedule to the Customs Tariff Act, 1975. (3 Marks)

Answer

- (a) (i) Section 125 of the Customs Act provides for the power of the customs officer to give an option to the owner of the goods or, where such owner is not known, the person from whose possession or custody the offending goods have been seized to pay 'fine' in lieu of confiscation of such offending goods. The provisions in this regard are as follows:

- (i) The customs officer may give an option to pay a fine in lieu of confiscation (Redemption Fine) in case of prohibited goods.
- (ii) In case of other goods, the customs officer shall give an option of payment of redemption fine.
- (iii) The amount of such fine cannot exceed the market price of the confiscated goods less the duty paid thereon.
- (iv) Where any fine in lieu of confiscation of goods is imposed, the owner of goods or the person from whom the goods were seized, shall in addition be liable to pay duty and charges payable in respect of such goods.

The word 'penalty' means punishment under the law, i.e. such punishment as is provided in penal laws. It also means the sum payable as a punishment for a default. Penalty provisions under the Customs Act are for improper importation/exportation of goods, short-levy or non-levy of duty in certain cases, non accounting for goods and contravention etc. not expressly mentioned.

- (ii) According to section 2(36) of the Act, 'rules' means the rules made by the Central Government under any provision of this Act. Section 156 of the Act gives the Central Government the general power to make rules.

As per section 2(35) of the Customs Act, 1962, 'regulations' means the regulations made by the Central Board of Excise and Customs (CBEC) under any provision of this Act. The Board gets the authority to make regulations under section 157 of the Customs Act, 1962.

While the rules are to be framed in consistence with the provisions of the Act, the regulations are subject to an additional limitation, i.e. they should not be contrary to the rules also.

Rules have to be placed before the Parliament, while regulations framed by CBECE are not required to be placed before the Parliament. However, both are 'subordinate legislations' and are legally valid and enforceable.

- (iii) Search under section 100 is conducted by the proper officer of the customs, whereas search under section 101 is conducted by the officer of customs empowered by the Commissioner of Customs.

A person can be searched under section 100 if the proper officer has reason to believe that any goods liable to confiscation or documents relating thereto are secreted in his person. However, a person can be searched under section 101 only for certain specified goods which are liable to confiscation or documents relating thereto. The specified goods are gold, diamonds, manufactures of gold or diamonds, watches, and any other notified goods.

Section 100 applies to only the persons specified therein e.g. any person in a customs area. However, for search under section 101, there is no restriction regarding place of such person.

- (b) Yes, the Authority for Advance Rulings (AAR) can entertain applications from residents also. Section 28E(c) of the Customs Act, 1962 has been amended by the Finance Act, 2005 so as to include the following within the definition of an applicant:
 - (i) a joint venture in India, and
 - (ii) a resident falling within any such class or category of persons as the Central Government may by notification in the Official Gazette specify in this behalf.
- (c) Section 70 of the Customs Act provides for the remission of duty in case of shortage of the volatile goods, which are warehoused. The Assistant or Deputy Commissioner of Customs is empowered to remit the duty leviable on such deficiency, if following conditions are satisfied:
 - (i) The goods should be found deficient in quantity at the time of removal from the warehouse;
 - (ii) The deficiency should be on account of natural loss, i.e. evaporation etc.

These provisions are applicable only to such warehoused goods as the Central Government, having regard to the volatility of the goods and the manner of their storage, may, by notification in the Official Gazette, specify.
- (d) 'Standard Unit of Quantity' is a unit of measure. It has been prescribed in column 3 of the First Schedule to the Customs Tariff for each tariff item to facilitate the collection, comparison and analysis of trade statistics. The unit of measure is indicated by abbreviations. Some abbreviations are cc-cubic centimeter, cm-centimetre(s), g-gram(s), mt- Metric Tonne.

Board's *Circular No.51/2003 dated 18.06.2003* provides that an importer should use single standard unit of quantity. Usage of single standard unit of quantity has been again emphasized vide Directorate General of Valuation, CBEC *Letter No. F VAL/217/2001 dated 9.11.2005*.

Use of different units of quantity for the same goods has been causing serious problems in data analysis for National Import Data Base. Unacceptable units like sacks, cartons, bundles are often used in respect of certain goods. These practices make it difficult to do value comparison for such kind of goods. Data analysis and Risk Management also will run into difficulties due to such inconsistent use of units of quantity.

PART – C

Question 9

- (a) *Export of Services Rules, 2005 were made effective from March 15, 2005. Answer the following questions with reference to the said rules:*
- (i) *What are the three categories of taxable services dealt with under Rule 3?*
 - (ii) *What are the three options available to an exporter of taxable services under these rules for claiming exemption or rebate of service tax? (3 x 2 = 6 Marks)*
- (b) *With reference to the Finance Act, 1994 as amended and the rules made thereunder relating to service tax, state whether registration is required or not in the case of the following persons or class of persons:*
- (i) *Input service distributor*
 - (ii) *Small service provider whose aggregate value of taxable service is Rs.3,50,000 per annum.*
 - (iii) *India based recipient of taxable services provided from abroad by a non-resident not having any place of business in India. (1 x 3 = 3 Marks)*
- (c) *Answer any three of the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:*
- (i) *Entrance fee and life membership fee paid by members of the club providing various services and facilities and organizing get togethers and functions for its members.*
 - (ii) *Construction of residential complex having ten bungalows.*
 - (iii) *Selling of SIM (Subscribers Identification Module) card and the process of activation thereof by mobile/cellular telephone companies.*
 - (iv) *Study material or written text provided by commercial training and coaching centre. (2 x 3 = 6 Marks)*

Answer

- (a) (i) Rule 3 of Export of Services Rules, 2005 classifies the taxable services in three categories as under:
- (a) when the immovable property in respect of which the service is rendered is situated abroad [Rule 3(1)(i)];
 - (b) when the service is partly/fully performed outside India [Rule 3(1)(ii)];
 - (c) when service is provided from India, but recipient of service is located outside India [Rule 3(1)(iii)].
- In order to be treated as export of services, different requirements in each of the three categories have to be fulfilled.
- (ii) The three options available to an exporter of taxable services for claiming exemption or rebate of service tax are:

- (a) Export taxable service without payment of service tax under Rule 4 and utilize CENVAT credit of excise duty/service tax paid on inputs/input services used in providing exported taxable services for payment of service tax on other services.
 - (b) Export taxable service without payment of service tax and claim rebate of service tax paid on input services and excise duty paid on inputs used in providing such taxable service under Rule 5.
 - (c) Pay service tax on exported service and claim rebate of service tax paid on such taxable service under Rule 5.
- (b) (i) Yes. As per section 69(2) of the Finance Act, 1994 and *Notification No.26/2005-ST dated 07.06.2005*, an input service distributor is required to make an application for registration.
- (ii) Yes. Any provider of taxable service whose aggregate value of taxable service in a financial year exceeds Rs.3,00,000 is required to get registration under section 69(2) of the Finance Act, 1994.
- (iii) Yes. As per *Circular No.B1/6/2005-TRU dated 27.7.2005* an India based recipient of taxable services provided from abroad by a non-resident not having any place of business in India is deemed to be the service provider and hence has to obtain registration.
- (c) (i) Membership of clubs or associations has been made a taxable service w.e.f. 16.6.2005. Facilities or advantages are provided to members in return for a subscription or other consideration. Entrance fee and life membership fee shall also be treated in the same way as a subscription, hence these would also be taxable.
- (ii) Construction of residential complex has been made a taxable service w.e.f. 16.6.2005. However, construction of residential complex having only 12 or less residential units is not chargeable to service tax. Thus, construction of residential complex having 10 bungalows would not be chargeable to service tax.
- (iii) *M.F. (D.R.) Circular No. 23/3/97- S.T., dated 13.10.1997* has clarified that the amount received by the cellular telephone company from subscribers towards SIM card forms part of the value of taxable service for levy of service tax.
- (iv) The gross amount charged for rendering the taxable services is liable to service tax. However, *Notification No.12/2003-ST, dated 20.06.2003* exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service from the service tax leviable thereon subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. Further, the said exemption is available only when CENVAT credit on such goods and materials sold has not been taken by the service provider.

Therefore, the stuzdy material and written text provided by the coaching centre will be charged to service tax if the conditions set out in the above notification are not complied with. However, if the conditions are complied with, exemption will be granted.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2006 and Notifications/Circulars issued up to 31.10.2006 which are relevant for May 2007 examinations.

PAPER – 8 : INDIRECT TAXES

Question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain any two of the following with reference to the provisions of the Central Excise Act, 1944:*
- (i) *Adjudicating Authority*
 - (ii) *Central Excise Officer*
 - (iii) *Duty paid under protest* (2 x 2 = 4 Marks)
- (b) *What is the period of validity of registration certificate granted by the Appropriate Excise Authority?* (2 Marks)
- (c) *Discuss the validity or otherwise of the following statements, with reasons:*
- (i) *Inputs cleared as such to a job worker on 01.10.2006 were not returned in 180 days (assessable value being Rs.20,000, excise duty @ 16.32%). 50% of the inputs were received on 1.4.2007. In this situation, no cenvat will be allowed in the year ending on 31.3.2007.*
 - (ii) *Captive consumption of excisable goods should always be valued on the basis of sale price of similar goods manufactured by others.* (2 x 3 = 6 Marks)
- (d) *State the offences under Rule 25(1) of the Central Excise Rules, 2002.* (4 Marks)
- (e) *A2Z & Co., manufactured shikai powder. They purchased shikai seeds crushed them and sold the same. The assessee did not pay excise duty on such powder contending that such powder was not excisable goods. However, the Central Excise Department treated the said goods as excisable goods by classifying them under the chapter heading “3305.99 – Cosmetic or toilet – preparations, essential oil etc. – preparations for use on the hair – other”. Discuss the validity of the contention of the assessee.* (4 Marks)

Answer

- (a) (i) As per section 2(a) of the Central Excise Act, 1944, adjudicating authority means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, Commissioner of Central Excise (Appeals) or Appellate Tribunal.
- (ii) As per section 2(b) of the Central Excise Act, 1944, Central Excise Officer means

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

- (iii) Sometimes it happens that the classification and assessable value of goods determined by the excise authorities are not agreeable to or acceptable to the assessee. In such cases, the assessee can file an appeal and in the meanwhile he can pay duty under protest if no stay is obtained from Appellate Authorities.

The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and obtain a dated acknowledgement. The assessee shall mark invoices or monthly/quarterly return indicating the goods on which duty is paid 'under protest'.

- (b) Once registration certificate is granted, it has a permanent status unless it is suspended or revoked by the appropriate authority in accordance with law or is surrendered by the person or company concerned. If the person who applies for registration with the department is an individual, then the certificate ceases to be valid in the event of the death of the said individual. In the case of limited company, death of a director does not affect the status of registration, since registration is issued to the body corporate recognizing the same as a legal person. In the case of partnership firms also, normally, no difficulty arises with regard to succession, since the surviving partners continue either in the same name or with the change of name of the business.
- (c) (i) *True.* Rule 4(5)(a) of the CENVAT Credit Rules, 2004 *inter alia* provides that CENVAT credit is allowed on the inputs or capital goods sent to the job worker for further processing, testing repair etc. if the same are received back in the factory of the manufacturer within 180 days of their being sent. If the inputs or capital goods are not received back within the said period, the manufacturer is required to pay an amount equal to the CENVAT credit attributable to such inputs or capital goods. However, the manufacturer can subsequently avail of the CENVAT credit again (which was debited when the said goods were not received) when the inputs or capital goods are received back.

In the given case, the inputs are received back on 01.04.2007 viz., after the expiry of 180 days of their being sent to the job worker. Therefore, the credit of Rs.3264 (Rs.20,000 x 16.32%) allowed earlier will have to be reversed.

However, credit of Rs.1632 (50% of Rs.3264) can be taken again on 01.04.07 since 50% of the inputs sent to the job worker are received back on 01.04.07, though the same cannot be shown in the CENVAT records made for financial year 2006-2007.

- (ii) *False.* It is incorrect to state that captive consumption of excisable goods should

always be valued on the basis of sale price of similar goods manufactured by others.

As per Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, then such captively consumed goods have to be valued at 110% of the cost of production or manufacture of such goods. CBE&C has clarified that such cost of production or manufacture should be computed in accordance with the Cost Accounting Standard - 4 issued by the Institute of Cost and Works Accountants of India.

- (d) Subject to the provisions of section 11AC of the Central Excise Act, 1944, following offences have been prescribed under rule 25(1) of the Central Excise Rules, 2002:
- (a) removal of any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or
 - (b) non accounting 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 Act; or
 - (d) contravention of any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty.

If any producer, manufacturer, registered person of a warehouse or a registered dealer commits any of the above-mentioned offences then, he shall be liable to the penalty as prescribed and such goods shall be liable to confiscation.

- (e) The facts of the given case are similar to the case of *Mayil Mark Nilayam v. Superintendent of Central Excise, Madras 2001 (127) E.L.T. 659 (Mad.)*. In this case, the High Court has held that Seeakkai is not an excisable commodity as it does not fall under the ambit of 'other' items grouped under Heading 3305.99 of the Central Excise Tariff. Seeakkai is a natural product, which is crushed into powder for removing oil stains and is also used for taking oil bath. Seeakkai means 'soap pod wattle' and is clearly distinct from soapnut powder or soapnut. It is neither a detergent or scouring powder nor does it have any application to the oil or to the hair.

Hence, the contention of the assessee is correct.

Note: Heading No.3305.99 now reads as 3305 90 90 in view of the new eight digit Central Excise Tariff being introduced with effect from 28.02.2005.

Question 2

- (a) *M/s P Ltd. manufactured concentrates of non-alcoholic beverages and sold it to various bottlers. The bottlers after processing the concentrates bottled the outcome and sold the same. Under the agreement between P Ltd. and the bottlers, P Ltd. was required to advertise the finished products. Subsequently, the bottlers formed S Ltd. to work as a centralized agency for the advertisement of the finished products. The shareholders as*

well as the directors of S Ltd. were the representatives of the bottlers.

Determine whether or not the expenses of advertisement incurred by S Ltd. to advertise aerated products manufactured by the third party i.e. bottlers, is includible in the assessable cost of concentrate manufactured by P Ltd. (4 Marks)

- (b) Examine the validity of the following statements:
- (i) Purchased a plant for Rs.1,16,320 cum-duty price on 12.12.2006 and received the plant in the factory on 5.4.2007. Excise duty rate 16.32%. Cenvat allowed will only be Rs.8,160 for the year ended 31.3.2007.
 - (ii) An assessee purchased inputs weighing 400 tons. The duty paid on inputs was Rs.4,000. During transit, 20 tons of the inputs were destroyed. The destroyed quantity of inputs does not qualify to be 'inputs' within the meaning of the Cenvat Credit Rules, 2004. (2 x 2 = 4 Marks)
- (c) Explain the non-applicability of 'transaction value' with reference to section 4 of the Central Excise Act, 1944. (5 Marks)
- (d) What are "exempted goods" under the Cenvat Credit Rules, 2004? (2 Marks)

Answer

- (a) The facts of the given case are similar to the case of *CCEx. Mumbai v. Parle International Ltd. 2006 (198) ELT 486 (SC)*. In this case, the Apex Court has held that advertisement expenses incurred by the centralized agency to advertise aerated products manufactured by third party bottlers would not be includible in the assessable value of concentrates manufactured by the assessee, as only the advertisement and sales expenses incurred for the goods under assessment (here concentrate) could be added to the assessable value.

Thus, in this case the advertisement expenditure incurred by S Ltd. to advertise aerated products manufactured by the third party i.e. bottlers would not be includible in the assessable value of the concentrates manufactured by P Ltd.

- (b) (i) Cum-duty price of plant is Rs.1,16,320

Therefore, duty component = $1,16,320 \times (16.32/116.32) = \text{Rs.}16,320$

As per rule 4(2) of the CENVAT Credit Rules, 2004, out of the total credit of Rs.16,320 available on the plant, credit not exceeding up to 50% can be taken in the first year of acquisition and the balance in the subsequent years. Further, credit in respect of duty paid on capital goods can be taken only on receipt of the capital goods in the factory of the manufacturer.

Hence, in the given case, credit of Rs.8,160 (50% of Rs.16,320) in respect of duty paid on plant can be taken only on or after 05.04.2007. Accordingly, the same cannot be taken in the financial year 2006-2007.

- (ii) As per rule 2(k) of the CENVAT Credit Rules, 2004 inputs should be used in or in relation to production or manufacture of excisable goods. In the given case, 20 tons

of the inputs are destroyed in transit. Thus, they could not be used in or in relation to manufacture of excisable goods. Hence, they do not qualify to be 'inputs' within the meaning of CENVAT Credit Rules, 2004.

Therefore, the CENVAT credit admissible to the assessee will be Rs.3800/ only

$$\left[4000 - \left(\frac{4000 \times 20}{400} \right) \right]$$

- (c) The concept of 'transaction value' is applicable only in the circumstances where:
- (a) there is a sale of goods;
 - (b) the goods are sold for delivery at the time and place of removal;
 - (c) the assessee and the buyer of the goods are not related; and
 - (d) the price is the sole consideration for the sale.

In cases where any of the above-mentioned requirements are missing, the concept of 'transaction value' does not apply and the assessable value is determined on the basis of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 notified under section 4(1)(b) of the Central Excise Act, 1944.

- (d) Rule 2(d) of the CENVAT Credit Rules, 2004 defines 'exempted goods' as goods which are exempt from the whole of the duty of excise thereon and includes goods which are chargeable to 'NIL' rate of duty.

Question 3

- (a) *The appellants were the manufacturers of rubber products. Some of the defective goods were returned by the buyers and the appellants took Cenvat credit of the duty originally paid under Rule 16 of the Central Excise Rules, 2002. Defective goods were reprocessed, which however yielded only scrap and such scrap was cleared on payment of duty. Department claimed that Cenvat credit taken by the appellants should be reversed since reprocessing did not amount to 'manufacture' whereas appellants argued that the process cannot be anything other than 'manufacture' in as much as the defective goods returned by their buyers were put to normal process of manufacture.*

Offer your comments to the appellants referring to the decided case law. (5 Marks)

- (b) *What are the provisions regarding general exemption to SSI units?* (5 Marks)

- (c) *M/s P Ltd. used to label its products with a foreign brand and claimed exemption under a notification. The classification list was approved by the department after carrying out verifications and all returns were regularly filed. The invoice containing description of goods were also regularly approved by the department. The department denied the benefit of exemption to the assessee by invoking extended period of limitation under section 11A on the ground that it failed to declare the particulars regarding affixing of labels. Is the department justified?* (5 Marks)

Answer

- (a) The facts of the given case are similar to the case of *Sundaram Industries Ltd. v. CCE, Madurai* 2006 (202) ELT 538 (Tri.-Chennai). In this case, the Tribunal relied on the case of *Commissioner v. Tata SSL Ltd.* 2005 (191) ELT 799 (Tri. Mumbai) wherein it was held that ".....what is ultimately cleared from the factory is scrap resulting out of further processing of rejected wire".

Thus, the Tribunal held that the "process" undergone by the defective/returned final product amounted to "manufacture" though it resulted in scrap. The Tribunal further elaborated that on this fact, rule 16 got attracted and it was open to the appellants to remove the scrap on payment of duty, after availing CENVAT credit on the defective/returned final product.

Thus, the contention of the appellants is correct.

- (b) The Government has given various concessions to small scale industries. The most important notification governing these concessions is *Notification No. 8/2003 CE dated 01.03.2003*. The provisions of the notification are:
- (i) A unit is entitled for SSI exemption only if its turnover in previous year does not exceed Rs.4 crore e.g. a unit whose turnover is more than Rs.4 crore in financial year 2005-06 will not be eligible for any SSI concession in financial year 2006-07. However, a unit whose turnover is less than Rs.4 crore in financial year 2005-06 will be eligible for SSI exemption in financial year 2006-07. SSI exemption is available in respect of the goods specified in the said notification.
 - (ii) For a unit entitled for SSI exemption, turnover up to Rs.100 lakhs is fully exempt if the unit does not avail of CENVAT credit on inputs. However, if the SSI unit avails of CENVAT credit on inputs, it has to pay normal duty on all clearances.
 - (iii) A unit availing SSI exemption can avail of CENVAT credit on capital goods but such credit can be utilized only after the turnover crosses Rs.100 lakhs.
 - (iv) The limit of Rs.100 lakh or Rs.4 crore is calculated by taking into account the clearances in respect of one manufacturer from one or more factories or from a factory by one or more manufacturers.
 - (v) SSI exemption is not available if the SSI unit uses a brand name of another person on its clearances.
- (c) The facts of the given case are similar to the case of *Pahwa Chemicals Private Ltd. v. CCEx., Delhi* 2005 (189) ELT 257 (SC) wherein the Apex Court has held that mere failure to declare the particulars does not amount to mis-declaration or willful suppression. Some positive act on the part of the assessee to establish either willful mis-declaration or willful suppression is must.

The Apex Court explained that there was no willful mis-declaration or willful suppression as all the facts were within the knowledge of the department and the assessee did not make the declaration on the belief that affixing of a label made no difference. Thus, the Apex Court held that since all the facts were within the knowledge of department, hence

extended period of limitation was not invokable.

Thus, in view of the abovementioned judgement, the department is not justified in invoking the extended period of limitation in the given case.

Question 4

- (a) *Explain whether a person who is neither a producer nor a curer nor a manufacturer of excisable goods, but only stores such goods in a warehouse, can be called upon to pay the duties of excise on such goods?* (3 Marks)
- (b) *"The value of price support incentives received from the raw materials supplier should be included in the assessable value of the final products". Do you agree? Explain.* (3 Marks)
- (c) *Briefly explain the procedure to be adopted in respect of exported goods subsequently re-imported and returned to factory.* (4 Marks)
- (d) *Explain the concept of 'Provisional Assessment' under Rule 7 of the Central Excise Rules, 2002.* (5 Marks)

Answer

- (a) As per rule 4(1) of the Central Excise Rules, 2002, every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods. No excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured or from a warehouse, unless otherwise provided.

Thus, a warehouse keeper though not a producer or manufacturer or curer, shall be liable to pay duty of excise on the goods stored by him.

- (b) In the case of *CCEx. v. Bisleri International Private Limited 2005 (186) ELT 257 (SC)*, the value of the price support incentives was held as not includible in the assessable value of the final product as
 - there was no flow back of any additional consideration from the buyers;
 - the price uniformity was maintained;
 - there was no evidence of any concession to any of the buyers or existence of any favoured buyers.

It is possible to take a view that if the conditions pointed out by the Apex Court are not satisfied, the value of the price support incentives would be includible in the assessable value of the final product.

- (c) Exported excisable goods, which are re-imported for carrying out repairs, reconditioning, refining, remaking or subject to any similar process, may be returned to the factory of manufacturer for carrying out the said processes and subsequent re-export.

Notification No. 42/2001-CE (NT) as amended prescribes the procedure in respect of exported goods subsequently re-imported and returned to the factory as under:

- (i) The manufacturer shall maintain separate account for return of such goods in the

daily stock account and shall make suitable entry in the said account after the goods are processed, repaired, reconditioned, refined or remade.

- (ii) Such re-import and re-export shall be governed by the provisions of the Customs Act, 1962.
 - (iii) Any waste or refuse arising as a result of the said processes shall be removed from the factory after the payment of appropriate duty or destroyed after informing the proper officer in writing at least 7 days in advance and after observing such conditions and procedure as may be specified by the Commissioner of Central Excise.
 - (iv) Thereafter, the duty payable on such waste or refuse may be remitted by the said Commissioner of Central Excise.
- (d) Rule 7 of the Central Excise Rules, 2002 contains the provisions in respect of provisional assessment. Provisional assessment can be requested by the assessee. Department itself cannot order provisional assessment.

An assessee can request for provisional assessment if he:

- (i) is unable to determine the value of the excisable goods or
- (ii) is unable to determine the applicable rate of duty.

In aforesaid cases, assessee may request Assistant/Deputy Commissioner in writing giving reasons for provisional assessment of duty. After such request, the Assistant/Deputy Commissioner may by order allow payment of duty on provisional basis. The Assistant/Deputy Commissioner shall also specify the rate or value at which duty will be provisionally paid. Payment of duty on provisional basis will be allowed subject to execution of bond for payment of differential duty.

The Assistant/Deputy Commissioner should pass the order for final assessment within 6 months from the date of order of provisional assessment. If after final assessment, any differential amount becomes payable, interest shall be payable from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof. However, if a refund arises consequent to the order of final assessment, interest shall be payable on such refund from the first day of the month succeeding the month for which such refund is determined, till the date of refund. The refund shall be subject to the provisions of unjust enrichment.

Question 5

- (a) *Discuss the power of the Central Government to amend First and Second Schedules of the Central Excise Tariff.* (3 Marks)
- (b) *What would be the outcome, if retail price is not indicated or wrongly indicated at the time of removal?* (3 Marks)
- (c) *State the non-application of provisions of unjust enrichment under section 11B(2) of the Central Excise Act, 1944.* (4 Marks)

- (d) *State the powers of the Settlement Commission under section 32 of the Central Excise Act, 1944.* (5 Marks)

Answer

- (a) Section 5 of the Central Excise Tariff Act, 1985 empowers the Central Government to amend the First and Second Schedules. It provides that where the Central Government is satisfied that it is necessary so to do in the public interest, it may, by notification in the Official Gazette, amend the First Schedule and the Second Schedule. However, such amendment shall not alter or affect in any manner the rates specified in the First Schedule and the Second Schedule in respect of goods at which duties of excise shall be leviable on the goods under the Central Excise Act, 1944. Such notifications shall be laid before each House of Parliament, while it is in session, for a total period of thirty days as soon as it is issued.
- (b) Section 4A(4) of the Central Excise Act, 1944 *inter alia* provides that where a manufacturer removes the excisable goods from the place of manufacture without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the central excise provisions or any other law then, such goods shall be liable to confiscation. Further, the retail sale price of such goods shall be ascertained in the prescribed manner and duty shall be payable as per the retail price so determined.
- (c) As per proviso to section 11B(2) of the Central Excise Act, 1944, a refund of excise duty is not hit by the bar of unjust enrichment (i.e., the refund, instead of being credited to the Fund, is paid to the applicant) if the amount of excise duty is relatable to:
- (a) rebate of excise duty on excisable goods exported out of India (if export is on payment of duty)
 - (b) rebate of excise duty on excisable materials used in manufacture of goods exported out of India (if CENVAT credit has not been availed)
 - (c) refund of credit of duty paid on inputs in accordance with any rules or notifications
 - (d) unspent advance deposits lying in balance in the applicant's account current
 - (e) the excise duty paid by the manufacturer, if he had not passed on the incidence of such duty to any other person
 - (f) the excise duty borne by the buyer, if he had not passed on the incidence of such duty to any other person
 - (g) the excise duty borne by certain notified applicants
- (d) The powers of the Settlement Commission are briefed hereunder:
- (i) It has all the powers of a Central Excise Officer.
 - (ii) It can attach the property of an applicant during the pendency of proceedings, to protect revenue.
 - (iii) It can regulate its own procedure and decide the places where the bench will sit.

- (iv) It has the power to grant immunity from prosecution, penalty, fine and interest.
- (v) It has the power to reopen any proceedings within five years from the date of application, if for proper disposal of the case pending before it, an earlier case which was settled is required to be reopened.
- (vi) It has the power to send back a case to proper officer if the applicant has not cooperated with it.

Note: Section 32 of the Central Excise Act, 1944 contains the provisions relating to the constitution of the Customs and Excise Settlement Commission. The powers of the Settlement Commission are given in section 32G, section 32H, section 32I etc.

PART - B

Question 6

- (a) *Explain briefly with reference to the provisions of the Customs Act, 1962 any two of the following:*
 - (i) Conveyance
 - (ii) Dutiable goods
 - (iii) India (2 x 2 =4 Marks)
- (b) *State the situations in which the proper officer is authorized to issue show-cause notice under section 28 of the Customs Act, 1962 and also the time limit.* (5 Marks)
- (c) *The assessee M Ltd. entered into a joint venture with a foreign collaborator N for promotion and selling antennas, accessories and other communication equipments. The agreement between them indicates that N owned majority of equity shares in M Ltd. Technical services were provided by N to M Ltd. for various functions that were carried out in respect of manufacture of antenna system in India, for which technical services fee was paid to N by M Ltd. Based on the above facts, the department opined that both M Ltd. and N were related persons in terms of Rules 2(2)(i) and 2(2)(iv) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and that the technical fee paid by M Ltd. was includible in the assessable value of the imported components in terms of Rule 9(1)(c) of the Rules. Decide referring to decided case law.* (5 Marks)
- (d) *From the following particulars, calculate assessable value and total custom duty payable:*
 - (i) *Date of presentation of bill of entry : 20.6.2006 [Rate of BCD 25%; Exchange Rate : Rs.43.60 and rate notified by CBEC Rs.43.80].*
 - (ii) *Date of arrival of goods in India : 30.6.2006 [Rate of BCD 20%; Exchange Rate: Rs.43.90 and rate notified by CBEC Rs.44.00].*
 - (iii) *Rate of Additional Customs Duty : 16%.*
 - (iv) *CIF value 2,000 US Dollars; Air Freight 500 US Dollars, Insurance cost 100 US Dollars [Landing charges not ascertainable].*

(v) *Education cess applicable 2%.*

(vi) *Assume there is no special CVD.*

(6 Marks)

Answer

- (a) (i) As per section 2(9) of the Customs Act, 1962, conveyance is defined to include vessel, an aircraft and a vehicle. As the Customs Act seeks to consolidate the laws relating to levy of duties on import and export of goods, it is necessary to cover all the modes of transport. Therefore, the Act uses the term "conveyance" with an inclusive definition covering all the 3 modes of transport i.e. water, air and land. The specific terms are vessel (by sea), aircraft (by air) and vehicle (by land).
- (ii) As per section 2(14) of the Customs Act, 1962, dutiable goods is defined to mean any goods which are chargeable to duty and on which duty has not been paid. In order to be dutiable, any article should be within the ambit of the word goods as defined under section 2(22) and should find a mention in the Custom tariff.
- (iii) As per section 2(27) of the Customs Act, 1962, India includes the territorial waters of India. Territorial waters of India extend to 12 nautical miles into sea from the appropriate base line. Goods are deemed to have been imported if the vessel enters the imaginary line on the sea at the 12th nautical mile i.e., if the vessel enters the territorial waters of India. India includes not only the surface of sea in the territorial waters but also the air space above and the ground at the bottom of the sea.
- (b) As per section 28 of the Customs Act, 1962, the proper officer is authorized to issue show cause notice in the following situations:
- (i) when duty has not been levied
 - (ii) when duty has been short-levied
 - (iii) when duty has been erroneously refunded
 - (iv) when interest payable has not been paid
 - (v) when interest payable has been part paid
 - (vi) when interest has been erroneously refunded

Time Limit for issue of show-cause notice

- (a) In case of any import made by an individual for his personal use or by the Government or by any educational, research or charitable institution or hospital – within one year from the relevant date
- (b) In any other case – within six months from the relevant date
- (c) In the case of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the time period shall be extended to 5 years.

Note: Relevant date is defined in sub-section (3) of section 28 of the Customs Act, 1962.

- (c) The given case relates to the Supreme Court's decision in the case of *CCus. v. Prodelin India (P) Ltd. (2006) 202 ELT 13 (SC)*. It was held by the Apex Court in this case that the technical fee paid by the assessee to the foreign collaborator for design, drawing, fabrication etc. was in respect of the manufacture of antenna system in India and not with regard to the imported parts of the antenna. Further, the Apex Court pointed out that the Department was not able to prove that the relationship between the assessee and the foreign collaborator had influenced the value of the imported goods. Therefore, this case indicates that the technical fee charged in respect of post importation activities should not be included in the assessable value of the imported goods under Rule 9(1)(c) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

Thus, in view of the above-mentioned decision, the technical fee paid by M Ltd. should not be included in the assessable value of the imported components.

(d)	CIF value	2000 US Dollars
	Less : Freight	500
	Insurance	<u>100</u> <u>600</u> US Dollars
	FOB Value	1400 US Dollars
	Add: Air Freight @ 20% of FOB Value	280
	Insurance (actual amount)	<u>100</u> <u>380</u> US Dollars
		1780 US Dollars
		Rs.
	Value @ 43.80/-	77964.00
	Add: 1% for landing charges	<u>779.64</u>
	Assessable Value	78743.64
	Basic Custom Duty @ 20% (a)	15,748.73
		94,492.37
	Additional Custom Duty (b)	15,421.15
	(@ 16% + 2% cess on 16% = 16.32% on Rs.94,492.37)	
	Total of Basic Duty + Additional Duty (c) = (a + b)	31,169.88
	Education Cess @ 2% on Rs.31,169.88 (d)	623.40
	Total Duty (c + d)	31,793.28

Notes:

- (i) Rate of exchange notified by CBEC on the date of presentation of bill of entry has been considered.
- (ii) Rate of duty as applicable on the date of the arrival of aircraft which is later than the date of submission of the bill of entry has been considered.

- (iii) Landing charges have been considered as per rule 9(2)(b) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

Question 7

- (a) *After visiting USA, Mrs. & Mr. X brought to India a lap-top computer valued at Rs.80,000, personal effects valued at Rs.90,000 and a personal computer for Rs.52,000. What is the customs duty payable?* (3 Marks)
- (b) *Write a brief note on the following with reference to the Customs Act, 1962:*
- Remission of duty on imported goods lost*
 - Pilfered goods* (2 x 3 = 6 Marks)
- (c) *State the requirements to be satisfied to accept 'transaction value' under rule 4(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.* (6 Marks)

Answer

- (a) As per the baggage provisions:
- personal effects and one laptop are exempt from customs duty.
 - general free allowance is Rs.25,000
Hence, duty shall be payable on Rs.52,000 – Rs.25,000 = Rs.27,000.
 - Effective rate of duty for baggage = 35% + 2% education cess
Therefore, duty payable = Rs.9,450 + Rs.189
Total customs duty = Rs.9,639
- (b) (i) *Remission of duty on imported goods lost*
- Section 23(1) of the Customs Act, 1962 provides for remission of duty on imported goods lost (otherwise than as a result of pilferage) or destroyed, if such loss or destruction is at any time before clearance for home consumption. Such loss or destruction covers loss by leakage. Duty is payable under this section but it is remitted by Assistant/Deputy Commissioner of Customs if the importer is able to prove the loss or destruction. Thus, unless remitted, duty has to be paid and burden of proof is on the importer. Remission is at the discretion of Customs authorities. The provisions of this section are applicable for warehoused goods also.
- (ii) *Pilfered goods*
- Section 13 provides that if imported goods are pilfered after unloading thereof but before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, no duty is payable on the goods, unless the pilfered goods are restored to importer. In such a case, duty on pilfered goods is payable by the Port authorities. Also, the importer does not have to prove pilferage. However, the loss must be only due to pilferage. Section 13 is not applicable for warehoused goods.

- (c) The transaction value can be accepted under rule 4(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 when:
- (i) the sale is in the ordinary course of trade under fully competitive conditions [Rule 4(2)(a)];
 - (ii) the sale does not involve any abnormal discount or reduction from the ordinary competitive prices [Rule 4(2)(b)];
 - (iii) the sale does not involve special discounts limited to exclusive agents [Rule 4(2)(c)];
 - (iv) objective and quantifiable data exists with regard to adjustments required to be made, under the provisions of rule 9, to the transaction value [Rule 4(2)(d)];
 - (v) there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which —
 - (i) are imposed or required by law or by the public authorities in India; or
 - (ii) limit the geographical area in which the goods may be resold; or
 - (iii) do not substantially affect the value of the goods [Rule 4(2)(e)];
 - (vi) the sale or price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued [Rule 4(2)(f)];
 - (vii) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 9 of these rules [Rule 4(2)(g)]; and
 - (viii) the buyer and seller are not related [Rule 4(2)(h)].

Question 8

- (a) *Enumerate the penalties in respect of improper exportation of goods under section 114 of the Customs Act.* (3 Marks)
- (b) *State the difference between transit and transshipment of goods under the provisions of the Customs Act.* (4 Marks)
- (c) *State the ingredients in the case of seizure under section 123 of the Customs Act.* (4 Marks)
- (d) *Explain the provisions under section 15 of the Customs Act for determining the rate of duty and tariff valuation of imported goods.* (4 Marks)

Answer

- (a) Section 114 of the Customs Act, 1962 provides that any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable:

- (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;
 - (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;
 - (iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.
- (b) Differences between transit and transshipment has been summarized in the table hereunder:-

<i>Transit</i>	<i>Transshipment</i>
(i) Section 53 of the Customs Act, 1962 provides for transit of goods.	(i) Section 54 of the Customs Act, 1962 provides for transshipment of goods.
(ii) In case of transit of goods, goods are allowed to remain on the same conveyance.	(ii) In case of transshipment of goods, the conveyance changes i.e., the goods are unloaded from one conveyance and loaded in another conveyance.
(iii) In case of transit, the record already made in the ship's/aircraft's manifest continues. The imported goods are shown in the manifest as the same bottom cargo. Thus, there is continuity in the records and there is no chance of the control over such transit goods being lost.	(iii) In transshipment of goods, continuity in the records is not maintained as the goods are transferred to another conveyance.

- (c) There are four ingredients in section 123 of the Customs Act:
- (i) there should be seizure under the provisions of Customs Act;
 - (ii) seizure must have been from the possession of the person proceeded against or the one claiming ownership of the goods;
 - (iii) seizure must be in respect of goods for which section 123 applies;
 - (iv) seizure must be in the reasonable belief that the goods seized are smuggled.

Section 123 applies in case of gold and manufactures thereof, watches and other notified goods. In a case where all these four ingredients are established by the seizing authorities, the burden to prove that the seized goods are not smuggled goods lies on the

owner or possessor of the seized goods.

Note: The provisions relating to seizure are dealt in section 110 of the Customs Act, 1962. Therefore, this question may also be answered in light of the provisions of section 110. The provisions of section 110 dealing with seizure are as follows:

An Officer of Customs can seize any goods, if he has reason to believe that the same are liable to confiscation, under the Customs Act. The proper officer may also seize any document or things that may be relevant to any proceedings under the Customs Act. However, the person from whom these documents are seized is entitled to make copies of the same.

The person from whom the goods are seized is issued a show cause notice, usually within six months. If the notice is not issued within six months, the seized goods are returned to the person from whom they were seized. However, the Commissioner of Customs, on sufficient cause being shown, can extend the time period for issue of show cause notice, by a further period of six months.

If the seized goods are perishable or hazardous in nature or are prone to depreciate in value over time or there is constraint in storage space, the Government may notify such goods and the same can be disposed off before the conclusion of the proceedings.

- (d) Section 15 provides that the rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force -
- (a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;
 - (b) in the case of goods cleared from a warehouse under section 68, on the date on which bill of entry for home consumption in respect of such goods is presented;
 - (c) in the case of any other goods, on the date of payment of duty;

However, if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.

The provisions of section 15 do not apply to baggage and goods imported by post.

PART – C

Question 9

- (a) *State whether in the following cases service tax is payable, with reasons:*
- (i) *Temporary transfer of any intellectual property right.*
 - (ii) *Canteens in office run by the canteen contractor providing service directly to employees/workmen.*

- (iii) *Business auxiliary service provided by commission agents in relation to sale of agricultural produce.* (3 x 1 = 3 Marks)
- (b) *M/s TCCL, providing management consultancy to its client, do not maintain any separate accounts and have paid Rs.1,00,000 as service tax and excise duty towards input services and input material/capital goods used by them. They have used the inputs for partially exempted and partially taxable services. They are now providing the output services for which current tax liability is Rs.1,40,000. How much credit out of Rs.1,00,000 can be availed by them for paying output service tax liability, if they do not maintain any separate accounts?* (4 Marks)
- (c) *Mr. AJAR, a Chartered Accountant, raised an invoice for Rs.28,060 (25,000 + 3,060 service tax) to a client on 20.1.2007. The client, however, has paid a lump-sum of Rs.26,000 on 28.4.2007 for full and final settlement.*
- (i) *How much service tax Mr. AJAR has to pay and when does this tax become due for payment?*
- (ii) *What will be his liability, if the client refuses to pay service tax and pays only Rs.25,000 in total?* (4 Marks)
- (d) (i) *The service provider is abroad. He renders service to a subsidiary of an Indian Company located abroad. Payment to him is done by holding Indian Company. Does this attract service tax?*
- (ii) *What do you understand by 'Centralised Registration'?* (2 x 2 = 4 Marks)

Answer

- (a) (i) Section 65(55b) of the Finance Act, 1994 defines intellectual property service as:
- (a) transferring, temporarily; or
- (b) permitting the use or enjoyment of,
- any intellectual property right.
- Thus, temporary transfer of any intellectual property right (IPR) shall be subject to service tax.
- (ii) Section 65(76a) of the Finance Act, 1994 defines outdoor caterer as a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services.
- Thus, if service is directly provided to employees/workmen, then the canteen will not come within the purview of the definition of the outdoor caterer as the place is not provided by the person receiving the service. Hence, this service would not be chargeable to service tax.
- (iii) Business auxiliary services provided by commission agents in relation to sale or purchase of agricultural produce is exempt from service tax vide *Notification No. 13/2003 ST dated 20.06.03 as amended.*

- (b) Rule 6(3) of the CENVAT Credit Rules, 2004 *inter alia* provides that where common input/input services are used for providing taxable as well as exempted services and separate accounts are not maintained, the output service provider shall utilize credit only up to 20% of the amount of service tax payable on taxable output service.

Therefore, M/s. TCCL can take full credit of Rs.1,00,000 but can utilize credit only upto 20% of the amount of service tax payable on taxable output service i.e.,:

$$20\% \text{ of Rs.1,40,000} = \text{Rs.28,000}$$

In this case, out of Rs.1,40,000 M/s. TCCL shall pay output service tax of Rs.1,12,000 in cash and balance Rs.28,000 shall be paid by utilizing CENVAT credit. Remaining credit available with M/s. TCCL shall be Rs.72,000 (i.e. Rs.1,00,000 - Rs. 28,000).

- (c) (i) The Department has clarified vide the Frequently Asked Questions issued by it that service tax is required to be paid only on the value/amount of taxable service received and not on the gross amount billed to the client. However, where the amount received is less than the gross amount charged/billed to the client, the assessee is required to amend the bills either by rectifying the existing bill or by issuing a revised bill and by properly endorsing such change in the billed amount.

Assuming that Mr.AJAR has amended the bill, amount of service tax payable shall be computed by back calculations. Effective rate of service tax is 12.24% (12% service tax + 2% education cess on service tax).

$$\begin{aligned} \text{Service tax and education cess payable} &= \frac{\text{Gross value} \times \text{Rate of tax}}{100 + \text{rate of tax}} \\ &= \frac{26000 \times 12.24}{100 + 12.24} \\ &= \frac{26000 \times 12.24}{112.24} \\ &= \text{Rs.2835} \end{aligned}$$

Such service tax should be paid along with the tax of 1st quarter of financial year 2007-08 by 5th of July, 2007.

- (ii) The Department has clarified vide the Frequently Asked Questions issued by it that where the assessee only receives the service charges and not the service tax payable thereon, the amount so realized from the client would be treated as gross amount inclusive of service tax. Accordingly, the value of taxable service and the service tax liability will be worked out by back calculations. Effective rate of service tax is 12.24% (12% service tax + 2% education cess on service tax).

$$\begin{aligned}\text{Service tax and education cess payable} &= \frac{\text{Gross value} \times \text{Rate of tax}}{100 + \text{rate of tax}} \\ &= \frac{25000 \times 12.24}{100 + 12.24} \\ &= \frac{25000 \times 12.24}{112.24} \\ &= \text{Rs.2726}\end{aligned}$$

- (d) (i) Section 64(1) of the Finance Act, 1994 provides that provisions of service tax law extend to whole of India except the State of Jammu & Kashmir. Service tax is paid by the person or firm or a company who provides the services. In this case, service tax will not be attracted as service provider is abroad and renders service outside India.
- (ii) Sometimes an assessee provides taxable service from more than one premises. Rule 4(2) of the Service Tax Rules, 1994 provides that in such cases, the assessee can obtain centralized registration at his option if:
- (a) he has centralized billing or centralized accounting in respect of such service, and
 - (b) such centralized billing or centralized accounting systems are located in one or more offices or premises.

The assessee can register such offices or premises where centralized accounting or centralized billing systems are located.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2006 and Notifications/Circulars issued up to 30.04.2007 which are relevant for November 2007 examinations.

PAPER – 8 : INDIRECT TAXES

Answer to question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain any two of the following with reference to the provisions of the Central Excise Act, 1944:*
- (i) *Manufacture and processing*
 - (ii) *Dutiability of site related activities*
 - (iii) *Labelling and branding activities* (2 x 2 = 4 Marks)
- (b) *Explain briefly the meaning of “Trade parlance test” in matters relating to classification under the Central Excise Tariff Act, 1985.* (4 Marks)
- (c) *Discuss the validity or otherwise of the following statements with brief reasons:*
- (i) *An assessee would lose the benefit to pay duty in monthly instalments if he has made a default in payment of duty by the due date and the same is discharged beyond a period of 30 days from the due date in terms of rule 8 of the Central Excise Rules, 2002.*
 - (ii) *Excise duty is payable on intermediate goods, manufactured by factory A which are removed without payment of duties of excise for use in the manufacture of subject goods, namely machines, in factory B of a Large Tax Payer Unit under rule 12BB of the Central Excise Rules, 2002.* (2 x 3 = 6 Marks)
- (d) *Answer briefly in the context of refund of CENVAT credit under rule 5 of the CENVAT Credit Rules, 2004, the following:*
- (i) *Under what circumstances will the benefit under the Rule be available for inputs or input services?* (3 Marks)
 - (ii) *How is the manufacturer or provider of output service allowed to utilize the CENVAT credit in respect of the inputs or input services?* (3 Marks)

Answer

- (a) (i) *Manufacture involves a series of processes, whereas a process is one of the activities undertaken for manufacture of a product from input materials. Manufacture is the cumulative effect of various processes to which raw materials are subjected and each step towards the finished product would constitute*

processing in relation to manufacture.

- (ii) Excise duty is a levy on movable goods and not on immovable property. Excise duty is chargeable when, at site, there emerges movable goods, during the course of fabrication or bringing into being of immovable property, in the form of buildings, plant etc. In other words, if movable goods such as fabricated parts, structures, equipments are brought into being and they are thereafter mounted or fixed on civil foundations so as to complete the construction, excise duty will be chargeable on such movable goods, notwithstanding that the final products are items of immovable property.

On the other hand, if the site work is carried out on top of a civil foundation and such parts, structures etc. are erected piece by piece on such foundation, no movable goods are brought into being and hence no duty is chargeable on such activities.

- (iii) An unlabelled or a labelled product is normally treated in commercial parlance as the one and the same and consequently mere labelling of fully manufactured products does not constitute manufacture in law. However, the legislature has specifically provided in section 2(f)(iii) of the Central Excise Act, 1944 that in respect of goods specified in the Third Schedule of the Central Excise Act, 1944, labelling or re-labelling *inter alia* amounts to manufacture. As regards branding, it has been held in numerous decisions that this would not amount to manufacture.

- (b) According to the Trade Parlane test, if a product is not defined in the Schedules and Section Notes and Chapter Notes of the Central Excise Tariff Act, 1985, then it should be classified according to its popular meaning or meaning attached to it by those dealing with it i.e., in its commercial sense. However, where the Tariff headings itself uses highly scientific or technical terms, goods should be classified in scientific or technical sense.

The Supreme Court in *Akbar Badruddin Jiwani v. CC* [1990] 47 ELT 161 has held that the said doctrine of commercial nomenclature and trade understanding should be departed from in a case where the statutory context in which the Tariff entry appears, requires such a departure.

- (c) (i) Sub-rule (3A) of rule 8 of the Central Excise Rules, 2002 provides that if an assessee defaults in payment of duty beyond 30 days from the due date then he shall pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit. He shall continue to pay duty consignment-wise (from PLA) till the date he pays the outstanding amount including interest thereon. In the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided shall follow.

Hence, the given statement is valid.

- (ii) As per rule 12BB of the Central Excise Rules, 2002, the given statement would be valid in all cases where:
 - (i) the machines are not exported under bond or letter of undertaking within 6

months from the date of receipt of the intermediate goods in the recipient premises (factory B), or

- (ii) the machines are removed without payment of duty, or
- (iii) the machines are removed by paying appropriate excise duties beyond a period of 6 months, or
- (iv) any duty of excise is payable on intermediate goods and the said duty is not payable on machines.

However, the statement would be invalid in cases not covered by points (i) to (iv) mentioned above.

- (d) (i) The benefit under rule 5 of the CENVAT Credit Rules, 2004 for inputs or input services would be available when the same are used:
 - (a) in the manufacture of final product which is cleared for export under Bond or Letter of Undertaking (LUT), or
 - (b) in the manufacture of intermediate product cleared for export; or
 - (c) in providing output service which is exported.
- (ii) The CENVAT credit in respect of the input or input services shall be allowed to be utilized by the manufacturer or provider of output service towards payment of:
 - (a) duty of excise on any final product cleared for home consumption or for export on payment of duty; or
 - (b) service tax on output service.

Where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Question 2

- (a) *M/s. KE Ltd. manufactured elastics with brand name of M/s. XYZ Ltd., who in turn used these elastics in the manufacture of other excisable goods. These elastics were never sold in the open market. The general public only received the manufactured excisable goods. M/s. KE Ltd. claimed the exemption based on value of clearances (SSI) in terms of Notification No. 8/2003-C.E. dated 01.03.2003 on the ground that they did not use the brand name on the final product and that the brand name was used only in respect of the goods meant for captive consumption. This claim was disputed by the Excise Department on the basis that it is immaterial that the ultimate customer got only the final product as the use of the brand name on elastics, even if not sold in the open market, would convey to the customer that the elastics had connection with the owner of the brand name. Briefly discuss whether the stand of the Department is valid in law?*

(5 Marks)

- (b) With reference to the CENVAT Credit Rules, 2004, discuss briefly whether the following statements are correct or not:
- (i) CENVAT credit cannot be taken on the inputs lying in stock on the date when the final product becomes dutiable because the said product was initially exempt.
 - (ii) CENVAT credit of duties of excise on inputs can be availed on the basis of an invoice, while credit of service tax paid on input services can be availed only upon payment of the full invoice value including service tax.
 - (iii) In case of transfer of ownership of the factory by way of sale along with inputs and capital goods, the unutilized input credit shall lapse. (3 x 2 = 6 Marks)
- (c) Briefly answer with reference to the provisions of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 whether in the following cases any notional interest on the advance received is includible in the value for purpose of assessment:
- (i) An assessee sells his goods against full advance payment to X. He also sell such goods to Y without any advance payment at the same price per unit.
 - (ii) A, the assessee manufactures and supplies certain goods as per design and specification of B. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. (2 x 2 = 4 Marks)

Answer

- (a) The facts of the given case are identical to the case of *Kohinoor Elastics Pvt. Ltd. v. CCEx.* [2005] 188 ELT 3 (SC). In the instant case, the Supreme Court has observed that as per the small scale exemption notification, the benefit of small scale exemption is available only in respect of those goods which do not bear a brand/trade name of another person. However, the notification does not provide that exemption shall be lost only for those goods (bearing the brand name of other person) which are sold in the market or those goods which reach the customers without any change in form. Therefore, the Apex Court has held that goods manufactured for captive consumption would not be any exception and the exemption would not be available if brand name of another person is used on them.

Hence, in the given case the Department's stand is valid in law and M/s. KE Ltd. will not be entitled for the small scale exemption in respect of the elastics (meant for captive consumption) bearing the brand name of M/s. XYZ Ltd.

- (b) (i) *False.* Manufacturer of final products shall be allowed to take CENVAT credit of the duty paid on-
- inputs lying in the stock or
 - inputs in process or
 - inputs contained in the final products lying in stock
- on the date on which such final product cease to be exempted goods [Rule 3(2)].

- (ii) *True.* Credit of service tax paid on input services can be availed only after the recipient of input service makes payment of input services and the service tax payable on it, as shown in the invoice [Rule 4(7)].

However, in case of excise duty, credit is available as soon as the goods are received in the factory. The reason for such different treatment is that the input supplier can clear the inputs from his factory only after paying the applicable duty irrespective of the time at which he receives the payment against the invoice, whereas the input service provider pays the service tax only after he realizes the payment for taxable services as the service tax is due upon realization only.

Note: If the recipient of input service settles the bill on a value less than the invoice value, service tax payable shall also be reduced proportionately and the assessee would be eligible to avail the reduced CENVAT credit.

- (iii) *False.* The manufacturer shall be allowed to transfer the credit lying unutilized provided the transfer takes place with specific provision for transfer of liabilities of such factory [Rule 10(1)] and the said inputs and capital goods are duly accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise [Rule 10(3)].

Note: It is also possible to answer as 'True' if it is assumed that there is no specific provision of transfer of the liabilities of such factory or the inputs and the capital goods have not been accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise.

- (c) Explanation 2 to rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 provides that where any advance payment from the buyer is received against delivery of excisable goods, no notional interest on such advance shall be added to the value unless the central excise officer has evidence to the effect that the advance received has influenced the fixation of price of the goods by way of charging a lesser price or by offering of a special discount to the buyer who has made the advance deposit.
- (i) No notional interest on the advance received by the assessee is includible in the transaction value in the present case as same price is also charged from Y (another buyer) who has not given the advance deposit.
- (ii) Notional interest would be includible only if there is evidence available with the central excise officer that advance has resulted in lowering of prices. In the absence of any such evidence, no notional interest on the advance received shall be added to the transaction value.

Question 3

- (a) *M/s PQR Ltd. were granted a refund by the Appellate Authority under the Central Excise Act, 1944. The jurisdictional Assistant Commissioner of Central Excise has issued a notice under section 11A of the Central Excise Act, 1944 demanding the amount of*

refund on the ground that such a refund is erroneous. Briefly discuss whether the action taken by the Assistant Commissioner of Central Excise is valid in law. (4 Marks)

- (b) *Answer briefly with reference to rule 21 of the Central Excise Rules, 2002 (regarding remission of duty and destruction of goods) the following:*
- (i) *The circumstances under which remission of duty may be ordered;*
 - (ii) *The manner of destruction. (2 x 2 = 4 Marks)*
- (c) *Briefly explain the procedure for removal of goods by an hundred percent export oriented unit for domestic tariff area. (4 Marks)*
- (d) *Write a brief note on "electronic maintenance of records and preparation of returns and documents" under the Central Excise Rules, 2002. (3 Marks)*

Answer

- (a) The facts of the given case are similar to the case of *Dynamite Technologies Ltd. v. Union of India* 2005 (186) ELT 277 (Kar.) wherein the High Court has held that where refund arises only as a consequence of an order/direction issued by the Appellate Authority, as a quasi judicial functionary, any recovery of amount could only be made if the order is again modified further in appeal proceedings and not otherwise. The High Court observed that even in such an event the amount could be recovered only as a consequential action and not otherwise. The High Court stated that the show cause notice in the said case was unnecessary and not within the scope of the power under section 11A of the Central Excise Act, 1944. The expression "whether or not" in section 11A could not be extended to the case of short levy/non-levy or erroneous refund granted as a result of appellate proceedings.

Therefore, in view of the above-mentioned judgement the action taken by the Assistant Commissioner is not valid in law.

- (b) (i) Rule 21 of the Central Excise Rules, 2002 provides that where it is shown to the satisfaction of the Central Excise Officer that goods have been lost or destroyed by natural causes or by unavoidable accident or claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods subject to such conditions as may be imposed by him.
- (ii) The goods intended and presented before the proper officer must be destroyed in such a manner that they become irretrievable as excisable commodity. The actual method of destruction will depend upon the nature of the goods to be destroyed. For example matches, cotton, rayon and woolen fabrics, papers, cigar and cheroots may be destroyed by fire. Electric bulb and batteries may be destroyed by crushing into bits and scraps. Vegetable oils and vegetable products may be destroyed by mixing earth or kerosene and dumping into pits. Whatever method of destruction is adopted, the officer supervising the destruction will satisfy himself that the destroyed goods cannot be marketed.

- (c) Rule 17 of the Central Excise Rules, 2002 provides that where any goods are removed from a 100% EOU to domestic tariff area, such removal shall be made under an invoice in the procedure prescribed under Rule 11. Further, removal shall be made only after payment of appropriate duty by debiting the account current maintained for this purpose or by utilizing the CENVAT credit.

Such unit is required to maintain appropriate accounts related to production in the prescribed form giving the following details:-

- (i) description of goods
- (ii) quantity removed
- (iii) duty paid

Such unit is further required to submit a monthly return in the specified Form (ER-2) in respect of excisable goods manufactured in, and receipt of inputs and capital goods in, the unit. The return is to be submitted to the Superintendent of Central Excise within ten days from the close of the month to which the return relates.

- (d) Any person may electronically maintain or generate all or any of the records or returns, invoices and other documents prescribed under the rules made under the Central Excise Act using a computer, in an electronically readable format. The Department will maintain a record to the effect that records are maintained electronically. The records can be kept on any electronic media and besides this print outs may also be kept where required.

The records together with back-ups in electronic or other form should be preserved for a period of 5 years counted from the first day of the financial year following the financial year to which they relate. The person who maintains electronic records will have to produce the relevant records in hard copy and/or in an electronic readable format, policy and procedure manuals, instructions to record the flow of transactions through the accounting system from the stage of initiation to the closure and storage to the central excise officer or audit party deputed by the Commissioner or the Comptroller and Auditor General of India. An audit trail and inter-linkages including the source document and financial accounts record layout, data dictionary and explanation for the codes used and total number of records in each field along with sample copies of documents will also have to be produced when required. Changes made in the systems adopted by the assessee should be informed to the Department.

In case there is misuse of this facility or if the information required is not made available then the Assistant/Deputy Commissioner of Central Excise may withdraw the facility after giving a reasonable opportunity of being heard to the person.

Question 4

- (a) *Section 35C(2) of the Central Excise Act, 1944 provides that the Appellate Tribunal, may at any time within six months of the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it. Briefly illustrate with two examples as to what would constitute "mistake apparent from the record" for the purpose of this provision.*

(5 Marks)

- (b) Briefly explain the provisions under the Central Excise Act, 1944 relating to special audit in cases where credit of duty availed or utilized is not within the normal limits. (4 Marks)
- (c) Write a brief note on the following with reference to the Central Excise Act, 1944 and the rules made thereunder:
- (i) Cancellation of export documents
 - (ii) Bond to be executed by 100% EOU for obtaining indigenous goods without payment of duty
 - (iii) Execution of bond by Government undertaking. (3 x 2 = 6 Marks)

Answer

- (a) Two illustrations of mistakes apparent on the face of the record:-
- (i) Failure to take into consideration the material evidence, which is present on record, would amount to a mistake apparent on the face of the record. The Tribunal has jurisdiction to correct such a mistake in exercise of its powers under section 35C(2) of the Central Excise Act, 1944 [CCEx. v. Bharat Bijlee Ltd. 2006 (198) ELT 489 (SC)].
 - (ii) When a decision rendered by the Apex Court is not considered, non-consideration of such binding precedent constitutes an error apparent on the face of the record. Even in the context of decisions of the Apex Court and the jurisdictional High Courts rendered after the order of the Tribunal, there would be a case of error apparent on the face of the record on the reasoning that the superior court declared the law as it always was. The binding decision of the Apex Court would cover even the period prior to the inception of such law during which the orders contrary to such ratio of the subsequent decision were passed, thus giving rise to an error apparent on the face of the record. Therefore, rectification of such an error within the period permissible by the statute is required to be effected [Hindustan Lever Ltd. v. CCEx. 2006 (202) ELT 177 (Tri.-LB)].
- Other mistakes apparent on the face of the record, which can be rectified by the Tribunal in terms of section 35C(2), can be typographical error, calculation mistakes, point raised in appeal but not considered, retrospective amendments in the statute etc.
- (b) Section 14AA of the Central Excise Act, 1944 states that the Commissioner of Central Excise may call for an audit if he has reason to believe that the credit of duty availed of or utilized by a manufacturer of any excisable goods:
- (a) is not within the normal limits having regard to the nature of excisable goods produced or manufactured, the type of inputs used and other relevant factors as he may deem appropriate;
 - (b) has been availed of or utilized by reason of fraud, collusion or any willful misstatement or suppression of facts.

The Commissioner shall direct such manufacturer to get the accounts of his factory, depot, office, distributor or any other place, as may be specified by him, audited by a Cost Accountant nominated by him. The Cost Accountant has to submit the duly signed and certified audit report within the period specified by the central excise officer. The report should include any other particulars as are required by such officer. This audit shall be in addition to any other audit under any other law for the time being in force.

The manufacturer shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit and proposed to be utilized in any proceeding under the Act.

- (c) (i) If the excisable goods cleared under A.R.E.-1 are not exported for any reason and the exporter intends to divert the goods for home consumption, he may request the Bond/Letter of Undertaking accepting authority in writing to allow cancellation of application and diversion of goods for consumption in India. He will be permitted to do so if he pays the duty as specified in the application along with interest on such duty from the date of removal for export from the factory till date of payment. Since the duty has been assessed once, there will not be any need for reassessment. After the duty is discharged, the exporter may take credit in his running bond account on the basis of letter of permission, invoice and TR 6 challans.

If the exporter after clearing the goods without payment of duty intends to change the destination and cancel the original documents and issue fresh ones, the same may be done under permission and authentication by the bond/LUT accepting authority.

- (ii) In the case of 100% EOU obtaining indigenous goods without payment of duty under a notification issued under section 5A of the Central Excise Act, 1944, acceptance of surety bond instead of bank guarantee is permissible. EOUs may continue to execute bond in the format given in Form B 17. While executing the combined B 17 bond, security to the extent of 5% of the value of bond in the form of bank guarantee or cash deposit or any other mode of security may be accepted in lieu of surety.
- (iii) The Central Board of Excise and Customs has decided that every undertaking owned and managed directly through any Ministry, Directorate or Directorates of Central Government is exempt from execution of any bond. A State Government is exempt from furnishing any security or surety for bond, where the execution of such bond, or, as the case may be furnishing of security or surety is required under the rules.

An undertaking owned or controlled by the Central Government or State Government does not include any undertaking belonging to corporation owned or controlled by the Central Government or State Government and established by or under a Central or State Act, or any undertaking belonging to a Government Company within the meaning of section 617 of the Companies Act.

Question 5

- (a) Discuss briefly the validity of the following statement with reference to the powers of the Central Excise Department to launch prosecution proceedings under section 9 and section 9AA of the Central Excise Act, 1944:
- “Confiscation and penalty in departmental adjudication and prosecution in criminal proceedings are independent and do not amount to double jeopardy.”* (4 Marks)
- (b) Write a brief note on the procedure for warehousing of excisable goods removed from a factory or warehouse with reference to rule 20 of the Central Excise Rules, 2002. (4 Marks)
- (c) State briefly the procedure to be followed by the Authority for Advance Ruling under section 23D of the Central Excise Act, 1944 on the receipt of an application. (4 Marks)
- (d) Write a brief note on the duty of excise not levied or short levied as a result of general practice that is notified as not recoverable under section 11C of the Central Excise Act, 1944. (3 Marks)

Answer

- (a) Besides the departmental adjudication, prosecution may also be launched under section 9 of the Central Excise Act, 1944 for offences under section 9(1) of the Act. As per the provisions of section 9AA, prosecution may be launched against any person, director, manager, secretary or other officers of the 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. Section 9 of the Central Excise Act provides for prosecution of offences in a court of law and provides a minimum imprisonment of six months which can extend to a period of seven years in certain cases. 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. Prosecution is launched in all cases where there is sufficient evidence to prove fraudulent intention. The Chief Commissioner of Central Excise or the Director General of Central Excise Intelligence has the power to sanction prosecution. Thus, confiscation and penalty in departmental proceedings and prosecution in criminal proceedings are independent.
- (b) Rule 20 of the Central Excise Rules, 2002 prescribes the following procedure for warehousing of excisable goods removed from a factory or a warehouse:
- (i) The consignor (i.e. manufacturer or registered person of the warehouse) shall prepare an application for removal of goods from a factory or a warehouse to another warehouse in quadruplicate in the specified form.
 - (ii) The consignor shall prepare the invoice in the manner prescribed in Rule 11.
 - (iii) The original, duplicate and triplicate application and the duplicate invoice shall be sent to the warehouse of the destination.

- (iv) The consignor shall send the quadruplicate copy to the Superintendent-in-charge having jurisdiction over his factory or warehouse within 24 hours of removal of the consignment.
 - (v) On arrival of the goods at the destination, the consignee (i.e., the registered person of the warehouse who receives the excisable goods from the factory or a warehouse) shall verify the goods with the copies of the application within 24 hours. The consignee shall send the original application to the Superintendent-in-charge, of his warehouse, the duplicate to the consignor and retain the triplicate for his records.
 - (vi) The Superintendent-in-charge of the consignee shall countersign the application received by him and forward the same to the Superintendent-in-charge of the consignor.
 - (vii) The consignor shall retain the duplicate application duly endorsed by the consignee for his record.
- (c) Section 23D of the Central Excise Act, 1944 prescribes the following procedure to be followed by the Authority for Advance Ruling on receipt of an application:
- (i) On receipt of the application for advance ruling, the Authority shall forward a copy to the relevant Commissioner.
 - (ii) The Authority has the sole discretion to accept or reject the application. However a hearing has to be given before rejection. Application is liable to be rejected in the following cases:-
 - (a) where the question raised in the application is already pending before any Central Excise Officer, Appellate Tribunal or any Court.
 - (b) where the question raised is the same as in a matter already decided by any Appellate Tribunal or Court.
 - (iii) The Authority shall pass an order admitting or rejecting the application. A copy of such order should be given to the applicant and the Department.
 - (iv) The Authority can further examine any material placed before it after admission of the application.
 - (v) The Authority should pronounce the final order within 90 days of the receipt of the application.
 - (vi) Copies of the order have to be given to the applicant and the Commissioner.
- (d) Sometimes goods liable to central excise duty may not be charged to duty on account of generally prevalent practice. They may also be subjected to a lower rate of duty than the applicable rate. 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 such 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) relating to refunds.

The person claiming 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 before the expiry of six months from the date of issue of the said notification.

PART B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 any two of the following:

- (i) "Import" and "Importer"
- (ii) Meaning of "Assessment"
- (iii) "Clearance for home consumption" and "Clearance for warehousing"

(2 x 2 = 4 Marks)

- (b) XYZ ice cream company imported cone containers made from printed aluminium foils which according to the assessee were classifiable under Chapter 76: "Aluminium and Articles thereof" in section XV of the first schedule to the Customs Tariff Act, 1975. According to the Revenue, these were classifiable under Chapter 48: "Paper and Paperboard; articles of paperpulp, of paper or paperboard". The revenue's view was that where composite goods are made of different components and cannot be classified by reference to Rule 2 of the Interpretative Rules, then the classification has to be according to the principles contained in Rule 3. The classification has to be as if the goods consists of the material or components which give them their essential character. Since the contents of the material in this case was 70.7% paper, that was the essential component of the cone containers for ice cream and merit classification under Chapter 48.

The chapter notes to Chapter 48 read as follows:

Notes :

1.

2. This chapter does not cover;

(a)

.....

(n) metal foil backed with paper or paper board (Section XV)

Discuss briefly whether the action proposed by the Revenue is correct is law. (4 Marks)

- (c) Examine the validity of the following statements with reference to the Customs Act, 1962 giving brief reasons. (Answer any three):

- (i) *Service charges paid to canalizing agent are not includible in the assessable value of imports.*
- (ii) *Design and engineering charges are includible in the assessable value of the imported goods only if the goods imported are specifically manufactured on the basis of the design and engineering specifications provided by the importer.*
- (iii) *Inspection charges are not includible in the assessable value of the imported goods if contract does not specify for certification by an independent agency.*
- (iv) *Goods exempt from basic customs duty would automatically be exempt from additional duty of customs.* (3 x 2 = 6 Marks)
- (d) (i) *With reference to section 125 of the Customs Act, 1962 briefly explain the following:*
 - (a) *Option to pay fine in lieu of confiscation.*
 - (b) *Whether this fine once paid could be claimed as a refund if the importer decides to abandon the goods?* (2 x 2 = 4 Marks)
- (ii) *Briefly explain the provisions of Section 89 of the Customs Act, 1962 with regard to supply of ship stores.* (2 Marks)

Answer

- (a) (i) The term import under section 2(23) of the Customs Act, 1962 refers to bringing into India from a place outside India. Import of goods into India commences when the goods enter the territorial waters of India, but gets completed only when the goods become part of the mass of goods within the country.

As per section 2(26) of the Customs Act, 1962 importer, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.
- (ii) In the context of customs duty, the term assessment means quantification of the amount of duty payable. The process of assessment involves determining:
 - (i) the quantity and total value of the consignment
 - (ii) the proper tariff classification of the goods
 - (iii) the appropriate rate of duty after all abatements
 - (iv) whether the goods are to be cleared for home consumption or for warehousing.
- (iii) Clearance for home consumption implies that the customs duty on the imported goods has been discharged and goods are cleared for utilization. Clearance for warehousing implies that the goods may, instead of being cleared for home consumption, be deposited in a warehouse and cleared later. When the goods are deposited in a warehouse the collection of duty is deferred till the time such goods are cleared for home consumption. However, the importer has to execute a bond up to a sum equal to twice the amount of duty assessed on the goods at the time of import.

- (b) In the given case, the Chapter Note 2(n) specifically excludes metal foil backed with paper or paperboard from the purview of Chapter 48. The aluminium cone foil containers made up of 70.7% paper cannot be included under Chapter 48 by mere reference to the title of the Chapter 48: "Paper and Paperboard; articles of paper pulp, of paper or paperboard". The contention of the Revenue that the Chapter Note will not apply because of Rule 3(b) of the Interpretative Rules, is not correct as it has been specifically provided in Rule 1 of the Interpretative Rules that "the titles of sections and Chapters are provided for ease of reference only; for legal purposes classification shall be determined according to the terms of the headings and any relative section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained".

Therefore, only if there is no specific Chapter Note requiring otherwise, the subsequent rules i.e., rule 2 onwards, including rule 3(b) of the Rules for Interpretation, can be invoked. However, in the present case, Chapter 48 – Note – 2(n) is very specific leaving no option to resort to Rule 3(b).

The argument that the Interpretative Rules override the Chapter Note is not acceptable in view of the specific enumeration that the rules do not have any other purpose other than ease of reference.

Hence, the Revenue's contention that the cone containers should be classified under Chapter 48 is not correct.

- (c) (i) The statement is not correct. Since the canalizing agent is not the agent of the importer nor does he represent the importer abroad, purchases by canalizing agency from foreign seller and subsequent sale by it to Indian importer are independent of each other. Hence, the commission or service charges paid to the canalizing agent are includible in the assessable value as these cannot be termed as buying commission [*Hyderabad Industries Ltd. v. UOI* 2000 (115) ELT 593 (SC)].
- (ii) The Supreme Court in the case of *TISCO Ltd. v. CCEx. & Cus.* 2000 (116) ELT 422 (SC) has held that design and engineering charges paid for use during construction, erection, assembly etc. of imported goods, being relatable to post import activity, are not includible in the value. Thus, the design and engineering charges which relate to pre-importation activity are only includible in the value. Since, in this case the design and engineering charges are paid for manufacturing the imported product, i.e., they relate to pre-importation activity, the same are includible in the value. Thus, the statement is correct.

Note: With effect from 10.10.2007, new Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have been notified under section 14 as amended by the Finance Act, 2007. Explanation to rule 10(1) of the said rules clarifies that the royalty, licence fee or any other payment for using a process shall be added to the price actually paid or payable, notwithstanding the fact that such goods may be subjected to the said process after their importation if such payments are related to imported goods and are a condition of the sale of imported goods.

- (iii) The statement is correct. Where there is no requirement in the contract for independent inspection and the inspection is carried out by foreign supplier on his own and is not required for the purpose of fulfilling the condition of the contract, then such charges incurred on inspection are not includible in assessable value [*Bombay Dyeing & Mfg. v. CC 1997 (90) ELT 276 (SC)*].
- (iv) The statement is not correct. Exemption from basic customs duty would not mean exemption from additional duty. When goods are exempted from basic customs duty in terms of section 12 of the Customs Act, 1962 it would not mean that they are exempted from additional duty of customs also, as basic customs duty is leviable by virtue of section 12 of the Customs Act, 1962 while additional customs duty is leviable under section 3 of the Customs Tariff Act, 1975 [*Kaur Sarin Traders v. Union of India 2006 (199) ELT 224 (Pat.)*].
- (d) (i) (a) Section 125 of the Customs Act empowers a customs officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose custody such goods have been seized to pay fine in lieu of confiscation. The provisions in this regard are as follows:
 - (i) In case of prohibited goods, the proper officer may give an option to pay fine in lieu of confiscation.
 - (ii) In case of other goods, the proper officer shall give an option of payment of fine, in lieu of confiscation.

The amount of such fine cannot exceed the market price of the goods confiscated, less import duty paid (in the case of imported goods) thereon. Also, the assessee shall be liable to pay any duty and charges payable in respect of such goods.
- (b) In the case of *Purfina Chemicals Pvt. Ltd. v. CEGAT Madras 2004 (167) ELT 145 (Mad.)* the High Court has observed that the provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, the redemption fine becomes liable only in lieu of confiscation.

The High Court has held that where the importer has abandoned the goods, the scope for confiscation comes to an end. Hence, the redemption fine, if already paid becomes liable to be refunded.
- (ii) Section 89 of the Customs Act, 1962 covers the case of indigenous goods, which are supplied to a vessel as ship stores. Goods produced or manufactured in India and required as stores on a foreign going vessel or aircraft may be exported free of duty in such quantities as the proper officer may determine having regard to the size of the vessel or the aircraft, the number of passengers and the crew and the length of voyage or journey on which the vessel or aircraft is about to depart. In other words, the duty free supply of ship stores should be reasonable and not in commercial quantities.

Question 7

- (a) *M/s. HIL imports copper concentrate from different suppliers. At the time of import, the seller issues a provisional invoice and the goods are provisionally assessed under section 18 of the Customs Act, 1962 based on the invoice. When the final invoice is raised, based on the price prevalent in the London Metal Exchange on a predetermined date based on the covenant in the contract between the buyer and seller, the assessments are finalized on such invoices. M/s HIL had filed two refund claims arising out of the finalization of the bills of entry by the authorities on 01.03.2006 and on 15.03.2006. With effect from 13.07.2006 (Presidential assent on 13.07.2006) section 18 of the Customs Act, 1962 was amended with the insertion of certain provisions in terms of which it became necessary for the assessee to prove that they had not passed on the amount to their customers. Based on this amendment, the department has rejected the refund claims. Discuss in the light of decided case law, if any, whether the action of the department is correct in law?* (5 Marks)
- (b) *M/s. RIL Ltd. claimed duty drawback in respect of its export products. Over 97% of the inputs by weight of the product were procured indigenously and were not excisable. All Industry Rates under the Customs and Central Excise Duties Drawback Rules, 1995 were fixed taking into account the incidence of customs duty on imported inputs. Explain briefly with reference to Rule 3(1)(ii) of the said rules whether the claim of M/s. RIL will merit consideration by the authorities.* (4 Marks)
- (c) *In the context of section 65 of the Customs Act, 1962 dealing with waste or refuse arising during the manufacturing operations or other processes done in the warehouse:*
- (i) *Examine the validity of the following statement with brief reasons:*
"If finished products are cleared for home consumption on payment of appropriate import duty of customs, then appropriate duty of customs should be levied on the imported goods content in the waste or refuse." (3 Marks)
 - (ii) *Explain briefly the "relevant date" for determination of rate of duty leviable on the imported material content in the waste or refuse.* (3 Marks)

Answer

- (a) The Supreme Court in *M/s Oriental Exports v. Commissioner of Customs New Delhi* (2006) 200 ELT A/138 (SC) has held that bar of unjust enrichment does not apply in case of refund arising out of finalization of provisional assessment. However, with effect from 13.07.2006, the Taxation Laws Amendment Act has amended section 18 (dealing with provisional assessment) so as to incorporate the principle of unjust enrichment in case of refund arising out of finalization of provisional assessment.

In the instant case, the finalization of the bills of entry has taken place on 01.03.2006 and on 15.03.2006. However, the amendment, by which the provisions of unjust enrichment are incorporated in section 18, has come into effect from 13.07.2006 (Presidential assent on 13.7.2006). Thus, bills of entries have been finalized before the said amendment has become effective. The issue under consideration is whether the said provision will have

retrospective operation so as to enforce this amendment even in respect of bills of entry assessed prior to 13.07.2006. Prior to 13.07.2006, in order to claim refund arising out of finalization of provisional assessment, it was not necessary to prove that incidence of duty has not been passed on to the customers. The said requirement has been inserted in section 18 with effect from 13.07.2006. Thus, the assessments finalized by the authorities prior to 13.07.2006 would be governed by the provisions of section 18 as it stood during the relevant period. However, the assessments finalized by the authorities after 13.07.2006 and refund claim arising out of the same would be governed by the provisions as are incorporated on 13.07.2006.

Therefore in the instant case, the assessee M/s HIL will not be required to adduce proof that in respect of the bills of entry finalized on 01.03.2006 and 15.03.2006 they have not passed on the incidence of such duty to their customers.

- (b) Clause (ii) of second proviso to rule 3 of the Customs and Central Excise Duties Drawback Rules, 1995 *inter alia* provides that no drawback shall be allowed if the exported goods have been produced or manufactured using imported materials or excisable materials on which duties have not been paid.

In the given case, there was no duty incidence on 97% of the inputs of the export product except the duty incidence on remaining 3% of the inputs, which was insignificant. All Industry Rates fixed for particular export products are applicable to all exporters who export the same. However, in a case where there is clear evidence, as in the present one, that the inputs of such export products have not suffered any duty, no drawback can be claimed. Same view was expressed by the Tribunal in the case of *Rubfila International Ltd. v. CCus. Cochin 2005 (190) ELT 485 (Tri.-Bang.)*.

Note: Circular No. 19/2005 Cus. dated 21.03.2005 clarifies that All Industry Rates of Duty Drawback shall be allowed on export goods manufactured partly of non-duty paid inputs. However, in the given case the said Circular shall not apply as almost whole of the inputs have not suffered duty at all.

- (c) (i) Section 65(2)(b) of the Customs Act, 1962 deals with the question whether import duty should be levied on imported goods content in the waste and scrap when finished products are cleared for home consumption. The said section lays down that if the finished products are cleared for home consumption on payment of appropriate duty of customs, then appropriate duty of customs should be levied on the imported goods content in the waste or refuse.
- (ii) The relevant date for determination of rate of duty leviable on the imported material content in the waste or refuse shall be decided as per the provisions of section 15(1) of the Customs Act, 1962. In the given case, the goods are not:-
- (a) cleared for home consumption on a bill of entry filed under section 46; or
 - (b) cleared from the warehouse, where the date of filing bill of entry for home consumption is relevant. Hence, in this case the third alternative namely the "date of payment of duty" under section 15(1)(c) shall apply.

Thus, in collecting the import duty on the imported material content in the waste or refuse, the rate of duty prevalent on the date of payment of duty shall apply.

Question 8

- (a) *Briefly explain the salient features of the Customs Act, 1962 relating to Special Economic Zones.* (5 Marks)
- (b) *Explain briefly the provisions of section 28(1A) of the Customs Act, 1962 in respect of a person who voluntarily deposits full duty demanded along with interest and applicable penalty.* (5 Marks)
- (c) *Write a brief note on the provisions of section 28BA of the Customs Act, 1962 regarding property that may be attached provisionally to protect the interest of revenue in certain cases.* (5 Marks)

Answer

- (a) The main features of Special Economic Zones (SEZ) are as follows:
 - (i) SEZ may be set up in the public, private or joint sector or by the State Government as notified by the Ministry of Commerce and Industry. The provisions of Chapter XA of the Customs Act, 1962 relating to SEZ are applicable to goods admitted to a SEZ. The Central Government may make rules regarding the requirements relating to goods or class of goods admissible to SEZ.
 - (ii) Any goods imported directly from outside India or procured from within India shall be authorized for admission to the SEZ. Goods admitted to SEZ are exempt from duties of customs subject to certain conditions.
 - (iii) Any goods admitted to SEZ from DTA shall be chargeable to export duties at such rates as are leviable on such goods when exported, subject to any rules made in this behalf. Any goods removed from the SEZ to DTA shall be chargeable to the duties of customs including antidumping, countervailing and safeguard duties as leviable on such goods when imported.
 - (iv) SEZ could be set up for manufacturing goods, rendering of services, production, processing, assembling, trading, repair, re-making, re-conditioning and re-engineering, making of gold, silver and other articles of precious metals and jewellery.
 - (v) It shall be under the administrative control of the Development Commissioner. All activities in the SEZ, unless otherwise specified, shall be carried out through self certification procedure.
 - (vi) Goods going into SEZ from DTA shall be treated as deemed exports. At the same time, goods coming from SEZ to DTA shall be treated as import of goods.

Note: The Finance Act, 2007 has omitted Chapter XA of the Customs Act, 1962 which contains the provisions relating to Special Economic Zones in view of the operationalisation of the Special Economic Zones, Act 2005.

- (b) With effect from 13.07.2006, the Taxation Laws Amendment Act, 2006 has inserted sub-section (1A) in section 28.

Section 28(1) prescribes the condition and time limit within which a show cause notice has to be served for recovery of customs duties. The new sub-section (1A) of section 28 provides an option to the importer or the exporter or the agent or employee of the importer or exporter to whom a notice has been served by the proper officer for short/non levy or non charging or short payment of interest or erroneous refund of duty and interest by reason of fraud, collusion or any willful mis-statement or suppression of facts.

Such a person may pay the duty in full or in part as may be accepted by him including the interest payable thereon under section 28AB and penalty equal to 25% of the duty specified within 30 days of the receipt of the notice.

Where duty is paid in full together with the interest and penalty under sub-section (1A), the proceedings in respect of such persons to whom notices have been issued shall be deemed to have been concluded in respect of the matters stated therein. Where the duty has been paid in part along with interest and penalty, the proper officer shall determine the amount of duty or interest which will not exceed the amount partly due from such person.

- (c) With effect from 13.07.2006, the Taxation Laws (Amendment) Act, 2006 has inserted a new section 28BA in the Customs Act, 1962. Section 28BA provides that during the pendency of any proceeding under section 28 or section 28B, the proper officer may provisionally attach any property belonging to the person on whom notice has been served under section 28(1) or section 28B(2), in accordance with section 142 of the Customs Act and the Rules made thereunder. This action requires prior approval of the Commissioner of Customs and must be necessary for protecting the interest of Revenue.

Such an attachment could be effected for a period of 6 months which shall commence from the date of the order of the Commissioner permitting such provisional attachment. This period may be extended by the Chief Commissioner of Customs by such further period or periods as may be determined by him. The reasons for such extension should be recorded in writing and the total period should not exceed 2 years.

If an application for the settlement of the case is made under section 127B, the period commencing from the date on which such an application is made and ending with the date on which order under section 127C(1) is made shall be excluded from the period of 2 years mentioned above.

PART C

Question 9

- (a) *Service Tax (Determination of Value) Rules, 2006 (Valuation Rules) and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 (Import Rules) came into force from 19.4.2006.*

Answer the following with reference to the said Rules:

- (i) Expenditure or costs incurred by the service provider as a "Pure agent" of the recipient of service shall be excluded from the value of the taxable service. Who is a "pure agent" under the Valuation rules?
 - (ii) What is the value of taxable service in the case of service provided from outside India under the Valuation Rules?
 - (iii) What are the three categories of taxable services specified in Rule 3 of the Import Rules? (3 x 2 = 6 Marks)
- (b) Answer the following with reference to the Finance Act, 1994 and the rules made thereunder relating to service tax:
- (i) Intimation regarding change in details furnished by an assessee in Form ST-1.
 - (ii) Cancellation of registration certificate.
 - (iii) Adjustment of excess amount paid towards service tax liability for the subsequent period. (3 x 1 = 3 Marks)
- (c) Answer any three of the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:
- (i) Manpower recruitment agency services in respect of staff not contractually employed by the recipient of service but who come under his direction.
 - (ii) Business support services in the context of "outsourced services".
 - (iii) Construction of roads, airports, railways, bridges, tunnels in the context of "site preparation and clearance, excavation, earth moving and demolition services".
 - (iv) Clearing and forwarding agent's services. (3 x 2 = 6 Marks)

Answer

- (a) (i) Explanation 1 to rule 5 of the Valuation Rules provides that "pure agent" means a person who—
- (a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
 - (b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
 - (c) does not use such goods or services so procured; and
 - (d) receives only the actual amount incurred to procure such goods or services.
- (ii) Rule 7 of the Valuation Rules provides that the value of taxable service received under section 66A (i.e., the services which are provided from outside India and received in India) of the Finance Act, 1994 shall be such amount as is equal to the

actual consideration charged for the services provided or to be provided. Rule 7(2) provides that the value of the taxable services partly performed in India and specified in Rule 3(ii) of the Import Rules shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India.

(iii) The three categories of taxable services are:

- ◆ When the immovable property in respect of which the service is provided or to be provided is located in India [Rule 3(i) of Import Rules]
- ◆ When the service is performed in India [Rule 3(ii) of Import Rules]
- ◆ When the service is received by a recipient located in India for use in relation to business or commerce [Rule 3(iii) of Import Rules].

(b) (i) As per rule 4(5A) of the Service Tax Rules, 1994, change in any information or details furnished by an assessee in Form ST-1 at the time of obtaining registration or any additional information or detail intended to be furnished should be intimated in writing by the assessee to the jurisdictional Assistant/ Deputy Commissioner of Central Excise. Such intimation should be made within a period of 30 days of such change.

Further, the assessee would be required to submit a self-certified copy of the registration certificate while intimating any such change and the amended registration certificate shall be issued after canceling the original registration certificate issued earlier.

(ii) As per rule 4(7) of the Service Tax Rules, 1994, every assessee who is registered and ceases to provide taxable service shall surrender his registration certificate to the Superintendent of Central Excise immediately. Sub-rule (8) of rule 4 provides that on receipt of such certificate the Superintendent of Central Excise shall ensure that the assessee has paid all moneys due to the Central Government under the provisions of Act/Rules/Notifications and thereupon cancel the registration certificate.

(iii) Rule 6(3) of the Service Tax Rules, 1994 allows an assessee to adjust the excess service tax paid by him in respect of the services not wholly or partially rendered by him for any reason against the service tax liability for the subsequent period if the value of the services and service tax thereon is refunded to the person from whom it was received.

Further, rule 6(4A) of the Service Tax Rules, 1994 provides that where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be. However, such adjustment of excess amount paid shall be subject to certain conditions specified in sub-rule (4B).

- (c) (i) As per section 65(105)(k) of the Finance Act, 1994, the scope of taxable service in relation to recruitment or supply of manpower includes any service provided or to be provided to a client by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise in any manner.

In the instant case, the manpower recruitment agency is supplying manpower on a temporary basis as the staff is not contractually employed by the recipient. Since, the scope of taxable service includes temporary supply of manpower, the service in the instant case shall be liable to service tax. Further, the CBEC vide *MF (DR) Letter F.No. B1/6/2005 TRU dated 27.07.2005* has also clarified that such service would be covered within the purview of service tax.

- (ii) Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as “Business Centre Services”. All such outsourced services are liable to service tax under business support services. Definition of support services of business or commerce gives indicative list of outsourced services [*MF (DR) Letter DOF No. 334/4/2006 TRU dated 28.02.2006*].
- (iii) Site formation and clearance, excavation and earthmoving and demolition and such other activities provided to any person by any other person in the course of construction of *inter alia* roads, airports, railways, bridges, tunnels are exempt from the whole of the service tax leviable thereon vide *Notification No. 17/2005 ST dated 07.06.2005*.
- (iv) As per section 65(25) of the Finance Act, 1994, clearing and forwarding agent means any person who is engaged in providing any service either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent.

The functions of a clearing and forwarding agent include receiving of goods from the factories of the principal, warehousing the goods, arranging the dispatch of the goods, maintenance of records etc. and preparation of invoices.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2007 and Notifications/Circulars issued up to 31.10.2007 which are relevant for May 2008 examinations.

PAPER – 8 : INDIRECT TAXES

Answer to question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain any two of the following with reference to the Central Excise Rules, 2002:*
- (i) *Assessee*
 - (ii) *Daily stock account*
 - (iii) *Large tax payer* (2 x 2 =4 Marks)
- (b) *M/s. Khan Ltd. is a small scale unit manufacturing plastic name plates for motor vehicles as per specifications provided to them by their customers, who are vehicle manufacturers. For purposes of classification under the first schedule to the Central Excise Tariff Act, 1985 the assessee has claimed that the plastic name plates are “parts and accessories of motor vehicles”. The Central Excise Department has proposed classification as “other plastic products” in respect of these plastic name plates. The department’s view is that the motor vehicle is complete without the affixation of name plates and cannot be treated as a part of the motor vehicle. Write a brief note on whether the stand taken by the department is correct in law.* (4 Marks)
- (c) *Discuss briefly the validity of the following statements with reference to the CENVAT Credit Rules, 2004:*
- (i) *Basic excise duty credit can be utilized for payment of basic excise duty and education cess and secondary and higher education cess.*
 - (ii) *CENVAT credit on inputs lying in stock or in process or contained in the final product shall be reversed when the final product is subsequently exempted unconditionally in terms of an exemption notification issued under section 5A of the Central Excise Act, 1944.* (3 x 2 = 6 Marks)
- (d) *State briefly whether the following circumstances would constitute “manufacture” for purposes of section 2(f) of the Central Excise Act, 1944:*
- (i) *Both inputs and the final product fall under the same tariff heading under the first schedule to the Central Excise Tariff Act, 1985 (Tariff Act.)*
 - (ii) *Inputs and final product fall under different tariff headings of the Tariff Act.* (3 x 2 = 6 Marks)

Answer

- (a) (i) Rule 2(c) of Central Excise Rules, 2002, states that 'assessee' means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored and includes an authorized agent of such person.
- (ii) As per Rule 10 of the Central Excise Rules, 2002, there is a specific requirement about maintenance of 'Daily Stock Account'. Such account should be maintained on daily basis, in a legible manner, indicating the particulars regarding:
- (a) description of the goods produced or manufactured,
 - (b) opening balance, quantity produced or manufactured,
 - (c) inventory of goods,
 - (d) quantity removed,
 - (e) assessable value,
 - (f) the amount of duty payable; and
 - (g) particulars regarding amount of duty actually paid [Rule 10(1)]

The first page and last page of such account books shall be duly authenticated by the producer or manufacturer or his authorized agent [Rule 10(2)]. All such records shall be preserved for a period of five years immediately after the financial year to which such records pertain [Rule 10(3)].

- (iii) As per Rule 2(ea) of the Central Excise Rules, 'large taxpayer' means a person who
- (a) has one or more registered premises under the Central Excise Act, 1944; or
 - (b) has one or more registered premises under Chapter V of the Finance Act, 1994;

and is an assessee under the Income-tax Act, 1961, who holds a Permanent Account Number issued under section 139A of the said Act, and satisfies the conditions and observes the procedures as notified by the Central Government in this regard.

The following persons have been notified to be eligible to opt as large taxpayer:

- (i) Any person engaged in the manufacture or production of goods, except the goods falling under chapter 24 or pan masala falling under chapter 21 of the First schedule of the Central Excise Tariff Act, 1985, or

- (ii) a provider of taxable service,

who has paid during the financial year 2004-05 or during the financial year preceding the year of filing of application for large tax payer-

- (a) duties of excise of more than Rs.500 lakhs in cash or through account current; or

- (b) service tax of more than Rs.500 lakhs in cash or through account current; or
- (c) advance tax of more than Rs.1000 lakhs, under the Income Tax Act, 1961, and is presently assessed to income tax or corporate tax under the Income Tax Act, 1961, under the jurisdiction of Chief Commissioner of Income Tax – I, Bangalore (other than revenue district of Tumkur) and Chief Commissioner of Income Tax – II, Bangalore (other than district of Kolar).

- (b) No, the stand taken by the Department is not valid in law. The plastic nameplates should be classified as parts and accessories of motor vehicles on following grounds:
 - (i) name plates are solely and exclusively used for motor vehicles.
 - (ii) classification as parts and accessories of motor vehicles is more specific while the classification as other plastic products is residuary and more general in nature.

The Department has examined only whether the name plates can be considered 'parts' of motor vehicles, it has not at all considered whether these name plates can be considered 'accessories' of motor vehicle – An 'accessory' by its very definition is something supplementary or subordinate in nature and need not be essential for the actual functioning of the product.

In a similar case of *Pragati Silicons Pvt. Ltd. v. CCEx. Delhi* (2007) 211 ELT 534 (SC), the Apex Court applying the test laid down in the case of *Mehra Bros. v. Joint Commercial Officer* (1991) 51 ELT 173 (SC) has held that name plates add to convenient use of motor vehicle and give an identity to it. They add effectiveness and value to vehicle and are at very least accessories of vehicles. Thus, even if there was any difficulty in the inclusion of the name plates as 'parts' of the motor vehicles, they would most certainly have been covered by the broader term 'accessory' as car seat covers and upholstery etc.

- (c) (i) Correct. There is no restriction in the said rules on utilization of CENVAT credit of basic excise duty (BED) for payment of education cess (EC) and secondary and higher education cess (SHEC). Rule 3(4) of the said rules provides that credit of BED can be utilized for payment of any duty of excise on any final product. Since EC and SHEC are 'duties of excise' as per statutory provisions hence, credit of BED can be utilized for payment of cesses.
- (ii) Correct. As per Rule 11(3) of CENVAT Credit Rules, 2004, as inserted w.e.f. 1.3.2007, when final product has been exempted absolutely under section 5A of the Central Excise Act, CENVAT credit on inputs, lying in stock or in process or contained in final product shall be reversed. The balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product or for payment of service tax on any output service.
- (d) (i) 'Manufacture' is bringing into being goods known in the market having distinctive name, character or use and separate and identifiable function. Once a new commodity having a definite and distinct commercial identity in market is produced and the same has been specified in the tariff, it is exigible to duty. It is irrelevant

whether the new article falls into the same tariff heading as the duty paid raw material from which it is manufactured or belongs to a separate tariff heading.

It was held in *CCEx. v. Kapri International (P) Ltd. (2002) 142 ELT 10 (SC)* that if manufacture takes place, the commodity is dutiable even if the raw material and the resultant product fall under the same tariff heading. It was followed recently in *CCEx., Jaipur v. Mahavir Aluminium Ltd. (2007) 212 ELT 3 (SC)*, wherein it was held that converting aluminium ingots (7601.10 – old entry) into aluminium billets (7601.10 – old entry) is 'manufacture', because they have separate, distinct and identifiable marketability and saleability.

- (ii) As held in *CCEx. v. Markfed Vanaspati (2003) 153 ELT 491 (SC)*, mere change in tariff does not mean there is 'manufacture'. It was again confirmed in *CCEx. v. S R Tissues (2005) 186 ELT 385 (SC)* that just because raw material and finished product fall in different tariff headings it cannot be presumed that process of obtaining finished product from such raw material automatically constitutes 'manufacture'.

Therefore, manufacturing is not only about a process and a product but it is about a new identity that must emerge out of the given process. Mere mention of process in tariff entry is not sufficient, it must be specifically stated that a particular process 'amounts to manufacture' – *Shyam Oil Cake Ltd. v. CCEx. (2005) 174 ELT 145 (SC – 3 members bench)*.

Question 2

- (a) Explain briefly, with reference to rule 21 of the Central Excise Rules, 2002 relating to remission of duty, the following:
- (i) Can remission of duty be granted on goods cleared from the factory after payment of duty, but which were destroyed by fire in transit?
 - (ii) Upon grant of remission of duty, the CENVAT credit on inputs used in final product has to be reversed. (2 x 2 = 4 Marks)
- (b) A unit availing small scale exemption in terms of Notification No. 8/2003-C.E. dated 1.3.2003 as amended, found that it has exceeded the exemption limit by Rs.20 lakh during the year 2006-07. Accordingly, appropriate duty was paid after obtaining registration and in accordance with the prescribed procedure.
- In the year 2007-08, the unit estimates that the aggregate value of clearances for the purpose of the aforesaid notification would be Rs.140 lakh. Write a brief note on the steps to be adopted for the purpose of due compliance with the requirements of the aforesaid notification and the requirements of the Central Excise Act, 1944 and the rules made thereunder. (5 Marks)
- (c) Write a note on the valuation of goods on the basis of retail sale price under section 4A of the Central Excise Act, 1944. (6 Marks)

Answer

- (a) (i) Remission of duty is granted when the goods are lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption, at any time before removal.

Hence, in this case remission of duty cannot be granted under rule 21 of the Central Excise Rules, 2002 as goods have already been cleared from the factory after payment of duty.

- (ii) As per sub-rule (5C) of rule 3 of CENVAT Credit Rules, 2004 inserted vide *Notification No. 33/2007 CE (NT) dated 07.09.2007*, where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, the CENVAT credit taken on the inputs used in the manufacture or production of said goods shall be reversed.
- (b) The SSI exemption limit till the year 2006-07 was Rs.100 lakh. Since the turnover of the unit exceeded the exemption limit by Rs.20 lakh during the year 2006-07 hence, the turnover of the unit in the year 2006-07 must have been Rs.120 lakh.

Though in the year 2007-08, the unit expects clearance of Rs.140 lakh, it can still avail full exemption up to Rs.140 lakh as with effect from 01.04.2007, the exemption limit under the SSI scheme has been increased from Rs.100 lakh to Rs.150 lakh vide *Notification No. 8/2007 CE dated 01.03.2007*. However, the unit can avail full exemption up to the turnover of Rs.150 lakh only if it does not avail CENVAT credit on inputs being used by it. If it avails CENVAT credit, it will have to pay normal duty on all clearances.

The unit will be required to submit a declaration in prescribed form as its turnover is expected to be more than the 'specified turnover' of Rs.90 lakh.

As per the second proviso to rule 12(1) of the Central Excise Rules, 2002, SSI unit availing concession on the basis of annual turnover has to file a return of production and removal of goods on quarterly basis within 20 days from the close of quarter in the form ER-3.

- (c) The provisions of section 4A are as follows:
- (a) Excisable goods are valued on the basis of retail sale price when they are packaged and it is required under Standard of Weights and Measures Act, 1976 or Rules or under any other law to declare on such packages the retail sale price thereof. The Government may notify the products for the purpose of this section.
- (b) The assessable value shall be deemed to be the retail sale price declared on the package less amount of abatement. Abatements can be given by the Central Government through notifications after taking into account the amount of duties and taxes payable on such goods.
- (c) The retail sale price has been defined to mean the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer inclusive of all taxes and expenses and price is the sole consideration for such sale.

However, if the provisions of the Act, rules or other law as referred to in (a) above require the retail sale price to exclude any taxes, local or otherwise, the retail sale price shall be construed accordingly.

- (d) Where there is more than one retail sale price, the maximum of such retail sale price will be deemed to be the retail sale price for the purpose of this section.
- (e) Where different retail sale prices are declared on different packages for different areas, each such retail price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates.
- (f) The excisable goods shall be confiscated and the retail sale price will be ascertained in the manner prescribed by the Central Government if the manufacturer:
 - ♦ tampers, alters or obliterates the retail sale price declared on the package of goods after their removal, or
 - ♦ removes such goods without declaring the retail sale price on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in (a) above.
- (g) If the retail sale price declared on the package of goods at the time of removal is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price.

Question 3

- (a) *With reference to the Central Excise Act, 1944 and the rules made thereunder, write a brief note on the circumstances when personal penalty could be imposed on a director of a company or a partner of a firm or an employee or a transporter.* (4 Marks)
- (b) *M/s MM & Co., a machinery manufacturer, effected clearances from its factory with effect from 1.4.2006 by payment of duty under protest and had also filed an appeal against the order for payment of duty. On 15.5.2006, one of its customers M/s BB & Co. purchased the machines from M/s MM & Co. On 23.5.2007, the appeal filed by M/s MM & Co. was decided in favour of M/s MM & Co. Pursuant to the said order in the appeal filed by M/s MM & Co., its customer M/s BB & Co. filed a refund claim on 1.6.2007 claiming refund of duty suffered by M/s BB & Co. This claim for refund of duty was rejected by the department on the ground of 'unjust enrichment' as well as on the ground of 'limitation'. Explain briefly with reference to section 11B of the Central Excise Act, 1944 whether the action of the department is correct in law.* (5 Marks)
- (c) *Explain briefly the following with reference to the provisions of the Central Excise Rules, 2002 and relevant notification issued thereunder with regard to e-payment of duty:*
 - (i) *The threshold limit for mandatory e-payment of duty;*
 - (ii) *How and in what manner the time of payment would be reckoned under the e-*

payment system?

- (iii) The due dates for payment of duty under the e-payment scheme in respect of an assessee. (2 x 3 = 6 Marks)

Answer

- (a) As per rule 26(1) 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 reasons to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or Rs.2,000 whichever is greater. Section 9(1)(bbb) of the Central Excise Act also contemplates punishment for such dealings by any person. Thus a director, partner, employee or transporter or trader will be personally liable to penalty if he is personally involved in clandestine removal etc.

Further, penalty can be imposed on such persons if they issue any duty invoice without delivery of the goods or abet in making such invoice [Rule 26(2)(i)].

Penalty is also imposable on such persons if they issue any other document or abet in making such document on the basis of which, user of such document takes any ineligible benefit such as CENVAT credit or refund [Rule 26(2)(ii)].

- (b) Section 11B provides that every claim of refund shall be made within 1 year from the relevant date. Though the time limit is not applicable when duty is paid under protest [Second proviso to section 11B(1)], such benefit is available only to the manufacturer, who has paid duty under protest and not to the purchaser as decided in the case of *Allied Photographics 2004 (166) ELT 3 (SC)*. The Apex Court, in the said case, explained that the claim of refund by the manufacturer and the buyer are different. Under section 4, every payment by manufacturer, whether under protest or otherwise, is on its own account. It cannot be said that after the buyer has borne the incidence of duty, it has stepped into the shoes of manufacturer. Thus, the benefit of no limitation period in case of protest cannot be extended to the buyer.

Thus, in the given question, since the refund claim filed by M/s. BB & Co., the purchaser, was not within a period of one year from the date of purchase, being 15.05.2006, the same is barred by period of limitation. Thus, the Department's action is correct in law.

- (c) (i) With effect from 01.04.2007, a third proviso has been inserted in rule 8(1) of Central Excise Rules, 2002 vide *Notification No. 8/2007 CE (NT) dated 01.03.2007* to make e-payment mandatory for payment of duty by all assesseees who have paid excise duty of Rs.50 lakhs or more in cash during the preceding financial year. For others, it is optional.
- (ii) This a 24 x 7 facility. Payment can be made anytime from anywhere. All payments effected upto 8 p.m. will be accounted for the day as that day's receipt.
- Payments effected after 8 p.m. will be accounted as the next working day's receipt.
- (iii) For payment of excise duty by electronic means, the due date will be 6th of the succeeding month. For assesseees availing SSI exemption, the due date will be 16th

of the following month [Notification No.34/2007-CE (NT) dated 11.09.2007]. For the month of March, the due date will remain unchanged i.e., 31st March.

Question 4

- (a) State briefly the procedure to be adopted for clearance of 'prototypes' which are sent for trial or development test from the factory in terms of the Central Excise Rules, 2002. (2 Marks)
- (b) Will omission on the part of the assessee to provide correct information constitute 'suppression of facts' for purpose of the proviso to section 11A of the Central Excise Act, 1944. Write a brief note with reasons. (3 Marks)
- (c) Briefly examine the provisions relating to 'Settlement Commission' under the Central Excise Act, 1944 with particular reference to the changes brought in by the Finance Act, 2007. (5 Marks)
- (d) M/s Smart Ltd. manufactures certain excisable goods that are exempt from duty in terms of a notification, provided CENVAT credit of duty paid on input is not taken by the manufacturer. M/s Smart Ltd. had taken the credit of duty paid on inputs, but reversed the same before its utilization. The department denied the benefit of exemption on the ground that once the credit is taken it is immaterial whether the same is reversed before or after utilisation of such credit. State briefly whether the action of the department is correct under the Central Excise Act and rules made thereunder with reference to decided case law, if any. (5 Marks)

Answer

- (a) As per CBEC's Central Excise Manual of Supplementary Instructions 2005, if a prototype is to be sent out for trial purpose by actually putting them to effective use after conducting certain test to ensure that it meets with certain standard/specific norm, clearance has to be made on payment of duty. Its subsequent return to the factory is regulated in terms of rule 21 of the Central Excise Rules, 2002.
Rule 16C prescribing a special procedure for removal of excisable good for carrying out certain processes does not apply to 'prototypes'.
- (b) Omission on the part of the assessee to provide correct information does not constitute suppression of facts as the expression 'suppression of facts' used in the proviso to section 11A of Central Excise Act is accompanied by very strong words as 'fraud' and 'collusion' and, therefore, has to be construed strictly. Suppression means failure to disclose full information with intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression.
Supreme Court in the case of *Continental Foundation Joint Venture v. CCE* (2007) 216 ELT 177 (SC) elaborated that mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty.
- (c) The various amendments made by the Finance Act, 2007 in the provisions relating to Settlement Commission tend to curtail the scope of Settlement Commission. The

amendments are discussed in brief as under:

(i) *Application only if the case is pending*

Prior to 01.06.2007, an application for settlement could be filed even when original adjudicating authority had passed an order and the appeal was pending before a Central Excise Officer or the Central Government.

However, as per amended section 31(c), application can be made only when a 'case' is pending before adjudicating authority on the date of application. The Commission can also not be approached when the matter is remanded for fresh adjudication.

(ii) *Amendment of section 32E putting certain restrictions*

No application can be made if proper records are not maintained in daily stock register or when there is clandestine removal of goods. The additional amount of duty accepted by the applicant as payable shall be more than Rs.3 lakhs (the limit was Rs.2 lakhs upto 01.06.07). The appellant is required to pay duty admitted to be payable by him along with interest.

(iii) *Application for settlement only once in life time*

Section 32-O of the Central Excise Act (amended w.e.f. 01.06.07) provides that application for settlement can be made only once during the life time of the applicant.

(iv) *Commission debarred from re-opening completed proceedings*

Section 32H empowered the Settlement Commission to re-open completed proceedings. However, the Finance Act, 2007 has disempowered the Commission to reopen the proceedings in cases where applications are made on or after 01.06.2007.

(v) *Commission debarred from granting immunity from prosecution for any offence under Indian Penal Code or any Central Act other than Central Excise Act*

Section 32K empowered Settlement Commission to grant immunity from prosecution and penalty. However, with effect from 01.06.2007, the immunity can be granted only in respect of prosecution under the Central Excise Act. Further, with effect from 01.06.2007, the Commission shall also not have the power to grant immunity from payment of interest as provided under this Act.

Note: The Finance Act, 2007 has made few other amendments also in the provisions relating to the Settlement Commission. All such amendments are given in point no. 5 of the Final Course Supplementary Study Paper 2007.

- (d) The case is similar to *CCEx. v. Bombay Dyeing & Mfg. Co. Ltd. (2007) 215 ELT 3 (SC)*, wherein it was held by the Apex Court that since the entry for credit was reversed before utilizing the same, it would amount to not taking of credit.

Hence, in view of this decision, M/s Smart Ltd. is entitled to claim the benefit of exemption notification and thus the Department's action is not correct.

Question 5

- (a) *State briefly the provisions of the Central Excise Act, 1944 relating to arrest of a person.*

(3 Marks)

(b) Write short notes on the following:

- (i) Desk review under Excise Audit, 2000.
- (ii) Duty drawback under section 37 of the Central Excise Act, 1944.

(3 x 2 = 6 Marks)

(c) Based on the following particulars, arrive at the CENVAT credit available on clearance of goods to Domestic Tariff Area (DTA) from an Export Oriented Unit (EOU):

Assessable value	Rs. 20 lakhs
Basic customs duty	10%
Excise duty	16%
Education cess	2%
Secondary and Higher Education cess	1%
VAT payable under State VAT law	4%

(6 Marks)

Answer

- (a) Any Central Excise Officer not below the rank of Inspector may arrest any person whom he has reason to believe to be liable to punishment under the provisions of the Central Excise Act or rules made thereunder. Such arrest can be made only with the prior approval of the Commissioner of Central Excise [Section 13 of Central Excise Act].

As per section 19 of the Act, every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. The arrest should be made as per the provisions of the Code of Criminal Procedure [Section 18 of the Central Excise Act].

- (b) (i) Desk Review is the first step in Excise Audit, 2000. Upon assignment of an audit, the auditor is required to be sufficiently prepared before the visit to the unit. For this purpose, the auditor reviews all the information available about the unit, its operations, and reasons for selection for audit and possible issues that can be identified at desk review stage. Perusal of assessee's profile, annual report, trial balance, cost audit report and income-tax audit report is involved in desk review.
- Department has also decided to take help of practicing chartered/cost accountants in desk review of Excise Audit 2000.
- (ii) Under duty drawback scheme, excise and customs duties paid on inputs is given back to the exporters of finished products. Section 37 of Central Excise Act, 1944 empowers the Central Government to make rules to carry into effect the purpose of

the Act.

The Central Government, in exercise of powers conferred by section 37 of the Central Excise Act, 1944, section 75 of the Customs Act, 1962 and section 93A read with section 94 of the Finance Act, 1994 has made the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

Under these rules, drawback is allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government.

The All Industry Rates of Drawback are given separately i.e., when CENVAT credit has been availed of and when such credit facility has not been availed of.

- (c) As per *Notification No. 23/2003 CE dated 31.3.2003*, 75% of basic customs duty is exempt in case of clearance of goods by an EOU to DTA. The amount of CENVAT credit can be calculated as under:

	Rs.
(i) Assessable value	20,00,000
(ii) Customs duty 25% of 10% of Rs.20,00,000	50,000
(iii) Additional duty (CVD) @ 16% of (Rs.20,00,000 + Rs.50,000)	3,28,000
(iv) Education cess @ 2% of Rs.3,28,000	6,560
(v) S & H education cess @ 1% of Rs.3,28,000	3,280
(vi) Special CVD (as VAT is payable)	NIL

As per rule 3 of CENVAT Credit Rules, 2004, the amount of CENVAT credit will be as under:

	Rs.
Additional duty of customs (CVD)	3,28,000
Education cess	6,560
S & H education cess	<u>3,280</u>
Total amount of credit	<u>3,37,840</u>

The credit can also be computed by using the formula provided in rule 3(7) of the CENVAT Credit Rules, 2004. The said rule gives the following formula for availing credit when goods are cleared by EOU to DTA after 1.3.2006:

$$\begin{aligned}
 \text{Credit available} &= \text{Assessable value} \times [(1 + \text{BCD}/400) \times \text{CVD}/100] \\
 &= 20,00,000 \times [(1 + 10/400) \times 16/100] \\
 &= 20,00,000 \times 1.025 \times 0.16 \\
 &= \text{Rs.}3,28,000 \\
 \text{Add: education cess @ 2\%} &= \text{Rs.}6,560
 \end{aligned}$$

Add: secondary and higher education cess @ 1%	= Rs.3,280
Total credit available	= Rs.3,37,840

PART - B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 the following :
- Appointment of officers of customs
 - Tariff value (2 x 2 = 4 Marks)
- (b) M/s Hind IT Co. imported laptops with Hard Disc Drives (HDD) preloaded with operating software like Windows XP, XP home etc. The department has claimed that the said laptop along with the operating software was classifiable and assessable as a single unit. It is the claim of the assessee that the software loaded HDD should be classified and assessed separately as an exemption is available as per notification issued under section 25(1) of the Customs Act, 1962. Decide with a brief note whether the action proposed by the department is correct in law. (4 Marks)
- (c) Write a note on "Project Imports" under the Customs Tariff Act, 1975 enumerating the eligible projects and the minimum investment criteria, if any. (6 Marks)
- (d) XYZ Industries Ltd., has imported certain equipment from Japan at an FOB cost of 2,00,000 Yen (Japanese). The other expenses incurred by M/s. XYZ Industries in this connection are as follows:
- Freight from Japan to India Port 20,000 Yen
 - Insurance paid to Insurer in India Rs.10,000
 - Designing charges paid to Consultancy firm in Japan 30,000 Yen
 - M/s. XYZ Industries had expended Rs.1,00,000 in India for certain development activities with respect to the imported equipment
 - XYZ Industries had incurred road transport cost from Mumbai port to their factory in Karnataka Rs. 30,000
 - The Central Board of Excise and Customs had notified for purpose of section 14(3)* of the Customs Act, 1962 exchange rate of 1 Yen = Rs.0.3948. The inter bank rate was 1 Yen = Rs.0.40
 - M/s XYZ Industries had effected payment to the Bank based on exchange rate 1 Yen = Rs. 0.4150
 - The commission payable to the agent in India was 5% of FOB cost of the equipment in Indian Rupees

FOB cost of the equipment in Indian Rupees

Arrive at the assessable value for purposes of customs duty under the Customs Act, 1962 providing brief notes wherever required with appropriate assumptions. (6 Marks)

**Note: In the amended section 14, the provisions relating to exchange rate are covered under explanation to section 14.*

Answer

- (a) (i) Section 4(1) of the Customs Act, 1962 empowers the Central Board of Excise and Customs (CBEC) to appoint such persons as it thinks fit to be officers of customs.

Without prejudice to the provisions of sub-section (1), the Board may authorize a Chief Commissioner of Customs or a Commissioner of Customs or a Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs. [Section 4(2) of the Customs Act, 1962].

- (ii) As per section 2(40) of the Customs Act, 'tariff value' in relation to any goods, means the tariff value fixed in respect thereof under sub-section (2) of section 14.

As per section 14(2) of the Act, notwithstanding anything contained in section 14(1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

- (b) The action proposed by the Department is correct in law. The facts of the case are similar to *CCus. v. Hewlett Packard India Sales (P) Ltd. (2007) 215 ELT 484 (SC)*.

In this case, the Supreme Court observed that the pre-loaded operating system recorded in HDD in the laptop (item of import) forms an integral part of the laptop as the laptop cannot work without the operating system. A laptop without an operating system is like an empty building. Hence, laptop should be treated as one single unit and assessed accordingly.

However, if the operating system had been imported as packaged software like an accessory, then the benefit of exemption notification would have been available on it.

- (c) Setting up of a project in India may require a number of machines and equipments to be imported. This importation may spread over a period of time and thus assigning values and paying heavy customs duty on imported machineries make the initial project a cumbersome and costly process. Hence, concept of 'project import' has been introduced under heading 9801 of Customs Tariff to cover all machinery, instruments, apparatus and appliances, components or raw materials for initial setting up of a unit or substantial expansion of the existing project. The spare parts, raw material and consumables stores upto 10% of value of goods can be imported.

The eligible projects are:

- (i) Industrial plant
- (ii) Irrigation project
- (iii) Power project
- (iv) Mining project
- (v) Oil & other mineral exploration project
- (vi) Other projects as notified by the Central Government

Earlier, there was a condition that investment in plant and machinery should be at least Rs.5 crore. This condition has been waived with effect from 22.01.2007.

(d)	Yen
FOB value	2,00,000.00
Add: Ocean freight	20,000.00
Add: Designing charges paid in Japan	<u>30,000.00</u>
Total	<u>2,50,000.00</u>
Total value in Indian rupees	
$2,50,000 \times 0.3948$	Rs.98,700.00
(Rate of 1 yen = Rs.0.3948)	
Add: Insurance	Rs.10,000.00
Add: Agent's commission at 5% FOB value	<u>Rs.3,948.00</u>
(5% of 2,00,000 Yen x 0.3948)	
Total CIF price	Rs.1,12,648.00
Add: Landing charges @ 1%	Rs.1,126.48
(1% of 1,12,648)	
Assessable value for the purposes of customs duty	Rs.1,13,774.48
Rounded off	Rs.1,13,774.00

Notes:

- (i) Rule 10(1)(b)(iv) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 *inter alia provides* that value of development work undertaken *elsewhere than in India* is includible in the value of the imported goods. Thus, development charges paid for work done *in India* have not been included for the purposes of arriving at the assessable value.
- (ii) As per rule 10(2)(a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the cost of transport of the imported goods *up to the place of*

importation is includible for the purpose of valuation. Thus, transport cost from Mumbai port (place of importation) to the factory in Karnataka has not been considered for the purpose of customs valuation.

- (iii) Insurance has been assumed to be in respect of the cost of the equipment till the place of importation and is thus, includible [Rule 10(2)(c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
- (iv) As per rule 10(1)(a)(i) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, buying commission is not includible in the value of the imported goods. Since the agent's commission does not represent buying commission, hence, it is includible.
- (v) Landing charges have been considered as per clause (ii) of the proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.
- (vi) The rate of exchange notified by the CBEC has been considered [Clause (a) of the explanation to section 14 of the Customs Act, 1962].

Question 7

- (a) *Explain briefly with reference to the provisions of the Customs Act, 1962 whether the owner of the warehoused goods has the right to relinquish his title to such goods after the expiration of the warehousing period or the extended warehousing period, as the case may be, and also state whether any charges shall become payable upon such relinquishment.* (5 Marks)
- (b) *State briefly any five illustrative cases under the Customs, Central Excise Duties and Service Tax Drawback Rules, 2006 (sic: 1995) where the All Industry Drawback rates will not apply.* (5 Marks)
- (c) *State briefly the provisions of the Customs Act, 1962 relating to payment of interest in case of provisional assessment.* (5 Marks)

Answer

- (a) Yes, the owner of the warehoused goods has the right to relinquish his title to such goods after the expiration of warehousing period/extended warehousing period.

Proviso to section 68 of the Customs Act, 1962, provides that the owner of the warehoused goods can relinquish his title to such goods any time before an order for clearance of goods for home consumption has been made in respect of such goods. Similar view was expressed in the case of *CCus. v. i2 Technologies Software (P) Ltd.* 2007 (217) ELT 176 (Kar.)

However, the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

On relinquishment of title to such goods, the owner of goods will be required to pay rent,

interest, other charges and penalties that may be payable. However, duty will not be payable on relinquishment.

- (b) *Notification No. 68/2007 Cus. (NT) dated 16.07.2007* mentions that All Industry Drawback Rates do not apply to export of a commodity or product if such commodity or product is -
- (i) manufactured partly or wholly in a customs bonded warehouse.
 - (ii) manufactured or exported in discharge of export obligation against an Advance Licence or Advance Authorisation Scheme (however, excise portion of duty drawback rate is allowable).
 - (iii) manufactured or exported by a hundred percent export oriented undertaking.
 - (iv) manufactured or exported by a unit situated in free trade zone or export processing zone or special economic zone.
 - (v) manufactured or exported by availing the rebate of excise duty on inputs under rule 18 of the Central Excise Rules, 2002.
 - (vi) manufactured or exported without payment of duty under rule 19(2) of the Central Excise Rules, 2002.
 - (vii) manufactured or exported under duty entitlement pass book scheme.
- (c) Section 18 of the Customs Act, 1962 provides for provisional assessment. Duty is paid in two stages in case of provisional assessment; firstly, at the time of provisional assessment and another at the stage of finalization of assessment. Section 18(3) of the Customs Act provides that –
- (i) the importer or exporter shall be liable to pay interest, if differential amount is found to be payable.
 - (ii) the interest shall be payable at the rate prescribed under section 28AB of the Customs Act, 1962 (presently 13%).
 - (iii) the interest shall be payable from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.
- Similarly, section 18(4) of the Customs Act, 1962 provides that –
- (i) if any amount is refundable after final assessment (subject to doctrine of unjust enrichment), interest shall be payable to the assessee.
 - (ii) interest shall be payable at the rate specified (6% presently) under section 27A of the Customs Act, 1962.
 - (iii) interest shall be granted if refund is not made within 3 months from the date of final assessment of duty.

Question 8

- (a) *State briefly with reference to the provisions of section 27 of the Customs Act, 1962 whether the principle of “unjust enrichment” will apply in the following cases:*

- (i) *refund of wrongly encashed bank guarantee*
 - (ii) *refund of excess interest paid by the assessee*
 - (iii) *refund of duty on car imported for personal use.* (2 x 3 = 6 Marks)
 - (b) *The Committee of Commissioners of Customs is empowered under the Customs Act, 1962 to direct the filing of an appeal before the Appellate Tribunal in certain cases while in certain others, it may direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the said committee. Write a brief note on the powers of the Committee of Commissioners of Customs bringing out the difference in the exercise of such powers.* (4 Marks)
- *Note: The power to direct an application to be filed before the Appellate Tribunal for determination of such points arising out of the decision or order as may be specified by the Committee vests with the Committee of Chief Commissioner.*
- (c) *State in brief the provisions under the Customs Act, 1962 that seek to prohibit the import of goods infringing intellectual property rights (IPR).* (5 Marks)

Answer

- (a) The bar of unjust enrichment applies in case of refund of customs duty under section 27(2) of the Customs Act, 1962. In the given cases, the applicability of the doctrine has been examined as under –
 - (i) The provisions of section 27(2) apply when an assessee claims refund of *duty*, hence, bar of unjust enrichment will not apply to refund of wrongly encashed *bank guarantee*. An amount secured by bank guarantee cannot be held to be paid to the Revenue as duty. Hence, the Revenue will have to pay back the amount of bank guarantee (encashed wrongly), if the case is finally decided in favour of assessee – *Oswal Agro Mills Ltd. v. ACCE (1994) 70 ELT 48 (SC)*.
 - (ii) The bar of unjust enrichment will apply in case of excess interest paid by the assessee as the words used under section 27(1) and 27(2) are “duty and interest, if any, paid on such duty”. The payment of interest is inextricably laced with payment of duty. Thus, the excess amount of interest paid by the assessee will be refunded to him only if he does not pass on the incidence of such interest to any other person.
 - (iii) The principle of unjust enrichment will not apply to refund of duty on car imported for personal use, as clause (b) of the proviso to sub-section (2) of section 27 of the Customs Act, 1962 stipulates that in case of imports made by an individual for his personal use, the refund should not be credited to consumer welfare fund, but shall be paid to the applicant.
- (b) Under section 129A(2) of the Customs Act, 1962, the Committee of Commissioners of Customs may direct the proper officer to file appeal on its behalf to the Appellate Tribunal against the order of Commissioner (Appeals), if it is of the opinion that the order is not legal or proper.

Under section 129D(1) of the Customs Act, 1962, the Committee of Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceedings in which a Commissioner of Customs has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Customs in its order.

Therefore, difference in two cases mentioned above is that in the former case the Department has to file a regular appeal with the Tribunal while in the latter case a review application is filed with the Tribunal. It may also be noted here that the review application is treated as appeal filed against the decision or order of the adjudicating authority vide section 129D(4) of the Customs Act, 1962.

Further, in the former case an appeal has to be filed within three months as specified in section 129A(3) of the Customs Act, 1962 while in the latter case application for review can be filed within four months; three months for the Committee of Chief Commissioner of Customs to issue order for review and further one month to the Commissioner to file an application .

- (c) The Government of India has an international obligation to protect Intellectual Property Rights (IPR) at the stage of import in terms of an agreement arrived at the WTO. Under clauses (n), (o) and (u) of the Customs Act, 1962 the Government has been empowered to prohibit, absolutely or conditionally, import or export of goods for the purpose of patent protection, trade marks or copyrights or for prevention of deceptive practices. Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 have been notified for this purpose vide *Notification No. 47/2007 Cus. (NT) dated 08.05.2007*.

Further, *Notification No. 49/2007 Cus. (NT) dated 08.05.2007* has also been issued to prohibit the import of the goods described therein.

PART – C

Question 9

- (a) *State briefly whether the following services under the Finance Act, 1994, relating to service tax, are taxable services. (Answer any three):*
- (i) *Services provided in the State of Rajasthan by a person having a place of business in the State of Jammu and Kashmir.*
 - (ii) *Services provided from India for use outside India.*
 - (iii) *Service provided from outside India and received in India by an individual, otherwise than from purpose of use in business or commerce.*
 - (iv) *Service provided to an Export oriented unit.* (2 x 3 = 6 Marks)
- (b) *Briefly state the provisions under the Service Tax Rules, 1994 relating to filing of returns and also state any late fee payable for delay in filing of returns.* (3 Marks)

- (c) Answer the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:
- (i) Sale of lottery tickets.
 - (ii) Depository services and Electronic Access to Securities Information Services (EASI) provided by the Central Depository Services India Ltd.
 - (iii) Services provided by educational institutions like IIMs by charging a fee from prospective employers like corporate houses regarding recruiting candidates through campus interviews. (2 x 3 = 6 Marks)

Answer

- (a) (i) As per section 64(1) of the Finance Act, 1994, service tax provisions do not extend to the State of Jammu and Kashmir. However, since service tax is a destination based consumption tax, hence service provided in Rajasthan from Jammu and Kashmir would be liable to service tax.
- (ii) Since, service tax is a destination based-consumption tax, it is not leviable on export of services. Export of Services Rules, 2005 provide a scientific criteria to decide what is 'export of service'. The rules make it clear that exemption from service tax/rebate of service tax and excise duty paid is admissible only if there is 'export of service' as defined in these rules.
- Thus, assuming that the given service is exported in terms of Export of Services Rules, 2005, the export thereof would not be liable to service tax.
- (iii) Service tax would not be leviable in this case as the first proviso to section 66A(1) of the Finance Act, 1994 states that services received by an individual, otherwise than for the purpose of use in any business or commerce are exempt from payment of service tax.
- (iv) Service provided to export oriented undertaking is liable to service tax.
- (b) The service tax return is required to be filed under section 70 of the Finance Act, 1994 read with rule 7 of the Service Tax Rules, 1994, by any person liable to pay service tax in Form ST-3 as under:
- for the period from April to September – by 25th October
- for the period from October to March – by 25th April
- A single return has to be filed in respect of all taxable services provided by an assessee.
- As per rule 7C of the Service Tax Rules, 1994, delay in filing of return attracts late fee as under:
- (i) Delay upto 15 days - Rs.500
 - (ii) Delay upto 30 days – Rs.1,000
 - (iii) Delay beyond 30 days – Rs.1,000 + Rs.100 per day of delay beyond 30 days
- (c) (i) Section 65(19)(i) of the Finance Act, 1994 lays down that 'business auxiliary

service' means any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client. Since, lottery tickets are actionable claims and not goods as decided by the Apex Court in the case of *Sunrise Associates v. Govt. of NCT of Delhi* (2006) 5 SSC (603), hence sale of lottery tickets is not liable to service tax.

- (ii) As per *Circular No. 96/7/2007 ST dated 23.08.2007* definition of banking and other financial services *inter alia* specifically includes depository services [Section 65(12)(a)(v)] and provision and transfer of information and data processing [Section 65(12)(a)(vii)]. EASI services provided by the Central Depository Services India Ltd. (CDSL) fall within the scope of "provision and transfer of information and data processing". Therefore, the depository services provided by CDSL, including EASI services, for a fee are liable to service tax under banking and other financial services. [Section 65(105)(zm)]
- (iii) Manpower recruitment or supply agency is defined as 'any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client [Section 65(68)].

Educational institutes like IITs, IIMs etc. fall within the above definition. Thus, service tax is liable to be paid on services provided by such institutes in relation to campus recruitment under section 65(105)(k) of the Finance Act, 1994.

The suggested answers for Indirect Tax Laws (Paper 8) are based on the provisions as amended by the Finance Act, 2007 and notifications/circulars issued up to 30.04.2008 which are relevant for November 2008 examinations.

PAPER – 8: INDIRECT TAX LAWS

Answer all questions

PART - A

Question 1

- (a) *How will the assessable value under the subject transaction be determined under section 4 of the Central Excise Act, 1944? Give reasons with suitable assumptions where necessary.*

Contracted sale price for delivery at buyer's premises Rs. 9,00,000

The contracted sale price includes the following elements of cost:

(i) Cost of drawings and designs	Rs. 4,000
(ii) Cost of primary packing	Rs. 3,000
(iii) Cost of packing at buyer's request for safety during transport	Rs. 7,000
(iv) Excise duty	Rs.1,11,200
(v) VAT (Sales tax)	Rs. 37,000
(vi) Octroi	Rs. 9,500
(vii) Freight and insurance charges paid from factory to 'place of removal'	Rs. 20,000
(viii) Actual freight and insurance from 'place of removal' to buyer's premises	Rs. 42,300

(4 Marks)

- (b) *Following transactions took place in the factory of JKA Ltd:*

- (i) *An imported consignment of raw materials was received vide bill of entry dated 2.12.07 showing the following customs duty payments:*

Basic customs duty Rs. 25,000; Additional duty (CVD) Rs. 20,000; Special additional duty Rs. 5,800.

- (ii) *A consignment of 1,000 kg of inputs was received. The excise duty paid as per the invoice was Rs. 10,000. While the input was being unloaded, 50 kg were damaged and were found to be not usable.*

- (iii) *A vehicle containing machinery was received. The machinery was purchased through a dealer and not from the manufacturer. The dealer's invoice no. 925 dated 3.4.07 marked 'original for buyer' certified that the excise duty paid by the manufacturer of machinery was Rs. 24,000. The dealer is registered with the Central Excise Authorities.*

- (iv) Some inputs for final product were received. These were accompanied by a certified Xerox copy (photo copy) of invoice no. 286 dated 15.1.08 indicating that excise duty of Rs. 6,400 had been paid on inputs. The original or duplicate copy of invoice was not traceable.

Indicate the eligibility of CENVAT credit, in each case, under the CENVAT Credit Rules, 2004 with explanations where necessary. (4 Marks)

- (c) CTL Ltd. has a manufacturing unit situated in Lucknow. In the financial year 2006-07, the total value of clearances from the unit was Rs. 450 lakh. The break up of clearances is as under:

- (i) Clearances worth Rs. 50 lakh of certain non-excisable goods manufactured by it.
- (ii) Clearances worth Rs. 50 lakh exempted under specified job work notification.
- (iii) Exports worth Rs. 100 lakh (Rs. 75 lakh to USA and Rs. 25 lakh to Nepal).
- (iv) Clearances worth Rs. 50 lakh which were used captively to manufacture finished products that are exempt under notifications other than Notification No. 8/2003-CE dated 1.3.2003 as amended.
- (v) Clearances worth Rs. 200 lakh of excisable goods in the normal course.

Explain briefly, the treatment for various items and state, whether the unit will be eligible for the benefits of exemption under Notification No. 8/2003-CE dated 1.3.03 as amended for the year 2007-08. (7 Marks)

Answer

- (a) Computation of assessable value of the excisable goods:-

Contracted sale price	Rs.9,00,000
Less:	
Excise duty (Note – 1)	Rs.1,11,200
VAT (Note – 1)	Rs.37,000
Octroi (Note – 1)	Rs.9,500
Actual freight from "place of removal" to buyer's premises (Note – 2)	<u>Rs.42,300</u>
	<u>Rs.2,00,000</u>
Assessable value	<u>Rs.7,00,000</u>

Notes - In the given question, for the purpose of determining the assessable value of the excisable goods:-

1. the duty of excise, sales tax and other taxes, if any, actually paid or payable on the excisable goods shall be excluded [Section 4(3)(d) of the Central Excise Act, 1944].

2. the cost of transportation from the place of removal up to the place of delivery of the excisable goods shall be deducted [Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000].
 3. the cost of transportation, worth Rs. 20,000, from the factory to the place of removal shall not be excluded [Explanation 2 to rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000].
 4. cost of packing, Rs. 3,000 and Rs. 7,000 shall not be deducted. In this regard, it has been clarified that as per section 4 of the Central Excise Act, 1944, packing charges shall form part of the assessable value whether packing is ordinary or special, or primary or secondary. Any charges recovered for packing are the charges recovered in relation to the sale of the goods under assessment and, hence, will form part of the transaction value of the goods [Circular no. 354/81/2000 dated 30/6/2000].
- (b) (i) As per rule 3(1)(vii) of the CENVAT Credit Rules, 2004, CENVAT credit of the additional duty leviable under section 3 of the Customs Tariff Act, 1975 viz., Countervailing Duty (CVD) shall be allowed to a manufacturer or producer of the final products. Thus, credit can be availed in respect of Rs.20,000 paid as additional duty (CVD).
- (ii) Rule 2(k) of CENVAT Credit Rules, 2004 *inter alia* provides that input means all goods used in or in relation to the manufacture of final products, whether directly or indirectly. Thus, the inputs lost before being issued for production cannot be termed as "used in or in relation to manufacture of final product". Hence, CENVAT credit in respect of 50 kg of inputs will not be available but CENVAT credit of Rs.9,500 on balance 950 kg of inputs can be availed.
- (iii) Clause (iv) of rule 9(1)(a) of CENVAT Credit Rules, 2004 provides that CENVAT credit shall be taken by manufacturer on the basis of an invoice issued by a first/second stage dealer. Further, as per rule 9 of Central Excise Rules, 2002, a first/second stage dealer requires registration. Thus, in the given case, CENVAT credit can be claimed against dealer's invoice since the dealer is registered with Central Excise Authorities.
- However, CENVAT credit in respect of capital goods shall be taken only for an amount not exceeding 50% of the duty paid on such capital goods in the same financial year and balance 50% shall be available in the subsequent financial year [Rule 4(2) of CENVAT Credit Rules, 2004]. Hence, CENVAT credit of Rs.12,000 will be available in the current financial year. Balance credit of Rs.12,000 can be availed in any subsequent year.
- (iv) Rule 9 of CENVAT Credit Rules, 2004 states that the CENVAT credit can be availed on the basis of invoice issued by a manufacturer. Thus, the credit can be availed on any copy of the invoice i.e., whether it is the invoice marked as "original for buyer" or "duplicate for transporter" as it is still an invoice issued. However, a

certified photocopy is not an invoice issued by the manufacturer. Thus, credit cannot be availed on the basis of a certified copy.

- (c) In order to claim the benefit of exemption under Notification No. 8/2003 – C.E. in a financial year, the total turnover of a unit should not exceed Rs.400 lakh in the preceding year. For the purpose of computing the turnover of Rs. 400 lakh:-
- (i) Turnover of non-excisable goods has to be excluded. Therefore, clearances of non-excisable goods of worth Rs.50 lakh shall be excluded.
 - (ii) Clearances exempted under job work notifications should not be considered. Therefore, exempted clearances of Rs.50 lakh under job work notification will be excluded.
 - (iii) Export turnover has to be excluded. However, export to Nepal and Bhutan cannot be excluded as these are treated as “clearance for home consumption”. Therefore, clearances worth Rs.75 lakh exported to USA will be excluded while clearances worth Rs.25 lakh exported to Nepal will be included.
 - (iv) Value of intermediate products manufactured has to be included if the final product is exempt under any notification other than Notification No. 8/2003-CE dated 1-3-2003*. Therefore, clearances worth Rs 50 lakh which were used captively to manufacture finished products exempt under notifications other than Notification No. 8/2003 will be included.
 - (v) Clearances of excisable goods of Rs.200 lakh in the normal course will be considered.

Therefore, for the year 2007-08, the turnover of CTL Ltd. for claiming the SSI exemption will be:-

$$= \text{Rs.450 lakh} - (\text{Rs.50 lakh} + \text{Rs.50 lakh} + 75 \text{ lakh}) = \text{Rs.275 lakh}$$

Since the turnover is less than Rs 400 lakh, CTL Ltd. will be eligible for exemption under Notification No. 8/2003 – CE.

*Note - It is assumed that the value of clearances of final products manufactured from such intermediate products is not included in the total turnover of Rs.450 lakh of the unit.

Question 2

- (a) *M/s Ganga Marketing supplies 12 bottles of mineral water in a single package to Speed Airways (airline company).*

Maximum retail price was printed on the package. However, individual bottle of 200 ml. each did not carry such maximum retail price (M.R.P) as these were to be distributed to the passengers by the airline company and not intended for resale. M/s Ganga Marketing pays duty of excise assessing the goods under section 4 of the Central Excise Act, 1944.

The Department has taken a view that the package of 12 bottles is not a wholesale package. The airline company itself is the ultimate consumer. Hence, the package of 12 bottles itself is a 'retail package' and duty is payable on the basis of MRP under section 4A of the Central Excise Act, 1944.

Examine briefly, with the help of decided case law, if any, whether the stand taken by the Department is correct in law. (5 Marks)

- (b) *M/s Om Processors, a job worker, was engaged in the processing of manmade fabrics received from the principal supplier. The job worker (assessee) had undertaken to discharge all the duty liabilities under the Central Excise Act, 1944. The assessee received manmade fabrics on declaration from the principal supplier that the said fabrics had polyester content below 70%; processed the same and cleared the processed fabrics claiming the benefit of concessional rate of duty available to manmade fabrics containing polyester below 70%. On the basis of chemical examination by the Department, it was found that the fabrics contained polyester in excess of 70% and thus would attract higher rate of duty. A show cause notice was issued invoking the extended period of limitation under section 11A of the Central Excise Act, 1944 demanding differential duty and penalties on the ground of mis-declaration on the part of the assessee. Briefly discuss, with reference to decided case law, whether the stand taken by the Department is correct in law.* (5 Marks)
- (c) *M/s Raj Fibres had filed an appeal to the High Court on Aug. 11, 2008 under section 35G of the Central Excise Act, 1944 aggrieved by an order passed by the Appellate Tribunal. The order appealed against was received by the assessee on Jan. 1, 2008. The High Court dismissed the appeal petition on the ground that the same had been filed beyond the period provided for filing an appeal under section 35G of the Act and the court had no power to condone the delay. M/s Raj Fibres urged before the High Court that the provisions of the Limitation Act, 1963 should be made available and the delay in presenting the appeal ought to be condoned. State briefly, with reference to decided case law, if any, whether the High Court could condone the delay in presenting the appeal pursuant to the provisions of the Limitation Act, 1963 as urged by M/s Raj Fibres.* (5 Marks)

Answer

- (a) No, the stand taken by the Department is not valid in law. Section 4A(2) of the Central Excise Act, 1944 stipulates that value of the goods notified by the Central Government under section 4A(1) of the Act shall be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow. For the purpose of valuation under section 4A of the Central Excise Act, 1944, there should be requirement under the provisions of the Standards of Weights and Measures Act, 1976 or the rules made there under or any other law to declare the retail price of such goods on the package.

With effect from 14.01.2007, Standards of Weights and Measures (Packaged Commodity) Rules, 1977 have been amended to provide *inter alia* that MRP is not

required to be printed in case of sale to institutional consumers. Institutional consumers have been defined as those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like airways, railways etc. Thus, Speed Airways, being an institutional consumer, package of mineral water bottles meant for them is not required to bear any MRP. Hence, in the present case, the goods are to be valued under section 4 and not under section 4A of the Central Excise Act, 1944.

- (b) Proviso to section 11A(1) of the Central Excise Act, 1944 stipulates that the extended period of limitation can be invoked only in case of short payment of duty by reason of fraud, collusion, or willful mis-statement or suppression of facts with the intention to evade the payment of duty.

Similar view was expressed by the Apex Court in case of *Padmini Products v. CCE* (1989) 43 ELT 195 (SC), wherein it was held that failure to pay duty might not necessarily be due to fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Act. If facts of the case revealed that the appellant had acted bona fide, such act would not attract the penal provisions under section 11A of the Act. If the facts were otherwise, then the penalty would be levied.

In the given case, there was no requirement for the assessee (processor) to verify the correctness of the declaration filed by the principal (suppliers). Further, there was no allegation that the assessee was a party to such mis-declaration by the principal supplier. Therefore, extended period of limitation could not be invoked against the assessee. Thus, the action taken by the Department is not valid in law.

- (c) The Apex Court in the case of *CCE v. Punjab Fibres Ltd.* (2008) 223 ELT 337 (SC) has held that there is no provision for condonation of delay in section 35H of the Central Excise Act, 1944 i.e., the High Court was not empowered to condone delay in filing reference application. The Court also observed that the right or privilege to claim benefit of a provision for condonation of delay could be governed only by the law in force at the time of delay.

Though the above-mentioned case pertains to a reference application under section 35H of the Central Excise Act, 1944, the principle enunciated therein may also be applied to an appeal filed under section 35G of the Act as section 35G also does not provide for any condonation of delay in filing an appeal.

Hence, in the instant case, the High Court is justified in holding that the Court has no power for condonation of delay in filing an appeal.

Question 3

- (a) Discuss briefly, whether excise duty is attracted on the excisable goods manufactured in the following cases:
- (i) in the State of Jammu and Kashmir;
 - (ii) by or on behalf of the Government.

- (b) *What is the period of provisional attachment of property during the pendency of any proceeding under section 11A or section 11D of the Central Excise Act, 1944?*
- (c) *Under what circumstances, the rebate of excise duty paid on exported goods can be granted to the exporter in case of export of good to Nepal?*

Note - Rebate of excise duty paid on exported goods is granted to Government of Nepal.

- (d) *If a manufacturer manufactures various products, can he avail CENVAT credit on some products and exemption under Notification No. 8/2003-CE dated 1.3.03 on some other products?*
- (e) *Briefly discuss, the residual penalty under rule 27 of the Central Excise Rules, 2002.*

(2×5=10 Marks)

Answer

- (a) (i) Yes, excise duty is attracted on the excisable goods manufactured in the State of Jammu and Kashmir. Though originally the Central Excise Act, 1944 did not apply to Jammu and Kashmir, its application was extended to the same with the enactment of Taxation Laws (Extension to Jammu and Kashmir) Act, 1954.
- (ii) Section 3(1A) of the Central Excise Act, 1944 provides that the excise duty shall be levied and collected on all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government. Thus, excise duty will be payable on goods manufactured by, or on behalf of, the Government (both Central & State) also.
- (b) Provisional attachment of property can be done for a period of 6 months [Section 11DDA (2)].
- This period can be extended with written permission of Chief Commissioner of Central Excise. However, total period of extension cannot be more than two years [First proviso to section 11DDA(2)].
- However, if the assessee has made an application to the Settlement Commission, that period will be excluded for the purpose of calculating the time limit of two years [Second proviso to section 11DDA(2)].
- (c) Rebate of excise duty paid on goods exported to Nepal shall be granted to the Government of Nepal subject to the following conditions:
- (a) rebate shall not, in each case, exceed the aggregate of the duty of Customs and additional duty of Customs levied by His Majesty's Government of Nepal on such goods when they are imported into Nepal from any country other than India;
- (b) the excisable goods shall be exported after payment of duty, directly from a factory or warehouse except as otherwise permitted by the Central Board of Excise and Customs by a general or special order;

- (c) the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise may in any particular case allow;
- (d) when the goods are exported by land, the export shall take place through any of the prescribed land customs stations or such other check-post as may be specified by the Central Board of Excise and Customs.
- (d) No, if a manufacturer manufactures various products, he has to avail CENVAT for all items or opt for exemption for all products.
This view has been upheld in *CCE v. Ramesh Foods Products (2004) 174 ELT 310 (SC)*, where it has been held that simultaneous availment of CENVAT credit on some products and exemption on some other products is not permissible.
- (e) Rule 27 of the Central Excise Rules, 2002 stipulates that where no other penalty is provided in the rules therein or in the Act, a breach of these rules shall be punishable with a penalty which may extend to Rs. 5,000 and with confiscation of the goods in respect of which the offence is committed.

PART - B

Question 4

- (a) Calculate the VAT liability for the period Jan. 1, 2007 to Jan. 31, 2007 from the following particulars:
Inputs worth Rs. 1,00,000 were purchased within the State. Rs. 2,00,000 worth of finished goods were sold within the State and Rs. 1,00,000 worth of goods were sold in the course of inter-State trade. VAT paid on procurement of capital goods worth Rs. 1,00,000 during the month was at 12.5%. If the input and output tax rate in the State are 12.5% and 4% respectively and the central sales tax rate is 3%, show the total tax liability under the State VAT law and under the Central Sales Tax Act. (5 Marks)
- (b) Calculate the net service tax payable under the provision of rule 2A of the Service tax (Determination of Value) Rules, 2006 relating to determination of value of services in the execution of a works contract from the following particulars:

(i) Gross amount for the works contract (excluding VAT)	Rs 1,00,000
(ii) Value of goods and materials sold in the execution of works contract	Rs. 70,000
(iii) CENVAT credit on (ii) above	Rs. 1,000
(iv) Service tax paid on input services	Rs. 1,000
(v) CENVAT credit on capital goods issued in the provision of works contract service	Rs. 1,000
(vi) Service tax rate	2.36%

Make suitable assumptions and provide explanations where required.

Answer

(a) Computation of the tax liability for the period Jan. 1, 2007 to Jan. 31, 2007:-

	Rs.
Inputs purchased in the month	1,00,000
Output sold in the month (within the State)	2,00,000
Inter-State sales	1,00,000
Input credit (including capital goods) (Rs.12,500 + Rs.12,500)	25,000
Output tax	8,000
CST for Inter-State sale	3,000
State VAT liability (Rs.8,000 – Rs.25,000)	Nil
Excess credit	17,000
Central sales tax to be paid (Rs.3,000 – Rs.17,000)	Nil
Excess credit carried forward to subsequent period	14,000

(b) Computation of the Net service tax payable:-

	Rs
Gross amount charged (excluding VAT)	1,00,000
Less: Value of goods and materials	<u>70,000</u>
	<u>30,000</u>
Service tax @ 12.36%	3,708
Less: CENVAT credit of service tax paid on input service + CENVAT credit of excise duty paid on capital goods (50%) [Rs 1,000 + (50% of Rs 1,000)] [Note 2]	<u>1,500</u>
Net service tax payable	<u>2,208</u>

Notes –

1. CENVAT credit of Rs.1,000 on value of goods and materials sold in the execution of works contract shall not be available to the assessee.
2. CENVAT credit in respect of capital goods shall be taken only for an amount not exceeding 50% of the duty paid on such capital goods in the same financial year and balance 50% shall be available in the subsequent financial year [Rule 4(2) of the CENVAT Credit Rules, 2004].

Question 5

- (a) XYZ Co. was involved in the services of unloading of coal from wagon tipping system, stacking/reclaiming of coal to stacker reclaimer system and feeding of coal to boiler bunkers through conveyer system. The Department had taken a view that the charges received by XYZ Co. for such activity were taxable under the category of 'cargo handling services' in terms of section 65(105) (zr) read with section 65(23) of the Finance Act, 1994. M/s XYZ Co. claimed that the services rendered by it cannot be brought under 'cargo handling service' as it is engaged only in the handling of coal from railway wagons to the required destination of the thermal power station wherein machines are used with the aid of some manpower.

Briefly explain, with reference to relevant provisions and case law, if any, whether the stand taken is correct in law. (5 Marks)

- (b) M/s Krishna Computer Colour Lab. is in the business of developing and printing of colour photographic films. It develops the negatives supplied by the customer and provides positive prints as per the order placed by the customer. The Department has demanded service tax on the entire amount charged from the customers without deduction of any amount towards cost of materials.

The assessee's contention is that no service tax could be charged on the material content since service tax is only a tax on services and not on goods. Therefore, the assessee has sought to bifurcate the gross receipts on account of processing of photographs into the portion attributable to goods and those attributable to services so that service tax could be paid with respect to the value of service alone in their case.

Briefly explain, with regard to decided case law, if any, whether the stand taken by M/s Krishna Computer Colour Lab. is correct in law. (5 Marks)

Answer

- (a) The facts in the case are similar to the matter decided by the Rajasthan High Court in *S.B. Construction Company v. UOI* (2006) 4 STR 545. The High Court has held that the service tax has been levied on cargo handling, i.e. on such services which undertake the activities of packing, unpacking, loading, unloading of goods to be transported by any means of transportation namely truck, rail, ship or aircraft. In the instant case, the services provided by the company under the contract is distinct i.e., transporting coal from wagons to thermal power station by conveyor belt and not by any means of transportation. Thus, the services rendered by the company cannot fall under the ambit of cargo handling services and as such is not liable to service tax.

- (b) Yes, the request of M/s. Krishna Computer Colour Lab is valid in law.

In a similar case in *Adlabs v. CCE* 2006 (2) STR 121, the Bangalore Tribunal held that the assessee was entitled to deduction of the cost of materials which were used during the course of providing the services of photography while computing the value of taxable services.

However, when the issue as to whether photography service included any sale of materials had come up for consideration before the Supreme Court in the case of *C.K. Jidheesh 2006 (1) STR 3 (SC)* and in case of *Rainbow Color Lab & Anr. v. State of M.P. & Ors. 2001 (134) ELT 332(SC)*, it was decided that photography contracts were pure service contracts in which there was no element of sale of goods. Hence, the question of bifurcating the receipts into an element of goods and the element of service could not and did not arise. Relying upon these two judgments, in case of *Laxmi Color Pvt. Ltd. v. CCE 2006 (3) STR 363 (New Dehi – CESTAT)*, the Tribunal held that the appellant was not entitled to any deduction in respect of cost of goods used during the course of providing service.

However, the decisions in case of *Rainbow Color Lab* case and *C.K. Jidheesh* case were overruled by the Supreme Court in case of *Bharat Sanchar Nigam Ltd. v. UOI 2006 (2) STR 161*. Therefore, when the issue again cropped up in case of *Shilpa Colour Lab. V. CCE (2007) 8 STT 102 (Tri.-Banglore)*, the Tribunal held that in the services relating to photography, if certain goods and materials were consumed, the value of those goods and materials could not be included in the value of taxable service. The Tribunal also observed that its earlier decision in the *Adlabs* case was correct and legal in the light of the Supreme Court decision in the *Bharat Sanchar Nigam* case.

Hence, the stand taken by M/s Krishna Colour Lab. is correct in law.

Question 6

- (a) State whether the following are taxable under the provisions of the Finance Act, 1994 relating to service tax:-
 - (i) Services provided in connection with the management of an organization by a management consultant having no professional qualification.
 - (ii) Advance payment received from the service recipient by a person rendering construction services under section 65(105) (zzzh) of the Act. (4 Marks)
- (b) State briefly, whether the following persons are liable to apply for registration under the Finance Act, 1994 and the Service Tax (Registration of Special Category of Persons) Rules, 2005 and if so, from which date:
 - (i) An input service distributor who starts his business with effect from 1st January, 2008.
 - (ii) A provider of taxable service under an unregistered brand name of another person. Aggregate value of taxable services was Rs. 6,00,000 up to 31.3.08. (4 Marks)
- (c) Write a brief note to explain the impact of VAT on lease transactions. (4 Marks)
- (d) Illustrate with an example, whether inter-State purchases liable to central sales tax are eligible for input credit and explain the effect of the same on inter-State transactions. (4 Marks)
- (e) Who are not eligible for composition scheme under the VAT regime? Discuss briefly. (4 Marks)

Answer

- (a) (i) Yes, as per section 65(65), no academic or professional qualification is required in order to be taxable under the category of 'management or business consultant' service. In case, a person is not professionally qualified and is providing service of management consultancy, he is still liable to pay service tax on the taxable value of services provided by him.
- (ii) Section 67(3) of the Finance Act, 1994 stipulates that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service. Thus, the advance payment received from the service recipient by a person rendering construction services under section 65(105) (zzzh) shall be liable to service tax.
- (b) (i) Yes, as per rule 3(1) of the Service Tax (Registration of Special Category of Persons) Rules, 2005, an input service distributor is liable to apply for registration within a period of 30 days of the commencement of business. Thus, in the given case, the input service distributor should apply for registration by 31.01.2008.
- (ii) Yes, a provider of taxable service under a registered brand name of another person is liable to apply for registration within a period of 30 days of commencement of business of providing taxable service as basic exemption for small service provider is not available to a service provider who provides taxable service under a trade name or brand name, whether registered or not, of another person.
- (c) Impact of VAT on lease transactions:-
1. Lease is chargeable to tax by virtue of sub – clause (d) of clause 29A of Article 366 of the Constitution of India. This is a tax on the transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.
 2. The taxable event is the transfer of right to use any goods and hence immovable property is not covered.
 3. The taxable turnover means the valuable consideration paid or payable for any sale in a given period. Certain States have provided for deduction of interest or finance charges for the purpose of determination of taxable turnover.
 4. Lease of an asset in the course of inter-State trade cannot be subject to VAT.
 5. Transfer of right to use does not presuppose ownership of the goods. A sub-lease of an asset also is taxable unless specifically exempt under the State VAT Law.
 6. Sale of leased asset after the end of the lease period is taxable as a normal sale.
 7. The maintenance of leased asset involving supply of materials for maintenance/ repair by the lessor will not amount to a works contract as there would be no transfer of property in such materials to the lessee. Hence, there should be no VAT on the value of materials supplied during maintenance/repair of the leased asset.

8. The assets given on lease will be generally capitalized by the lessor in his books and will be treated as capital assets. Thus, provision relating to input tax credit on capital goods will apply.
9. The lessor would pay VAT at the time of procurement of goods. However, liability to pay VAT on lease rentals will be spread over the tenure of the lease. Therefore, some States have provided for utilization of input credit for paying output tax only over the entire period of lease.

Note – Any four points can be mentioned in the above answer

- (d) The inter-State purchases liable to central sales tax are not eligible for input tax credit. However, the liability to central sales tax can be set off against the input tax credit earned on other eligible purchases. By way of an example, a dealer in State K purchases goods from another dealer in State M. The dealer in State M charges CST at 3% on this sale against C Form produced by dealer in State K. The tax is deposited in State M. Though it is called CST, the Central Government does not get any share in this and it is a revenue receipt of the selling State. The dealer in State K sells these goods within the State K and collects VAT which is deposited in State K. The question is whether the dealer in State K can claim input tax credit of the central sales tax paid by him to be set off against the VAT liability in State K. This is not possible as State K will not permit the set off against the tax paid to another State M. This is because the same if permitted would result in loss of revenue to State K. This is the reason why CST is not vatable.

The effect on inter-State trade is that trade will be uncompetitive for the States that are net importers because in those State consumer prices will be high. CST is origin based tax collected by the exporting State while VAT is a destination based consumption tax. They both cannot go together and to that extent the objective behind the VAT regime in lowering of prices for consumers cannot be achieved.

- (e) Small dealers having gross turnover exceeding Rs 5 lakhs but less than Rs 50 lakhs have option of composition scheme. They will have to pay a small percentage of gross turnover. They will not be entitled to any input tax credit.

However, the following are not eligible for the composition scheme:

- (i) a manufacturer or a dealer who sells goods in the course of inter-State trade or commerce; or
- (ii) a dealer who sells goods in the course of import into or export out of territory of India; or
- (iii) a dealer transferring goods outside the State otherwise than by way of sale or for execution of works contract; or
- (iv) a manufacturer/dealer who makes inter-State purchases; or
- (v) a dealer/manufacturer who issues vatable invoices.

PART - C

Question 7

A consignment of 800 metric tonnes of edible oil of Malaysian origin was imported by a charitable organization in India for free distribution to below poverty line citizens in a backward area under the scheme designed by the Food and Agricultural Organization. This being a special transaction, a nominal price of US\$ 10 per metric tonne was charged for the consignment to cover the freight and insurance charges. The Customs House found out that at or about the time of importation of this gift consignment there were following imports of edible oil of Malaysian origin:

S. No.	Quantity imported in metric tonnes	Unit price in US \$ (CIF)
1.	20	260
2.	100	220
3.	500	200
4.	900	175
5.	400	180
6.	780	160

The rate of exchange on the relevant date was 1 US \$ = Rs. 43.00 and the rate of basic customs duty was 15% ad valorem. There is no countervailing duty or special additional duty. Calculate the amount of duty leviable on the consignment under the Customs Act, 1962 with appropriate assumptions and explanations where required. (5 Marks)

Answer

Determination of transaction value of the subject goods:-

In the instant case, while determining the transaction value of the goods, following factors need consideration:-

1. In the given case, US \$10 per metric tonne has been paid only towards freight and insurance charges and no amount has been paid or payable towards the cost of goods. Thus, there is no transaction value for the subject goods. Consequently, we have to look for transaction value of identical goods under rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Customs Valuation (DVIG) Rules, 2007].
2. Rule 4(1)(a) of the aforementioned rules provides that subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued. In the six imports given during the relevant time, the goods are identical in description and of the same country of origin. It may be presumed that they were produced by the same person. Even otherwise, such consignments can be accepted as identical goods.

3. Further, clause (b) of rule 4(1) of the said rules requires that the comparable import should be at the same commercial level and in substantially same quantity as the goods being valued. Since, nothing is known about the level of the transactions of the comparable consignments, it is assumed to be at the same commercial level.
4. As far as the quantities are concerned, the consignments of 20 and 100 metric tonnes cannot be considered to be of substantially the same quantity. Hence, remaining 4 consignments are left for our consideration.
5. However, the unit prices in these 4 consignments are different. Rules 4(3) of Customs Valuation (DVIG) Rules, 2007 stipulates that in applying rule 4 of the said rules, if more than one transaction value of identical goods is found, the lowest of such value shall be used to determine the value of imported goods. Accordingly, the unit price of the consignment under valuation shall be US \$ 160 per metric tonne.

Computation of amount of duty payable:-

CIF value of 800 metric tonnes:

$$= 800 \times 160 = \text{US } \$ 1,28,000$$

At the exchange rate of \$ 1 = Rs.43

CIF Value (in Rupees)	=	Rs.55,04,000
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Add: Landing Charges at 1%	=	<u>Rs.55,000</u>
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	=	<u>Rs.55,59,040</u>
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15% of Ad Valorem duty

on Rs.55,59,040	=	Rs.8,33,856
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Add: Education cess @ 2%

(rounded off)	=	Rs.16,677
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Add: Secondary and higher education

cess @ 1% (rounded off)	=	Rs.8,339
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Total custom duty payable	=	Rs.8,58,872
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Question 8

M/s IES Ltd. (assessee) imported certain goods at US \$ 20 per unit from an exporter who was holding 30% equity in the share capital of the importer company. Subsequently, the assessee entered into an agreement with the same exporter to import the said goods in bulk at US \$ 14 per unit. When imports at the reduced price were effected pursuant to this agreement, the Department rejected the transaction value stating that the price was influenced by the relationship and completed the assessment on the basis of transaction value of the earlier imports i.e. at US \$20 per unit under rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007, viz transaction value of identical goods. State briefly, whether the Department's action is sustainable in law, with reference to decided cases, if any. (5 Marks)

Answer

No, the Department's action is not sustainable in law. Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 *inter alia* provides that persons shall be deemed to be "related" if one of them directly or indirectly controls the other. The word "control" has nowhere been defined under the said rules. As per the common parlance, the control is established when one enterprise holds at least 51% of the equity shareholding of the other company. However, in the instant case, the exporter company held only 30% of shareholding of the assessee. Thus, exporter company did not exercise a control over the assessee. So, the two parties cannot be said to be related.

The fact that assessee had made bulk imports could be a reason for reduction of import price. The burden to prove under valuation lies on the Revenue and in absence of any evidence from the Department to prove under-valuation, the price declared by the assessee is acceptable.

In the light of foregoing discussion, it could be inferred that Department's action is not sustainable in law.

Question 9

- (a) *Explain briefly, the significance of Indian customs waters under the Customs Act, 1962.*
- (b) *Section 14 of the Customs Act, 1962, with effect from 10.10.2007, and the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 are now fully compatible. Explain with a brief note.*
- (c) *Can warehoused goods be transferred from one warehouse to another under the Customs Act, 1962?*
- (d) *What is the minimum and maximum rate or amount of duty drawback prescribed under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 made under section 75 of the Customs Act, 1962? Explain with a brief note.*
- (e) *Briefly discuss, the procedure for confiscation of goods or imposition of penalty under section 124 of the Customs Act, 1962.* (2×5=10 Marks)

Answer

- (a) Significance of Indian customs waters is as follows-
 - (i) If an officer of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person informing him of the grounds for such arrest [Section 104 of the Customs Act, 1962].
 - (ii) Where the proper officer has reason to believe that any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any smuggled goods, he may stop any such vehicle, animal or vessel or, in case of an aircraft, compel it to land [Section 106 of the Customs Act, 1962].

- (iii) Any vessel which is or has been within the Indian customs waters is constructed, adapted, altered or fitted in any manner for the purpose of concealing goods shall be liable to confiscation [Section 115(1)(a) of the Customs Act, 1962].
- (iv) Customs officer has the power to search any person who has landed from/about to board/is on board any vessel within Indian customs waters and who has secreted about his person, any goods liable to confiscation or any documents relating thereto [Section 100 of the Customs Act, 1962].
- (v) Any goods which are brought within the Indian customs waters for the purpose of being imported from a place outside India, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, shall be liable to confiscation [Section 111(d) of the Customs Act, 1962].

Note - Any two points can be mentioned in the above answer.

- (b) As per erstwhile section 14 of the Customs Act, 1962, the 'Customs value' was 'deemed value'. However, the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 provided that the value of the imported goods should be based on the concept of 'transaction value' according to WTO Valuation Agreement. The Finance Act, 2007 has substituted a new section 14 for the earlier section 14 with an aim to rectify this anomaly. New section 14 speaks of transaction value. Consequently, the existing valuation rules have also been replaced by new valuation rules, separately for imported goods and export goods. Hence, now there is no inconsistency between the section and rules and these are now fully compatible.
- (c) Yes, section 67 of the Customs Act, 1962 permits removal of warehoused goods to other warehouse under bond, with the permission of the proper officer, subject to such conditions as may be prescribed.
- (d) Minimum rate of duty drawback - Rule 8(1) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provides that no amount or rate of drawback shall be determined in respect of any goods, the amount or rate of drawback of which would be less than one per cent of the F.O.B. value thereof, except where the amount of drawback per shipment exceeds five hundred rupees.

Maximum rate of duty drawback - Rule 8A of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provides that the drawback amount or rate shall not exceed one third of the market price of the export product.

- (e) Section 124 of the Customs Act, 1962 provides that before confiscating goods or imposing any penalty on any person, a show cause notice must be issued to the owner of goods giving grounds for confiscation or imposition of penalty and he should be given an opportunity to make representation and being heard. The show cause notice can be issued only with the prior approval of the officer of customs not below the rank of Deputy Commissioner of Customs.

The notice and the representation, at the request of the person concerned, can be oral.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2007 and Notifications/Circulars issued up to 30.04.2008 which are relevant for November 2008 examinations.

PAPER – 8 : INDIRECT TAXES

Answer to question nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

- (a) *Briefly explain the following with reference to the provisions of the Central Excise Act, 1944:*

(i) *Curing*

(ii) *Broker or Commission agent.*

(2 × 2 = 4 Marks)

- (b) *SC Ltd. is a manufacturer of caustic soda, cement etc. It uses LSHS (Low Sulphur Heavy Stock) as fuel for generating electricity which in turn is captively consumed for the manufacture of final products. It has claimed CENVAT credit on LSHS on the reasoning that this is used ‘in relation to manufacture of final products’ and hence it is an input.*

However, the department did not allow the credit as LSHS had been used to generate electricity, which is not excisable and hence LSHS could not be considered as input used as fuel. State with reasons whether the action taken by the department is covered by the CENVAT Credit Rules, 2004. You may take help of the decided case law(s), if any.

(4 Marks)

- (c) *Explain the term ‘normal transaction value’ under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. How is the term used for valuation of excisable goods?*

(4 Marks)

- (d) *A particular product of a manufacturer was exempt from duty. Subsequently, central excise duty was imposed on it. The manufacturer assessee continued to sell the product without any change in selling price. Later, he realised that he had paid higher quantum of duty. He filed a refund claim stating that there was no change in the price before and after imposition of duty and hence, the burden of duty has not been passed on to the buyer. Will his stand for refund claim be acceptable ? Discuss briefly.*

(4 Marks)

- (e) *State in brief the penal provisions under the Central Excise Act, 1944 and rules made thereunder if a manufacturer of excisable goods does not apply for registration.*

(4 Marks)

Answer

- (a) (i) As per section 2(c) of the Central Excise Act, 1944, ‘curing’ includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture.

- (ii) As per section 2(aaa) of the Central Excise Act, 1944, broker or commission agent means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others.

- (b) In the present case, LSHS (low sulphur heavy stock) is used as fuel for generation of 'electricity', which in turn is used in relation to manufacture of final products.

As per rule 2(k)(i) of the CENVAT Credit Rules, 2004, goods used for generation of electricity used in or in relation to manufacture of final products or for any other purpose, within the factory of production, are inputs.

Thus, SC Ltd. can claim CENVAT credit on LSHS and hence, the action taken by the department is not covered by the CENVAT Credit Rules, 2004. The Apex Court in the case of *CCE v. Solaris Chemtech Ltd. (2007) 214 ELT 481 (SC)* has also confirmed that LSHS and furnace oil used for generation of electricity used for manufacture of final products are inputs eligible for CENVAT credit.

- (c) As per rule 2(b) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, 'normal transaction value' means the transaction value at which the greatest aggregate quantity of goods are sold.

The term is used for valuation in case of depot transfer under rule 7, sale to related person under rule 9 and valuation in case of job-work under rule 10A of the said rules.

In case of depot transfer under rule 7, the value of the excisable goods is the normal transaction value of such goods sold from such depot at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.

In case of sale to related person under rule 9, the value of the excisable goods is the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail.

Under rule 10A(ii), where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker.

- (d) In *CCE v. Allied Photographics 2004 166 ELT 3(SC)*, it has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Thus, even if the price remains the same before and after imposition of duty, the assessee has to establish that he has not passed on the burden of duty to the buyer.

Thus, the refund claim of the manufacturer will not be acceptable.

- (e) As per section 9(1)(a) of the Central Excise Act, 1944, any person who contravenes the provisions of rules regarding registration of a unit (required under section 6 of the Act), shall be punishable with imprisonment upto seven years and fine (without limit) if the duty leviable on the excisable goods exceeds Rs.1,00,000. The imprisonment should be minimum for six months unless there are special and adequate reasons for granting lesser punishment. However, if the duty leviable on goods is less than Rs.1,00,000, imprisonment upto three years or fine or both can be imposed.

Under rule 25 of the Central Excise Rules, 2002, where any manufacturer or producer engages in manufacture, production or storage of any excisable goods without having applied for registration, all such goods shall be liable to confiscation. Moreover, such manufacturer/producer shall also be liable to a penalty not exceeding the duty on such excisable goods or Rs.2,000, whichever is greater.

Question 2

- (a) *P Ltd. manufactures two products namely 'A' and 'B'. 'A' is a specified product under section 4A of the Central Excise Act, 1944. The sale prices of products 'A' and 'B' are Rs.50 per unit and Rs.30 per unit respectively. The sale prices of both the products include 14% basic excise duty plus 2% education cess and 1% secondary and higher education cess. Central sales tax @ 3% is also included in both the selling prices.*

1,00,000 units each of the two products were removed from the factory for sale. Calculate the total excise duty liability of P Ltd. on both the products assuming that 40% abatement is permissible under section 4A on product 'A'. (5 Marks)

- (b) *What is the 'relevant date' for claiming refund under section 11B of the Central Excise Act, 1944? (4 Marks)*
- (c) *What are the documents required to be submitted for filing claim of rebate by an exporter? (4 Marks)*
- (d) *K Ltd. is a manufacturer of glass fibre reinforced plastics, which are used for roofing sheets and partition. It is manufactured by impregnating plastics with glass to give stiffness and increased insulated capacity. Mention the relevant rule of "General Interpretative Rules", which is applicable here for the classification of the product. (2 Marks)*

Answer

- (a) Computation of duty liability in case of product 'A'

	Rs.
Retail sale price (Rs.50 x 1,00,000)	50,00,000
Less: 40% abatement	<u>20,00,000</u>
Assessable value under section 4A	<u>30,00,000</u>
Excise duty + cess @ 14.42% on Rs.30,00,000	<u>4,32,600</u>

Note : Sale price of product 'A' is taken as its retail sale price as it includes central sales tax, excise duty and cesses.

Computation of duty liability in case of product 'B'

	Rs.
Sale price (Rs.30 x 1,00,000)	30,00,000
Less : Central sales tax (Rs.30,00,000 x 3/103)	<u>87,379</u>
Price inclusive of excise duty & cess	<u>29,12,621</u>
Excise duty payable (Rs.29,12,621 x 14.42)/114.42	<u>3,67,069</u>

- (b) The relevant dates for claiming refund under section 11B of the Central Excise Act, 1944 in different circumstances are given in the following table:

Particulars	Relevant date
(i) In case of exports	
(a) by sea or air	Date of departure of the ship or aircraft
(b) by land	Date on which the goods pass the frontier
(c) by post	Date of despatch of goods by post office
(ii) In case of goods returned to factory for being remade, refined etc.	Date of entry into factory
(iii) In case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India	Date of entry into the factory
(iv) In case of reduction of duty in case of compounded levy scheme	Date of reduction
(v) In case of a person, other than the manufacturer	Date of purchase of the goods by such person
(vi) In case of provisional assessment	Date of adjustment of duty after final assessment
(vii) In case of a refund arising as a consequence of judgment, decree, order or direction of Appellate Authority, Tribunal, any court	Date of such judgment, decree, order or direction

(viii) In case of goods exempt from payment of duty vide a special order issued under section 5A(2)	Date of issue of such order
(ix) In any other case	Date of payment of duty

Note: Any four cases of relevant dates can be given in the answer.

- (c) An exporter has to submit the following documents for filing claim of rebate:
- (i) a request on the letterhead of the exporter containing claim of rebate, A.R.E. 1 numbers and dates, corresponding invoice numbers and dates, amount of rebate on each A.R.E. 1 and its calculations
 - (ii) original copy of the A.R.E. 1
 - (iii) invoice issued under rule 11
 - (iv) self attested copy of shipping bill
 - (v) self attested copy of bill of lading
 - (vi) disclaimer certificate (in case where claimant is other than exporter)
- (d) In this case, rule 3(b) of the General Interpretative Rules will apply as the product is a 'composite item'. Rule 3(b) provides that mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale should be classified on the basis of material or component which gives the product its essential character.

Therefore, since plastic is the more essential item in the product, applying the test of essentiality, the product will be classified under plastic items under the appropriate heading of the tariff. Same view was expressed in the case of *Kemrock Industries and Exports Ltd. v. CCE (2007) 210 ELT 497 (SC)*

Question 3

- (a) *Briefly explain the provisions of sub rule (5B) of rule 3 of the CENVAT Credit Rules, 2004 regarding the value of input or capital goods, on which CENVAT credit has been taken, is written off fully, before being put to use.* (4 Marks)
- (b) *Discuss briefly the provisions of rule 4(4) of the Central Excise Rules, 2002 regarding storage of non-duty paid goods outside the factory.* (4 Marks)
- (c) *Mention any four important types of bonds with their purpose for use under the central excise laws.* (4 Marks)
- (d) *Write a note on publication of information in respect of certain person in certain cases under the Central Excise Act, 1944.* (3 Marks)

Answer

- (a) Sub-rule (5B) of rule 3 of the CENVAT Credit Rules, 2004 provides that if the value of any,

- (i) input, or
- (ii) capital goods before being put to use,

on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods. However, if the said input or capital goods is subsequently used in the manufacture of final products, the manufacturer shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules.

- (b) As per rule 4(4) of the Central Excise Rules, 2002, the storage of non-duty paid goods outside the factory can be permitted by the Commissioner of Central Excise subject to such safeguards as he may specify. Such storage outside the factory premises is permissible in exceptional circumstances having regard to the nature of the goods and shortage of storage space in the factory.
- (c) Bond is a collateral security and its purpose is to secure compliance with the rules and procedures laid down under the excise law. The types and purpose of the bonds are given below.

Type of bond	Purpose
B -1 Surety/Security	Export of goods without payment of duty (Rule 19)
B - 2 Surety/Security	Provisional Assessment
B - 3	Despatch of excisable goods removed for rewarehousing and export therefrom without payment of duty
B - 11	Provisional release of seized goods
B – 17 Surety/Security	Composite bond of 100% EOUs/EPZ for assessment, export, accounting and disposal of excisable goods obtained free of duty

Note: Any four types of bonds can be given in the answer.

- (d) Section 37E of the Central Excise Act, 1944 provides that the Central Government may publish the name and other particulars of any person relating to any proceeding under the central excise law, in such manner as it thinks fit, if in its opinion it is in public interest to do so. However, the publication in relation to any penalty can be made 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.

In case of a firm, company or other association of persons, the name (s) of partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association may also be published if circumstances justify such publication.

Question 4

- (a) *State the matters, which can be referred for advance ruling under section 23C of the Central Excise Act, 1944.* (5 Marks)
- (b) *Which goods, bearing the brand name or trade name of others, are eligible for exemption available to small-scale units?* (5 Marks)
- (c) *A manufacturer purchased certain inputs from Z. The assessable value was Rs.20,000 and the central excise duty was calculated at Rs.3,296 making the total amount of invoice at Rs.23,296. However, the buyer manufacturer paid only Rs.20,800 to Z in full settlement of this bill. How much CENVAT credit can be availed by the manufacturer and why?* (3 Marks)
- (d) *A merchant manufacturer gets the goods manufactured according to his design and specifications from a job worker. Who will be called as manufacturer under the central excise law?* (2 Marks)

Answer

- (a) The following matters can be referred for advance ruling under section 23C of the Central Excise Act, 1944:
 - (i) classifications of any goods under the Central Excise Tariff Act, 1985;
 - (ii) applicability of a notification issued under section 5A(1) having a bearing on the rate of duty;
 - (iii) principles to be adopted for the purposes of determination of value of goods under the provisions of the Central Excise Act, 1944;
 - (iv) notifications issued, in respect of duties of excise under the Central Excise Act, 1944, the Central Excise Tariff Act, 1985 and any duty chargeable under any other law for the time being in force in the same manner as duty of excise leviable under the Central Excise Act, 1944;
 - (v) admissibility of credit of excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods;
 - (vi) determination of the liability to pay excise duty on any goods under the Central Excise Act, 1944.

Note: Any five matters can be given in the answer.

- (b) As per *Notification No. 8/2003 dated 01.03.2003* as amended, the small scale exemption is available in respect of the goods bearing the brand name or trade name of others in the following instances:

- (a) where the goods, being in the nature of components or parts of any machinery or equipment or appliances, are cleared for use as original equipment in the manufacture of the said machinery or equipment or appliances by following the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001;
 - (b) where the goods bear a brand name or trade name of -
 - (i) the Khadi and Village Industries Commission; or
 - (ii) a State Khadi and Village Industry Board; or
 - (iii) the National Small Industries Corporation; or
 - (iv) a State Small Industries Development Corporation; or
 - (v) a State Small Industries Corporation;
 - (c) where the goods are manufactured in a factory located in a rural area;
 - (d) where the goods are account books, registers writing pads and file folders falling under Heading 4820 or 4821 of the First Schedule.
- (c) As per rule 3(1) of the CENVAT Credit Rules, 2004, a manufacturer of final products is allowed to take credit of excise duty paid on any input or capital goods received in the factory of manufacture of final product. Thus, in case of inputs or capital goods the eligibility of availing CENVAT credit does not depend upon making the payment for such inputs or capital goods to the supplier.

Therefore, the manufacturer can avail full CENVAT credit of Rs.3296, provided Z does not claim the refund of the excess excise duty paid by him.

- (d) Excise duty liability arises when goods are manufactured. Thus, only if the goods are manufactured during job work, excise duty liability will arise. It will be immaterial as to who has supplied the raw material. However, if an item is only repaired or the process undertaken by the job worker does not amount to manufacture, there will not be any duty liability.

Thus, in the given case the job-worker will be the manufacturer as he is the one who manufactures the goods as per the design and specifications of the merchant manufacturer.

Question 5

- (a) *Discuss whether remission of duty will be granted under the Central Excise Rules, 2002, in the following cases:*
 - (i) *Loss of molasses due to auto combustion in sugar factory.*
 - (ii) *Normal evaporation, storage and handling losses of petroleum products.*
 - (iii) *There was natural calamity in the factory, but the department was not intimated in time.* (2 × 3 = 6 Marks)
- (b) *What do you mean by scrutiny of assessment in view of the self- assessment procedure under central excise?* (3 Marks)

- (c) SP Ltd. purchased capital goods worth Rs.11,44,200, inclusive of excise duty @ 14.42%, on 1.4.2007. CENVAT credit attributable on such capital goods was duly accounted for. You are required to compute the amount of CENVAT credit to be reversed, if the capital goods were removed, after being used, on 2.11.2008. (3 Marks)
- (d) State the obligation of a small-scale unit to file declaration under the following circumstances:

Year	Turnover (Rs. in lakhs)
2006-07	45
2007-08	80
2008-09	100

(3 Marks)

Answer

- (a) (i) Yes. Loss of molasses due to auto combustion in sugar factory is an unavoidable accident and hence, remission is admissible [*Shankar Sugar Mills v. CCE 1994 (71) ELT 753 (Tri.)*].
- (ii) Yes. Remission can be granted in case of normal evaporation, storage and handling losses of petroleum products.
- (iii) Yes. Remission cannot be denied simply because there was delay in giving intimation to the Department. If there is a natural calamity in the factory, procedural lapse cannot come in the way of benefit [*Bengal Chem. & Pharmaceuticals Ltd. v. CCE 2003 (158) ELT 327*].
- (b) In view of the self-assessment procedure wherein the assessee himself assesses the duty liability, the Departmental officers have been entrusted with the responsibility of scrutinizing the assessment for verification of its correctness.
- For this purpose, the proper officer may on the basis of information contained in the return filed by the assessee and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee on the goods removed, in the manner to be prescribed by the Board [Rule 12(3)]. Sub-rule 4 of rule 12 casts a responsibility on every assessee to make available to the proper officer all the documents and records for verification as and when required by such officer.
- (c) As per the second proviso to rule 3(5) of the CENVAT Credit Rules, 2004, where any capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the CENVAT credit.

No. of quarters or part thereof expired from 1.4.2007 to 2.11.2008 = 7 quarters

Amount of CENVAT credit taken = $(11,44,200 \times 14.42)/114.42$ = Rs.1,44,200

Amount of CENVAT credit to be reserved = Rs.1,44,200 – (17.5% of Rs.1,44,200)
= Rs.1,18,965

- (d) SSI units whose turnover is more than prescribed limit (called specified limit) have to file a declaration in a prescribed form. The specified limit is defined as Rs.60 lakh below the exemption limit. The exemption limit was Rs.100 lakh in 2006-07. However, from 01.04.2007 it was raised to Rs.150 lakh. Thus, the specified limit for the year 2006-07 is Rs.40 lakh and from 2007-08 onwards it has been increased to Rs.90 lakh.

Therefore, the unit was required to file the declaration in the year 2006-07, as the turnover was Rs.45 lakh (more than Rs.40 lakh). However, such declaration has to be filed only once in the lifetime of the assessee and not every year. Therefore, the unit is not required to file the declaration again in the year 2008-09 when its turnover is anticipated to cross the limit of Rs.90 lakh.

PART – B

Question 6

- (a) *Explain briefly, with reference to the provisions of the Customs Act, 1962, the following:*
- Bill of export*
 - Import report* (2 × 2 = 4 Marks)
- (b) *Answer the following with reference to the provisions of section 14 of the Customs Act, 1962 and the rules made thereunder:*
- What shall be the value, if there is a price rise between the date of contract and the date of actual importation?*
 - Whether the payment for post-importation process is includible in the value if the same is related to imported goods and is a condition of the sale of the imported goods?*
 - Bill of entry was filed on 27.10.2008. Will you apply the exchange rate notified by the Central Board of Excise and Customs on 25.9.2008 or notified on 25.10.2008?* (2 × 3 = 6 Marks)
- (c) *BL Ltd. imported Super Kerosene Oil (SKO) and stored it in a warehouse. An ex-bond bill of entry for home consumption was filed and duty was paid as per rate prevalent on the date of presentation of such bill of entry; and the order for clearance for home consumption was passed. On account of highly combustible nature of SKO, the importer made an application to permit the storage of such kerosene oil in the same warehouse until actual clearance for sale/use. The application was allowed. When the goods were actually removed from the warehouse, the rate of duty got increased. The department demanded the differential duty. The company challenged the demand. Whether it will succeed? Discuss briefly taking support of decided case law(s), if any.* (5 Marks)

- (d) What are the conditions required to be fulfilled by the importer to make the imported goods eligible for preferential rate of duty prescribed by the Central Government by notification under section 25 of the Customs Act, 1962? (5 Marks)

Answer

- (a) (i) As per section 2(5) of the Customs Act, 1962, bill of export means a bill of export referred to in section 50. Section 50 *inter alia* provides that the exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported by land, a bill of export in the prescribed form.
- (ii) As per section 2(24) of the Customs Act, 1962, import report means the report required to be delivered under section 30. Section 30 *inter alia* provides that the person-in-charge of a vehicle carrying imported goods or any other person as may be notified by the Central Government shall, in the case of a vehicle, deliver to the proper officer an import report within twelve hours after its arrival in the customs station, in the prescribed form.
- (b) (i) As per the amended section 14(1) of the Customs Act, 1962, the value of imported or export goods shall be their transaction value. The old concept of deemed value has been dispensed with. Accordingly, the value of the goods shall be the price of contract (i.e., the transaction value), even if there is price rise subsequently.
- (ii) On account of insertion of explanation to rule 10(1) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the payment for post-importation process is includible in the value of the imported goods if the same is related to such imported goods and is a condition of the sale thereof.
- (iii) The third proviso to section 14(1) of the Customs Act, 1962 *inter alia* provides that for imported goods, value under section 14(1) shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46. The rate of exchange applicable for a month is generally notified by the Board in the preceding month. Hence, the rate notified on 25.09.08 will apply for the bill of entry filed on 27.10.2008.
- However, it may be noted that the rate of exchange is not notified during the preceding month as a rule as the power to determine the rate of exchange given to the Board vide clause (a) of the explanation to section 14 of the Customs Act, 1962 is open ended.
- (c) Yes, the company will succeed. The facts of the given situation are similar to the case of *CCUs vs. Biecco Lawrie Ltd. 2008 (223) ELT 3 (SC)* wherein the Supreme Court has held that where duty on the warehoused goods is paid and out of charge order for home consumption is made by the proper officer in compliance of the provisions of section 68, the goods removed in smaller lots have to be treated as cleared for home consumption and importer would not be required to pay anything more.

Further, section 49 of the Customs Act, 1962 *inter alia* also provides that imported goods entered for home consumption if stored in a public warehouse, or in a private warehouse

on the application of the importer that the same cannot be cleared within a reasonable time shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods.

- (d) The Government may by notification under section 25 of the Customs Act, 1962 prescribe preferential rate of duty in respect of imports from certain preferential areas. The importer will have to fulfill the following conditions to make the imported goods eligible for preferential rate of duty:
- (i) At the time of importation, he should make a specific claim for the preferential rate.
 - (ii) He should also claim that the goods are produced or manufactured in such preferential area.
 - (iii) The area should be notified under section 4(3) of the Customs Tariff Act, 1975 to be a preferential area.
 - (iv) The origin of the goods shall be determined in accordance with the rules made under section 4(2) of the Customs Tariff Act, 1975.

Question 7

- (a) *Briefly explain the law relating to private warehouses. What are the guidelines for storage of sensitive goods in such warehouses?* (6 Marks)
- (b) *Who has the powers to -*
- (i) *appoint inland container depots;*
 - (ii) *appoint land customs stations;*
 - (iii) *specify limits of customs area; and*
 - (iv) *appoint public warehouse at places notified under the Customs Act, 1962?*
- (1 × 4 = 4 Marks)
- (c) *Explain the provisions of section 146 of the Customs Act, 1962 regarding licensing of customs house agents.* (5 Marks)

Answer

- (a) According to section 58 of the Customs Act, 1962, at any warehousing station, the Assistant/Deputy Commissioner may licence private warehouses where dutiable goods or any other imported goods may be deposited. However, where public warehouses are available, private warehouses are not permitted.

The Assistant Commissioner may cancel the licence by giving one month notice in writing to the licensee or if the licensee has contravened any provisions of the Customs Act, 1962 or any of the conditions of the licence. However, the cancellation of the licence in the latter case can be done only by giving the licensee a reasonable opportunity of being heard.

In case of sensitive items, the following guidelines are to be observed:

- (i) Applicants should produce a Solvency Certificate from a Scheduled Bank of repute for a value not less than Rs.50 lakhs;
- (ii) Such warehouses should not be located in residential areas;
- (iii) The premises should be secure, possess fire-fighting provisions and be easily accessible to the customs officers;
- (iv) Goods deposited should be fully insured for a value at least equal to the customs duty;
- (v) The proprietor/partner/director must not be involved in any customs or excise offence;
- (vi) A cash deposit/ bank guarantee equal to 25% of the duty liability (effective duty foregone) will be taken for each consignment.

Note: Any three guidelines can be given in the answer.

- (b) (i) Section 7 of the Customs Act, 1962 empowers the Central Board of Excise and Customs to appoint inland container depots.
- (ii) Section 7 of the Customs Act, 1962 empowers the Central Board of Excise and Customs to appoint land customs stations.
- (iii) Section 8 of the Customs Act, 1962 empowers the Commissioner of Customs to specify limits of customs area.
- (iv) Section 57 of the Customs Act, 1962 empowers the Assistant/Deputy Commissioner of Customs to appoint public warehouse at places notified under the Customs Act, 1962.
- (c) Section 146 of the Customs Act, 1962 stipulates that no person shall carry on the business as an agent relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the regulations.

The Board may make regulations for the purpose of carrying out the provisions of this section and, in particular, such regulation may provide for:

- (i) the authority by which a licence may be granted under the section and the period of validity of any such licence;
- (ii) the form of the licence and the fees payable therefor;
- (iii) the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as an agent;
- (iv) the restrictions and conditions subject to which licence may be granted;
- (v) the circumstances in which a licence may be suspended or revoked;
- (vi) the appeals, if any, against an order of suspension or revocation of a licence, and the period within which such appeals shall be filed.

Question 8

- (a) *Explain the obligation cast on person-in-charge on arrival of vessels or aircrafts in India under section 29 of the Customs Act, 1962.* (5 Marks)
- (b) *Explain the term 'joint venture in India' under the explanation to section 28E(c) of the Customs Act, 1962 for the purpose of advance ruling.* (5 Marks)
- (c) *A show cause notice demanding customs duty was issued in case of clearances made by a 100% Export Oriented Undertaking (EOU) to Domestic Tariff Area (DTA). Is the show-cause notice defective in law?* (3 Marks)
- (d) *What do you mean by assessment of goods under the Customs Act, 1962?* (2 Marks)

Answer

- (a) Section 29(1) of the Customs Act, 1962 provides that the person-in-charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land:

- (i) for the first time after arrival in India; or
- (ii) at any time while it is carrying passengers or cargo brought in that vessel or aircraft at any place other than a customs port or a custom airport, as the case may be.

Sub-section (2) of section 29 provides that the above provisions are not applicable in relation to any vessel or aircraft, which is compelled by accident, stress of weather or other unavoidable cause to call or land at a place other than a customs port or customs airport. However, in such a case the person-in-charge of such vessel or aircraft has the following obligations cast on him:

- (i) He shall have to report the arrival of the vessel/landing of the aircraft to the nearest customs officer or the officer-in-charge of a police station and shall produce the log book belonging to the vessel or the aircraft if demanded.
 - (ii) He shall not without the consent of any such officer permit any goods carried in the vessel or the aircraft to be unloaded from, or any of the crew or passengers to depart from the vicinity of, the vessel or the aircraft. However, passengers and crew can be allowed to depart from the vicinity of, or the goods can be removed from, the vessel/aircraft if the same is necessary for reason of health, safety or preservation of life or property.
 - (iii) He shall comply with any directions given by any such officer with respect to any such goods.
- (b) As per section 28E (c) of the Customs Act, 1962 which defines an applicant eligible for advance ruling, a joint venture in India is an eligible applicant. The concept of joint venture in India has been explained in a new explanation inserted in the definition of the applicant.

The explanation clarifies that joint venture in India means a contractual arrangement whereby two or more person undertake an economic activity which is subject to joint

control and one or more of the partners or participants or equity holders is a non resident having substantial interest in such arrangement.

- (c) Yes, the show cause notice issued is defective in law as in respect of clearances made by a 100% export oriented undertaking (EOU) to domestic tariff area, the duty to be paid by the 100% EOU is the duty of excise and not customs duty. Therefore, show cause notice using the word 'customs duty' instead of 'central excise duty' is not maintainable. Similar view was expressed in the case of *CCE v. Suresh Synthetics (2007) 216 ELT 662 (SC)*.
- (d) The provisions regarding assessment of goods are contained in section 17 of the Customs Act. After the bill of entry is filed, it is assessed by the appraisers of the customs department. There are two systems of assessment:
 - (i) First appraisalment system or first check procedure: In this type of assessment, goods are examined first and then assessed [Section 17(2)].
 - (ii) Second system of assessment or second check procedure: In this type of assessment, goods are assessed first and then examined [Section 17(4)].

PART – C

Question 9

- (a) *Explain in brief the manner of determination of value as per rule 3 of the Service Tax (Determination of Value) Rules, 2006.* (4 Marks)
- (b) *What action can be taken by the department in case of misuse of service tax credit?* (3 Marks)
- (c) *The value of service provided by a consulting engineer is Rs.10,00,000. He has paid Rs.50,000 as cess under section 3 of the Research and Development Cess Act, 1986. What is the amount of service tax payable by him?* (3 Marks)
- (d) *Whether a manufacturer of excisable goods, who has paid service tax on freight, can himself take credit of service tax paid, if such transportation service is in relation to the manufacture and clearance of his final products?* (3 Marks)
- (e) *The goods manufactured by a company got destroyed by fire. The payment of duty was ordered to be remitted. Is the company required to reverse the CENVAT credit taken on input services used in manufacture of such destroyed goods?* (2 Marks)

Answer

- (a) As per rule 3 of the Service Tax (Determination of Value) Rules, 2006, the value of taxable service, the consideration for which is not wholly or partly consisting of money, shall be determined by the service provider in the manner described below. However, the same is subject to the provisions of section 67.
 - (i) The value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade. The gross amount charged is the sole consideration.

- (ii) Where the value cannot be determined in accordance with above clause, the service provider shall determine the equivalent money value of such consideration. However, such value shall in no case be less than the cost of provision of such taxable service.
- (b) The following actions can be taken by the Department in case of misuse of service tax credit:
- (i) Penalty extending upto Rs.2,000 can be levied if a person has taken CENVAT credit in respect of input service wrongly [Rule 15(3) of the CENVAT Credit Rules, 2004];
 - (ii) Penalty prescribed under section 78 of the Finance Act, 1994 shall also be levied on the output service provider if the CENVAT credit in respect of input services has been taken or utilized wrongly by reason of fraud, collusion etc. with an intent to evade payment of service tax [Rule 15(4) of the CENVAT Credit Rules, 2004];
 - (iii) The special audit, in cases where credit of duty availed or utilized is not within the normal limits etc., prescribed under section 14AA of the Central Excise Act, 1944 can be ordered in case of misuse of service tax credit.
- (c) *Notification No. 18/2002 dated 16.12.2002* provides exemption to the taxable services provided by a consulting engineer to a client on transfer of technology from so much of the service tax leviable thereon as is equivalent to the amount of cess paid on the said transfer of technology under the provisions of section 3 of the Research and Development Cess Act, 1986.

Thus, service tax payable will be computed in the following manner:

Value of taxable services	= Rs.10,00,000
Service tax @ 12.36%	= Rs.1,23,600
Less : Cess paid	= <u>Rs.50,000</u>
Net service tax payable	= <u>Rs. 73,600</u>

- (d) Credit of service tax paid on freight is eligible in case of the manufacturer who pays service tax for inward transportation and satisfies the definition of input service. For outward freight, credit is admissible upto the place of removal.
- (e) As per rule 3(5C) of the CENVAT Credit Rules, 2004, where on any goods manufactured by an assessee, the payment of duty is ordered to be remitted, the credit taken on inputs used in the manufacture of said goods shall be reversed. Thus, there is no requirement for the reversal of CENVAT credit taken on input services used in the manufacture of such goods.

The suggested answers for Indirect Tax Laws (Paper 8) are based on the provisions as amended by the Finance Act, 2008 and Notifications/Circulars issued up to 31.10.2008 which are relevant for June 2009 examinations.

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Answer all questions.

SECTION-A

Question 1

- (a) Determine the total amount of excise duty payable on a machine using the details given below:

	Rs.
(i) Sale price of the machine excluding taxes and duties	2,00,000
(ii) Sales tax	20,000
(iii) Cost of durable and returnable packing included in the sale price given at (i) above	5,000
(iv) Design and development charges paid by buyer on behalf of seller to a third party	20,000
(v) Warranty charges charged separately by the seller	5,000
Rate of excise duty	16%
Education cess	3%

Calculations should be supported by notes, wherever required. (5 Marks)

- (b) X, a manufacturer purchased 500 kgs of inputs on 1.10.2007. Total assessable value of inputs was Rs. 10,000 and excise duty of 16% and 2% of excise duty as education cess was paid on the input. On the day of receipt itself, inputs were sent to the job worker. Job worker sent back 50% of the inputs on 1.4.2008 and balance 50% on 31.5.2008. X received back the processed the inputs on the same day. Calculate the CENVAT credit required to be reversed or that can be availed on relevant dates and net availment and reversal in the financial years 2007-08 and 2008-09. (5 Marks)
- (c) Y & Co. is a small scale unit located in a rural area and is availing the benefit of small scale exemption under Notification No. 8/2003-C.E. during the year 2007- 08. Determine the value of the first clearances of the unit and duty liability on the basis of data given below:-

	Rs.
(1) Total value of clearances of goods with own brand name	75,00,000
(2) Total value of clearances of goods with brand name of other parties	90,00,000
(3) Clearances of goods which are totally exempt under another notification (other than an exemption based on quantity or value of clearances)	35,00,000

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Normal rate of Excise duty - 16%

Education cess @ 3% of Excise duty.

Calculations should be supported with appropriate notes.

It may be assumed that the unit is eligible for exemption under Notification No. 8/2003.

(5 Marks)

Answer

(a) Computation of total amount of excise duty payable:-

<i>Particulars</i>	<i>Rs.</i>
Sale price of the machine excluding taxes and duties	2,00,000
Add : Design and development charges (Note-3)	20,000
Add: Warranty charges (Note-4)	5,000
Less : Cost of durable and returnable packing (Note-2)	<u>5,000</u>
Assessable value	<u>2,20,000</u>
Excise duty @ 16%	35,200
Education cess @ 3%	<u>1,056</u>
Total excise duty payable (Rs. 35,200 + Rs. 1,056)	<u>36,256</u>

Notes:

1. Sales tax is not included since the definition of transaction value as per section 4 specifically excludes sales tax paid or payable on the goods.
 2. Cost of durable and returnable packing shall not form a part of transaction value.
 3. Design and development charges are essential for the purpose of manufacture and to make the product marketable. Hence, they have to be included in the assessable value, since payment is 'in connection with sale'.
 4. If the warranty charges are charged separately and are not considered as "price" of the goods by the assessee, then warranty charges will be includible in the transaction value forming basis of the valuation [Circular No. 354/81/2000-TRU dated 30.06.2000].
- (b) As per rule 4(5) of CENVAT Credit Rules, 2004, a manufacturer or output service provider is entitled to claim CENVAT credit on the inputs that are cleared to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose provided the goods are returned back in the factory within 180 days of their being sent to the job worker. In case inputs are not returned within 180 days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit

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attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service.

	Rs.
CENVAT credit that can be taken on 1.10.2007 (Rs. 10,000×16.32%)	1,632
CENVAT credit that should be reversed on 30.3.2008	1,632
 CENVAT credit availed and reversed in financial year 2007-08	 1,632
 CENVAT credit that can be taken on 1.4.2008 (50% of Rs. 1,632)	 816
CENVAT credit that can be taken on 31.5.2008 (50% of Rs. 1,632)	816
 CENVAT credit availed in financial year 2008-09	 1,632

(c) Computation of the value of first clearances and the duty liability:-

Particulars	Rs.
1. Value of clearances of goods with own brand name	75,00,000
2. Value of clearance of goods with brand name of other parties (Note-1)	<u>90,00,000</u>
Total value of first clearances	<u>1,65,00,000</u>
Value on which duty is chargeable (Rs. 1,65,00,000 – 1,50,00,000) = Rs. 15,00,000	
Excise duty payable @ 16% (Rs. 15,00,000 × 16%)	2,40,000
Education cess payable @ 3% (Rs. 2,40,000 × 3%)	<u>7,200</u>
Total excise duty payable	<u>2,47,200</u>

Notes:

1. SSI units in rural area are eligible to clear goods with other's brand name availing the exemption as per Notification No. 8/2003.
2. Notification No. 8/2003 also provides that value of clearances of goods totally exempt under other notifications need not be taken into account for calculation of aggregate value of first clearances.

Question 2

- (a) *M/s ABC Ltd. was a cement manufacturer. The company used ropeway system for bringing crushed limestone from the mines located 4 - 5 kms away from the factory. A part of ropeway system was installed in the factory and the system was controlled from*

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the factory. M/s ABC Ltd. availed CENVAT credit on parts / spares for ropeway system treating the same as capital goods. The Central Excise Department denied CENVAT credit on the ground that ropeway is used for transporting raw materials from the mines to the factory and can not be considered as material handling system within the factory premises. Examine, with the help of a decided case law, whether the stand taken by the Department is correct in law. (5 Marks)

- (b) *A Port Trust used cement concrete armour units in the harbour for keeping water calm. Each unit weighed about 50 tons and is like a tripod and keeps water calm and tranquil. These units are essentially in prismoid form and were made to order. They are harbour or location specific. The Central Excise Department contended that the armour units are excisable goods and chargeable to duty. Examine the validity of the Department's contention in the light of decided case law.* (5 Marks)
- (c) *I Scream Ltd. is engaged in manufacture of ice-cream falling under sub-heading 2105 of the Central Excise Tariff Act, 1985. The company supplied the ice cream in four litres pack to catering industry or hotels, who sell the same in scoops. The pack contained a declaration that the pack was not meant for retail sale. The Department contended that packs have to be assessed on the basis of value arrived at as per the provision of section 4(A) of Central Excise Act, 1944, which provides for assessment based on M.R.P and not under section 4 of the Central Excise Act, 1944. Assessee contended that the ice-cream pack sold was a bulk pack of 4 litres which was not meant to be sold in retail and they were not required to print the Maximum Retail Price and hence the transaction was a wholesale transaction and assessment under section 4 of the Central Excise Act, 1944 was correct.* (5 Marks)

Further contention of the assessee was that they are entitled to exemption under rule 34 of the Standard of Weights and Measures (PC) Rules, which exempts packs meant for industrial use. Examine whether the stand taken by the Department is correct in the light of decided case law.

Answer

- (a) No, Department's stand is not correct in law. Rule 2(a) of CENVAT Credit Rules, 2004, *inter alia*, provides that capital goods means goods "used in the factory of the manufacturer of final products". The Department's contention is that ropeway is used for transporting raw material from mines located 4-5 kms away and hence it can not be said to have been used in the factory.

The facts of the given case are similar to the case of *M/s. Birla Corporation Ltd. v. CCE 2005 (186) ELT 266 (SC)*. In the instant case, the Apex Court followed the principle laid down in case of *J.K. Udaipur Udyog Ltd. v. CCE, Jaipur-II 2001 (130) E.L.T. 996* wherein the same question arose for consideration and the facts were almost identical. Therefore, the assessee was entitled to the CENVAT credit of the spares of the ropeway system because the ropeway system, used to bring the crushed lime stone from the mines to the factory, could be covered under the expression 'precincts of the premises' in the definition of the factory under section 2(e) of the Central Excise Act, 1944. Thus,

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ropeway system is used within the factory. Therefore, parts/spares for ropeway system are covered under the definition of capital goods. Hence CENVAT credit is admissible.

- (b) The facts of the given case are similar to the case of *Board of Trustees v. CCE 2007 (216) ELT 513 (SC)*. The Supreme Court held that in order to constitute “goods”, twin tests have to be satisfied, namely, process constituting manufacture and secondly marketability. In the present case, the second test of marketability was in issue.

In this case, armour blocks, in prisomoid form, were made to order and were of certain specifications. They were harbour or location specific. It would depend on the water level required to be maintained in the harbour. There was no evidence to show that these blocks could be used in any other harbour. Moreover, the Department failed to prove marketability of the impugned goods. Therefore, assessee's contention, that goods are not capable or being bought and sold in the market, has to be accepted. Therefore, Department's stand is not correct and no duty is payable on the goods.

- (c) The issue is covered by a decision of the Supreme Court in the case of *Jayanti Food Processing (P) Ltd. v. CCE 2007 (215) ELT 327*. It was held that the product was not covered by the provision of section 4A of the Central Excise Act, 1944.

The Supreme Court held that firstly, the assessee could not be said to be “retail dealer” because four litre pack of ice-cream was not being sold directly to the consumer, but to the intermediary i.e. hotels.

Secondly, four litre pack of ice-cream could have been covered under the definition of “retail package” only if such package had been intended for retail sale for consumption by an individual or a group of individuals. However, the package specifically displayed that “the pack was not meant for retail sale”. Moreover, hotel could not be covered in term of ‘individual or a group of individuals’. Hence, the ice-cream package could not be termed as “retail package”. Therefore, the assessee was not required under Standards of Weight and Measures Act and the rules there under to print the MRP on the package

Lastly, the Apex Court agreed with the contention of the asseesee that they were entitled to exemption under rule 34 which exempts the product from requirement of affixing maximum retail price on the pack. Rule 34 of the Standard of Weights and Measures (Packaging Commodity) Rules, 1977 exempts the package specially packed for the purpose of servicing any industry. Supreme Court concluded that the sale of pack of ice-cream to the retail industry was squarely covered in the term “servicing any industry”.

Hence, it could be inferred that, since, the requirement of affixing maximum retail price is a pre-condition for application of section 4A of the Central Excise Act, 1944, assessment under section 4 is correct.

Question 3

- (a) Explain special procedure and facilities made available to large tax payer under rule 12BB of Central Excise Rules, 2002 in respect of intermediate goods. (6 Marks)
- (b) What are the provisions relating to the payment of excise duty on used capital goods cleared by an assessee on which CENVAT credit has been availed? (2 Marks)

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- (c) *What are the situations in which duty can be remitted under rule 21 of Central Excise Rules, 2002.* (2 Marks)

Answer

- (a) Rule 12BB of Central Excise Rules, 2002 provides that a large tax payer may remove excisable intermediate goods from any of his registered premises to his other registered premises for further use in the manufacture of other excisable goods (subject goods).

For this purpose, he should satisfy the following conditions:

1. Either of the following conditions must be satisfied:-
 - (i) Subject goods should be manufactured out of the intermediate goods and cleared on payment of excise duties within six months from the date of receipt of intermediate goods, or
 - (ii) The subject goods should be manufactured out of the intermediate goods and exported out of India, under a bond or letter of undertaking, within six months from the date of receipt of intermediate goods.
 2. Removal should be made under a transfer challan/invoice.
 3. Transfer challan should be serially numbered and should contain details of registration number, name, address, description, classification, time and date of removal, mode of transport, vehicle number and name of consignee unit and registration number.
 4. If goods manufactured out of intermediate goods are not cleared/exported out of India within six months, duties on intermediate goods are required to be paid with interest under section 11AB of the Central Excise Act, 1944.
 5. If intermediate goods are used in exempted subject goods, recipient unit has to pay duty on intermediate product along with interest under section 11AB.
- (b) Second proviso to rule 3(5) of the CENVAT Credit Rules, 2004, as amended with effect from 13.11.2007, provides the method to be adopted for payment of duty on used capital goods.
- If the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer/provider of output service shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by 2.5 percent for each quarter of a year or part thereof from the date of taking the CENVAT credit.
- (c) Rule 21 of the Central Excise Rules, 2002 provides that where it is shown to the satisfaction of Commissioner, empowered to remit the duty, that:-
- (i) goods have been lost or destroyed by natural causes or,
 - (ii) by unavoidable accident or
 - (iii) the goods have become unfit for consumption or for marketing.
- at any time before removal, he may remit the duty payable on such goods.

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SECTION-B

Question 4

(a) Purchases by S & Co. for the month of December are as follows:

- (1) Rs. 1,00,000 at 4% VAT
- (2) Rs. 5,00,000 at 12.5% VAT.

Sales of S & Co. for the month of December are as follows:

- (1) Sales of Rs. 3,00,000 at 4% VAT
- (2) Sales of Rs. 3,00,000 at 12.5% VAT.

Compute eligible input tax credit and VAT payable for the month. (3 Marks)

(b) Calculate the value of taxable service of 'X' Transport Company engaged in the business of transport of goods by road. Give reasons for taxability or exemption of each item. No freight is received from any of the specified category of consignor/consignee. Suitable assumptions may be made wherever required. X does not avail CENVAT credit:

	Rs.
1. Total freight charges received by 'X' during the year	13,50,000
2. Freight charges received for transporting fruits	1,25,000
3. Freight collected for transporting small consignment for persons who paid less than Rs. 750 for each consignment	75,000
4. Freight collected for transporting goods in small vehicles for persons who paid less than Rs. 1,500 per trip	1,50,000
	(7 Marks)

Answer

(a) Computation of input tax credit and VAT payable:-

	Rs.
Input tax paid by S & Co on Rs. 1,00,000 @ 4%	4,000
Input tax paid by S & Co on Rs. 5,00,000 @ 12.5%	<u>62,500</u>
Total input tax credit eligible	<u>66,500</u>
Output tax payable on Rs. 3,00,000 @ 4%	12,000
Output tax payable on Rs. 3,00,000 @ 12.5%	<u>37,500</u>
Total tax payable	<u>49,500</u>
Net input tax allowed to be carried over (Rs. 66,500-Rs. 49,500)	17,000
VAT payable by S & Co.	Nil

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(b) Computation of value of taxable service:

	Rs.
Total freight collected	13,50,000
Less : Freight charges received for transporting fruits (Note-1)	1,25,000
Less : Freight collected less than Rs. 750/- for each consignment (Note-2)	75,000
Less : Freight collected for transporting goods in small vehicles for persons who paid less than Rs. 1,500/- per trip (Note-2)	<u>1,50,000</u>
Balance freight charges	10,00,000
Less : Abatement of 75 % (Note-3)	<u>7,50,000</u>
Value of taxable service	<u>2,50,000</u>

Notes:

1. Taxable service provided by a goods transport agency in relation to transport of vegetables, eggs or milk by road is exempt from service tax (*Notification No. 33/2004 dated 03.12.2004*).
2. Service tax is exempt where:
 - (i) the gross amount charged on all consignments transported in a goods carriage does not exceed Rs. 1,500/- or
 - (ii) the gross amount charged on an individual consignment transported in a goods carriage does not exceed Rs. 750/-(*Notification No. 34/ 2004 dated 3.12.2004*).
3. As per *Notification No. 13/2008 dated 1.3.2008*, service tax is required to be paid on 25% of the gross amount charged i.e. 75% of the gross amount charged is allowed as abatement.

Question 5

- (a) *The assessee owned a collection centre, which was engaged in drawing of human blood, urine and stool samples on behalf of the principal laboratory in a metro city for conducting pathological tests. The assessee sent the samples through courier and received commission for such service. Department demanded service tax on the ground that the activity amounted to promotion or marketing of the service provided by the principal and hence covered under business auxiliary service. With reference to legal provisions and case law, examine the stand taken by the Department. (5 Marks)*
- (b) *The assessee used to finance the purchase of vehicles manufactured by a leading automobile company which used to sell the vehicles through its distributors. Assessee financed part of the vehicle cost to the purchaser of vehicle after getting, an agreement with the purchaser providing the right of repossession of the vehicle in case buyer of the vehicle defaulted in paying installment. Immediately on sale, purchaser of the vehicle became the owner and vehicle was registered in his name. The Department seeks to*

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levy service tax in the category of "Banking and other Financial Services." Examine whether Department's stand is correct in terms of legal provisions' and case law.(5 Marks)

Answer

- (a) Section 65 (106) of the Finance Act, 1994 defines technical testing and analysis services. However, any testing or analysis done for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals has been excluded from the scope of this service. In this case, the Department's contention is that assessee is providing business auxiliary service to the laboratory and is not eligible for the exemption since assessee is not performing laboratory functions.

Similar issue came up before Punjab & Haryana High Court in the case of *CCE v. Dr. Lal Path Lab (P) Ltd.* 2007 (8) STR 337 (P&H). High Court held that merely because the assessee renders any incidental service like putting across or dropping of the name of the principal laboratory, it does not get covered by the definition of business auxiliary service. The activity of drawing of test sample is covered by the exception to technical testing and analysis service under section 65(106) of the Finance Act, 1994.

- (b) The issue was examined by the Customs Excise, Service Tax Appellate Tribunal (CESTAT), Mumbai in the case of *Bajaj Auto Finance Ltd. v. CCE, Pune* 2007 (7) STR 423. The Tribunal distinguished between hire purchase agreement and hire purchase finance agreement. In the case of former, the title to the goods remains with the hire purchase company. Payments are considered as hire charges and when all periodical payments are made, title to the goods is transferred to the customer provided he exercises such an option. In the case of latter, title to the goods vests with the purchaser right from the beginning and hire purchase company has only a right to take over possession for non payment of loan.

It was also quoted that since the appellants herein have the right and control over the goods, it cannot be concluded that they had entered into a hire purchase agreement with their customers for the reason that in all hire purchase finance agreements, terms and conditions giving the finance company control over the goods, exist. Since hire purchase finance is not covered by the definition of banking and other financial services under section 65(10) of the Finance Act, 1994, service tax is not attracted. This judgment has been affirmed later on by the Apex Court in *CCE v. Bajaj Auto Finance Ltd.* 2008 (10) STR 433 (SC).

Question 6

- (a) *What are the purchases not eligible for input tax credit of VAT paid?* (6 Marks)
- (b) *What are the provisions relating to best judgement assessment under Service Tax Law?* (2 Marks)
- (c) *State whether the following services are taxable under the provisions of the Finance Act, 1994 relating to service tax:*

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- (i) *A practising Chartered Accountant representing a client before Income Tax Officer in assessment proceeding.* (2 Marks)
- (ii) *Royalty received from the publisher by an author of a text-book for printing and publishing his book.* (2 Marks)
- (d) *Give four illustrations to explain the scope of service rendered by a consulting engineer.* (4 Marks)
- (e) *List out any four services brought under the service tax net by the Finance Act, 2008.* (4 Marks)

Answer

- (a) Input tax credit is not allowed on the following purchases.
 - (i) purchases from unregistered dealers;
 - (ii) purchases from registered dealer who opt for composition scheme under the provisions of the Act;
 - (iii) purchase of goods as may be notified by the State Government;
 - (iv) purchase of goods where the purchase invoice is not available with the claimant or there is evidence that the same has not been issued by the selling registered dealer from whom the goods are purported to have been purchased;
 - (v) purchase of goods where invoice does not show the amount of tax separately;
 - (vi) purchase of goods, which are being utilized in the manufacture of, exempted goods;
 - (vii) goods in stock, which have suffered tax under an earlier Act but under VAT Act they are covered under exempted items;
 - (viii) purchase of goods used for personal use/consumption or provided free of charge as gifts (partial credit is available in the State of Maharashtra);
 - (ix) goods imported from outside the territory of India (commonly known as high seas purchases);
 - (x) goods imported from other States viz. inter-State purchases.

Note: Any 4 points may be given.

- (b) The Finance Act, 2008 has inserted a new section 72 to empower the Central Excise Officer to make best judgment assessment. The provisions of new section are as follows:

If any person, liable to pay service tax,—

- (a) fails to furnish the return under section 70;
- (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem

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necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

- (c) (i) Services provided or to be provided by a practicing chartered accountant in his professional capacity, to a client, relating to representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, from the whole of service tax leviable thereon under section 66 of the Finance Act, 1994 as amended (*Notification No. 25/2006 ST dated 13.7.2006*).
- (ii) As per section 65(55a) of the Finance Act, 1994, "intellectual property right" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright. Therefore, any royalty or other payment related to publishing involving copyright is not liable to tax.
- (d) Consulting engineer service would include
 - (i) Design engineering
 - (ii) Pre design services/project report
 - (iii) Supervision or construction and project management
 - (iv) Feasibility study
 - (v) Supervision of commissioning and initial operation
 - (vi) Post operation and management
 - (vii) Trouble shooting and technical services including establishing system and procedures for an existing plant.
- (e) Following new services have been brought under tax net by the Finance Act, 2008:-
 1. Services in relation to information technology software for use in the course, or in furtherance of business or commerce.
 2. Services provided in relation to management of investment under unit linked insurance business, commonly known as ULIP.
 3. Services provided by a recognized stock exchange in relation to securities.
 4. Services provided by a recognized or registered association (commodity exchange) in relation to sale or purchase of any goods or forward contracts.
 5. Services provided by a processing and clearing house in relation to processing, clearing and settlement of transactions in securities, goods or forward contracts.
 6. Services provided in relation to supply of tangible goods without transferring right of possession and effective control of the tangible goods.
 7. Services provided in relation to internet telecommunication.

Note: Any four services may be given.

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SECTION-C

Question 7

From the following particulars, determine the assessable value of the imported equipment giving explanation for each item:

	Rs.
1. FOB cost of equipment (Japanese Yen)	2,00,000 Yen
2. Freight charges in Japanese Yen	20,000 Yen
3. Charges for development connected to equipment paid in India	Rs. 60,000
4. Insurance charge paid in India for transportation from Japan	Rs. 15,000
5. Commission payable to agent in India	Rs. 15,000
Exchange rate as per RBI is 1 Yen = Rs. 0.45	
Exchange rate as per CBEC is 1 Yen = Rs. 0.50	
Landing charges: one percent of CIF cost	

(5 Marks)

Answer

Computation of assessable value:-

FOB value	2,00,000 Yen
Add: Freight from Japan (Note – 1)	<u>20,000 Yen</u>
Total (in yen)	2,20,000 Yen
Exchange rate applicable is 1 Yen = Rs. 0.50 (Note – 4)	
Total (in rupees)	Rs. 1,10,000
Add : Insurance charges	<u>Rs. 15,000</u>
Total	Rs. 1,25,000
Add : Commission (Note – 2)	<u>Rs. 15,000</u>
CIF value	Rs. 1,40,000
Add : Landing charges @ 1% of CIF value	<u>Rs. 1,400</u>
Assessable value	<u>Rs. 1,41,400</u>

Notes:

1. Freight from Japan is includible in the assessable value.
2. Agency commission paid in India is not a buying commission and hence will be added to CIF value.

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3. Charges for development paid in India do not form part of assessable value because as per rule 10(1)(b)(iv) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, only the development undertaken at a place other than India shall form a part of assessable value.
4. Currency conversion rate as notified by CBEC is to be taken into consideration.

Question 8

ABC imported a vessel 'Waterloo' for the purpose of breaking from XYZ Ltd. of U.K. A memorandum of understanding was signed between the buyer and seller on 2.6.97 and ABC took delivery of the vessel on 4.6.97. Vessel drifted and landed in the yard of B in a damaged condition on 9.6.97. On 24.6.97, ABC filed application to concerned Assistant Commissioner for extension of time to file bill of entry, which was granted on 12.8.97. ABC paid Rs. 24 crores to XYZ Ltd. towards the purchase price of the vessel. Thereafter, ABC sold the vessel to B for Rs. 12 crores and B filed bill of entry on 12.9.97. Assessing authority assessed the ship taking the value as Rs. 24 crores and ship was taken over by B after assessment order was passed. 'B' argues that assessable value should be taken as Rs. 12 crores since the vessel was damaged because of the storm which made the vessel drift during appellate proceedings. No application for abatement of duty was made before the assessing authority by ABC or B. Examine whether benefit of relief under section 22 of the Customs Act, 1962 to reduce the value and thereby duty can be extended to B under the above circumstances. The assessment order in respect of bill of entry was passed on 23.12.97. (5 Marks)

Answer

Supreme Court held that in order to claim the benefit of the abatement under section 22, the party claiming the abatement has to satisfy the Assessing Authority that a case has been made out under section 22 for abatement of duty on damaged or deteriorated goods. In the absence of any claim made under section 22 in writing to the Assessing Authority, the appellant (B) could not claim the abatement under section 22 and the Assessing Authority did not record rightly to its satisfaction that the appellant was entitled to the abatement of duty.

In this case, damage occurred in Indian shore. Importer sought extension of time to file bill of entry. But, thereafter remitted the purchase price and sold the vessel to B. B in turn filed the bill of entry and the vessel was assessed. No application was made by the buyers i.e. importer (ABC) to the Assistant Commissioner for any abatement of duty on damaged goods.

The transaction between the importer (ABC) and the respondent (B) cannot be described as the transaction of purchase and sale during the course of international trade. Any sale of goods carried out, after the act of 'import' within the meaning of the Act is over, can only be described as a sale in the course of domestic trade and not a sale in the course of international trade. Therefore, the appellant i.e. buyer (B) who had purchased the vessel in the course of domestic trade was not entitled to seek any abatement of duty under section 22 of the Customs Act, 1962 on the ground on which it claimed before the Appellate Authority.

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Hence, in the light of above discussion, it can be inferred that the assessable value of the ship shall be the transaction value at which the importer (ABC) has paid at the time of importation i.e. Rs. 24 crores.

Question 9

- (a) *Is a person entitled to inspect or obtain copies of report made by any Officer to the Settlement Commission? Can the Settlement Commission furnish copies of such report?*
(2 Marks)
- (b) *Under what circumstances, provisional assessment under section 18 of the Customs Act, 1962 can be made?*
(2 Marks)
- (c) *Explain briefly, legal provisions relating to pilfered goods under the Customs Act, 1962.*
(2 Marks)
- (d) *Explain briefly, legal provisions relating to power to summon persons under the Customs Act, 1962.*
(2 Marks)
- (e) *Define customs area.*
(2 Marks)

Answer

- (a) As per the provisions of section 127G of the Customs Act, 1962, no person shall be entitled to inspect or obtain copies of any report made by any officer of customs to the Settlement Commission, but the Commission may, in its discretion, furnish copies thereof to any such person on an application and on payment of specified fee.

However, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Commission shall furnish a certified copy of relevant part of such report on receipt of an application and payment of fee as specified in rules.
- (b) According to provisions of section 18 of the Customs Act, 1962, provisional assessment can be resorted to in the following cases:-
 - (i) Where the proper officer is satisfied that an importer or an exporter is not able to produce documents or information necessary for assessment.
 - (ii) Where proper officer deems it necessary to subject the imported or export goods to chemical or other test for the purpose of assessment of duty thereon.
 - (iii) Where proper officer deems it necessary to make further enquiry.
- (c) Pilferage does not mean loss of total package. Normally claim for pilferage would be under following circumstances:
 - a. there should be evidence of tampering with packages.
 - b. there would be blank space for missing article on package.
 - c. Missing article would be unit article.

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According to section 13 of the Customs Act, 1962, if any imported goods are pilfered after unloading and before proper officer has passed an order for clearance for home consumption or deposit in warehouse, the importer shall not be liable to pay duty leviable on such goods.

However, where such goods are restored to the importer, he becomes liable to pay duty.

- (d) Section 108 of the Customs Act, 1962 provides that any Gazetted Officers of Customs shall have the power to summon any person either to present himself for enquiry or produce a document or any other thing in any inquiry which the officer is making under the Act. All persons who are summoned shall be bound to attend either in person or by an authorized agent and state the truth, make statement, produce document and other things.
- (e) As per section 2(11) of the Customs Act, 1962, customs area means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2008 and Notifications/Circulars issued up to 31.10.2008 which are relevant for June 2009 examinations.

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Answer to question nos. 1, 6 and 9 are compulsory. In addition thereto, answer any two questions from Part “A” and one question from Part “B”.

PART – A

Question 1

(a) *Briefly explain the following with reference to the provisions of the Central Excise Act, 1944 as amended by the Finance Act, 2008:*

- (i) *Deposit of excise duty collected from the buyer.*
- (ii) *Payment of interest on pre-deposit made by an appellant under section 35FF.*

(2×2=4 Marks)

(b) *Explain the provisions of section 3A of the Central Excise Act, 1944 regarding duty payable on the basis of capacity of production in respect of notified goods. (5 Marks)*

(c) *X Ltd. of Kanpur was receiving goods in semi-finished condition from its sister concern based at Mumbai. After carrying out some operations, it cleared the goods at lower value than the landing cost of semi-finished goods received from the supplier. After verification of company's records, Revenue Department alleged that the value of the intermediate goods had been inflated by the supplier to pass on excess CENVAT credit and hence, Department wanted to disallow the excess credit so availed as per the provisions of rule 14 of the CENVAT Credit Rules, 2004. Explain, whether the contention of the Department is correct, giving reference to decided case law, if any. (5 Marks)*

(d) *Discuss the validity or otherwise of the following statements giving reasons to support your answer:*

- (i) *Erroneous claim made by the assessee earlier precludes him from subsequently making a claim for correct classification.*
- (ii) *Omission to give correct information can be construed as 'suppression of facts' for the purpose of the proviso to section 11A of the Central Excise Act, 1944.*

(2×3=6 Marks)

Answer

(a) (i) The scope of section 11D was expanded by inserting sub-section (1A) which provides as follows:-

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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.

- (ii) New section 35FF provides that where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.
- (b) Central Government, having regard to the nature of the process of manufacture/production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, can issue notification specifying that duty on such notified products will be levied and collected on the basis of production capacity of the factory. In this connection, new section 3A has been introduced under the Central Excise Act, 1944 by Finance Act, 2008 giving the provisions for ascertaining the production capacity, with effect from 10-5-2008. It provides as follows:-
- (i) Capacity will be determined by an officer not below the rank of Assistant Commissioner. Factors relevant to determine production capacity will be specified by rules framed by Central Government.
- (ii) The annual capacity fixed will be deemed to be annual production of such goods by the factory. If factory is not working for part of the year, annual production will be calculated on proportionate basis of the annual capacity of production. If factors determining production capacity are changed during the year, annual capacity will be re-determined on a proportionate basis having regard to such alteration or modification.
- (iii) The rate of duty payable based on production capacity will be notified by Central Government in rules. If factory does not work for a continuous period of 15 days or more in a month, duty calculated will be proportionately reduced, subject to prescribed conditions.

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- (iv) Provision of payment of duty on the basis of production capacity does not apply to goods produced or manufactured, by a 100% Export Oriented Undertaking (EOU) and brought to any other place in India.
 - (v) Even if duty on goods notified u/s 3A is payable as per rates notified if similar goods are imported, CVD will be payable at the rate specified in Central Excise Tariff read with any exemption notification.
- (c) In *CCE v. MDS Switchgear Ltd. 2008 (229) ELT 485*, the Hon'ble Supreme Court held that CENVAT credit availed by the assessee was justified in this case.

CESTAT's view which was up-held by the Apex Court was that if the Department was of the opinion that the value of the final product was depressed, then they should have charged Kanpur unit with under- invoicing of their product, which had not been done in this case. Valuation as given by the Mumbai unit was duly approved by the Department and the payment of duty was also accepted. The CENVAT Credit Rules, 2004 entitled the recipient unit to avail the benefit of the duty paid by the supplier unit. A quantum of duty already determined by the jurisdictional officers of supplier unit could not be contested by the officers in charge of recipient unit.

- (d) (i) The statement is not valid. The question as to whether erroneous claim made by the assessee earlier precludes him from subsequently making a claim for correct classification was negatively answered by Rajasthan High Court in the case of *Guljag Industries Ltd. v. Union of India 2008 (224) ELT 38*. In this case, the appellant-the manufacturer wrongly classified the storage tank, motor rails and platforms manufactured by him under chapter heading 73.09 by taking it to be the storage of general use. Later on, he claimed the classification under chapter heading 84.19 on the ground that storage tank concerned, was actively used for manufacturing activity of the plant and was an integral part of the manufacturing process, therefore ought to be classified under chapter heading 84.19. Adjudicating Authority contended that classification once opted by the manufacturer could not be allowed to be altered subsequently. The High Court approved the contention of appellant that earlier claim to a particular classification by the manufacturer did not stop the assessee from claiming the correct classification under a different head by pointing out that the classification earlier claimed was erroneous.
- (ii) The statement is not valid. The question as to whether omission to give correct information can be construed as 'suppression of facts' for the purpose of the proviso to section 11A of the Central Excise Act, 1944 was negatively answered by Supreme Court while deciding the case of *Continental Foundation Joint Venture v. CCEx. 2007 (216) ELT 177*. The Supreme Court observed that the expression "suppression" used in proviso to section 11A of the Central Excise Act, 1944 should be construed strictly. Suppression means failure to disclose full information with intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. The Apex Court held that mere omission to give correct information is

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not suppression of facts unless it was deliberate to stop the payment of duty. The Apex Court further explained that an incorrect statement cannot be equated with a wilful misstatement. There cannot be a non wilful suppression or misstatement of a fact. Misstatement of fact must be wilful.

Question 2

- (a) Assessee purchased duty paid M.S. tubes from its manufacturers and cut into requisite length and were put into the swaging machine for undertaking swaging process whereby dies fitted in the machine imparted 'folds' to flat surface of M.S. tube/pipe. Department's view is that 'swaging process' amounts to manufacture whereas assessee denies. Discuss whether the Department's contention is correct by referring to section 2(f) of the Central Excise Act, 1944. You can take the help of decided case law, if any. (5 Marks)
- (b) Briefly explain the provisions relating to re-entry of the goods cleared for export under bond but not actually exported, in the factory of manufacturer as per notification issued under rule 19 of the Central Excise Rules, 2002. (4 Marks)
- (c) Raj & Co. furnishes the following expenditure incurred by them and wants you to find the assessable value for the purpose of paying excise duty on captive consumption. Determine the cost of production in terms of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and as per CAS-4 (Cost Accounting Standard):

(i)	Direct material cost per unit inclusive of excise duty at 10%	Rs.880
(ii)	Direct wages	Rs.250
(iii)	Other direct expenses	Rs.100
(iv)	Indirect materials	Rs.75
(v)	Factory overheads	Rs.200
(vi)	Administrative overhead (25% relating to production capacity)	Rs.100
(vii)	Selling and distribution expenses	Rs.150
(viii)	Quality control	Rs.25
(ix)	Sale of scrap realized	Rs.20
(x)	Actual profit margin	15%

(6 Marks)

Answer

- (a) This problem is based on the case law *Prachi Industries v. CCEx., Chandigarh* 2008 (225) ELT 16 (SC).

In this case, Department took the plea that swaging process amounted to manufacture and duty was payable on the goods manufactured by the appellant. However, the demand by the Department was not accepted. Consequently, the appeal was filed before the Supreme Court.

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The Apex Court held that by reading section 2(f) of the Central Excise Act, 1944, it was clear that manufacture includes "any process incidental or ancillary to the completion of a manufactured product". In other words, incidental process must be an integral part of manufacture resulting into a new finished product which must be of a different physical shape, size and use. Moreover, the said process must impart a change of a lasting character to the original product or raw material. Supreme Court observed that swaging was the process which imparted a change of a lasting character to the plane MS pipe or tube by use of dies which existed in the machine. After the process of swaging, the identity of the plane MS pipe or the tube underwent a change in terms of form, shape or use. Hence, Supreme Court held that swaging amounted to manufacture and thus, excise duty was payable by the assessee.

- (b) The excisable goods cleared for export under bond or undertaking but not actually exported for any genuine reasons may be returned to the same factory provided:
- (i) such goods are returned to the factory within 6 months with original documents like invoice and ARE-1.
 - (ii) the assessee shall give intimation of re-entry of each consignment in Form D-3 within twenty four hours of such re-entry;
 - (iii) such goods are to be stored separately at least for forty eight hours from the time intimation is furnished to the Range Office or shorter period if verification is done by the Superintendent of Central Excise or through Inspector in charge of factory, about the identity of such goods with reference to the invoice, ARE-1 and daily stock account in respect of 5% of intimations, within another 24 hours of receipt of intimation.
 - (iv) the assessee shall record details of such goods in daily stock account and taken in the stock in the factory.
- (c) Computation of assessable value as per rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and CAS-4:-

S. No.	Particulars	Total cost Rs.
1	Material cost consumed–net of excise duty (Note-1)	800
2	Direct wages	250
3	Direct expenses	100
4	Works overheads (75 +200) (Note-2)	275
5	Quality control cost	25
6	Administration overheads (relating to production capacity)	<u>25</u>
7	Total (1 to 6)	1,475

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8	Less: Credit for recoveries/scrap/by products/ miscellaneous income	<u>20</u>
9	Cost of production (8-9)	1,455
10	Add: 10% as per rule 8 (Note-3)	<u>145</u>
11	Assessable value	<u>1,600</u>

Note:

1. Material Consumed: Rs. 880-Rs. 80 (excise duty) =Rs. 800
2. Indirect materials and factory overheads have been included in works overheads.
3. Actual profit margin earned is not relevant for excise valuation as per rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

Question 3

- (a) *Is there any discretion under section 11AC of the Central Excise Act, 1944 to impose penalty less than the amount equal to duty evaded? Briefly explain based on case law, if any.* (3 Marks)
- (b) *Explain eligibility of CENVAT credit in each of the following occurrences during the month of January, 2008 for an assessee:*
 - (i) *Assessee received a consignment of inputs on which excise duty paid was Rs.12,000. The invoice is dated 10th January, 2008. The transporters delivered the goods on 1st February, 2008.*
 - (ii) *Inputs on which CENVAT credit availed earlier Rs.5,000, were sent to production centre and on its way, the inputs were completely damaged due to careless handling. Inputs have become unfit for use.*
 - (iii) *CENVAT credit of Rs.20,000 was taken on certain inputs. Due to long storage they have become unfit and were sold as scrap for Rs.5,000 and excise duty is 14.42%.* (3×2=6 Marks)
- (c) *S & Co., a small scale unit, had cleared goods of the value of Rs.750 lakhs during the financial year 2007-08. Records show that the following clearances were included in the total turnover of Rs.750 lakhs :*

	Rs. in lakhs
(i) Total exports during the year	200
(ii) Job work in terms of Notification No. 214/86	50
(iii) Job works in terms of Notification No. 83/94-CE	50
(iv) Clearance of excisable goods without payment of duty to a 100% E.O.U.	20
(v) Goods manufactured in rural area with others' brand	100

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Find out whether the unit is eligible to avail concession for the year 2008-09, under Notification No. 8/2003 dated 1st March, 2003, giving reasons for your answer. 30% of total exports were to Nepal. (5 Marks)

Answer

- (a) The Supreme Court in case of *Union of India v. Dharmendra Textile Processors* 2008 (231) ELT 3 (SC) has held that there is no discretion to impose lower penalty under section 11AC of the Central Excise Act, 1944. In notes to clause, while introducing section 11AC, it has been mentioned that levy of penalty under the said section is a mandatory penalty.

Earlier, similar view was taken by Bombay High Court, in case of *C.C.E. & C., Aurangabad v. Godavari Manar Sahakari Sakhar Karkhana Ltd.* 2008 (228) ELT 172, wherein it pronounced that under section 11AC, there was no discretion vested with the authority to impose any penalty different than the one prescribed by the said provision. It was evident that legislature had not fixed any upper or lower limit, but prescribed only one quantum for penalty which was equal to the duty intentionally evaded.

Hence, there is no discretion under section 11AC of the Central Excise Act, 1944 to impose penalty less than the amount equal to duty evaded. The Court observed that the reason for such stiff and stringent provision was that since the penalty under section 11AC was a sort of penal provision, the said provision ought to be harsh and stringent.

- (b) (i) The assessee is eligible for CENVAT credit in the month of February, 2008 and not in the month of January, 2008 because the inputs have been received only in the month of February. Rule 4(1) of CENVAT Credit Rules, 2004 provides that the CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. As the inputs in the problem have been received in February, 2008, CENVAT credit can be taken only in the month of February, 2008.
- (ii) In this case, the inputs were issued from the stores to the production department but got damaged due to careless handling on its way to production centre. It is a clear indication that the inputs are removed from the stores which is to be construed as if they were removed for use 'in or in relation to manufacture'. Hence, there is no need to reverse the CENVAT credit already availed.
- (iii) In this case, since the inputs were subsequently sold as scrap, the assessee will have to reverse CENVAT credit of Rs. 20,000 already taken on inputs. Since, credit on inputs is available only for inputs used in or in relation to manufacture of final products, if the inputs are lost or destroyed in the store room, credit of duty paid on such inputs will not be available, as it cannot be said that they are used 'in or in relation to manufacture'.
- (c) In order to claim the benefit of exemption under Notification No. 8/2003 – C.E. in the financial year 2008-09, the total turnover of the unit should not exceed Rs.400 lakh in the

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preceding financial year 2007-08. For the purpose of computing the turnover of Rs. 400 lakh:-

- (i) Export turnover has to be excluded. However, export to Nepal and Bhutan cannot be excluded as these are treated as "clearance for home consumption". Therefore, clearances worth Rs.140 lakh will be excluded while clearances worth Rs.60 lakh exported to Nepal shall remain included.
- (ii) Job work under Notification No. 214/86-CE and under Notification No. 85/94-CE shall not to be included. Consequently, clearances worth Rs. 100 lakh are to be excluded.
- (iii) Clearance of excisable goods without payment of duty to EOU has to be excluded as it is considered as "deemed export". Therefore, clearances worth Rs. 20 lakh have to be deducted.
- (iv) Goods manufactured in rural area with other's brand name, the turnover which is cleared without payment of duty shall be included. Therefore, the clearances worth Rs. 100 lakh shall not be excluded.

Therefore, for the year 2008-09, the turnover of S & Co. for claiming the SSI exemption will be:-

= Rs. 750 lakh – (140 + 20 + 100) lakh = Rs. 490 lakh. Hence, S & Co. will not be entitled to exemption under Notification No. 8/2003 dated 01.03.2003 in 2008-09.

Question 4

- (a) *Discuss with reference to the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, the following:*
 - (i) *Goods sold only through inter-connected undertaking*
 - (ii) *Valuation in case of job worker.* (2×3=6 Marks)
- (b) *As per section 11B(2) of the Central Excise Act, 1944, refund shall be granted to the applicant only in specified cases otherwise shall be credited to Consumer Welfare Fund. You are required to explain briefly such cases.* (5 Marks)
- (c) *Rule 9(2) of the Central Excise Rules, 2002 provides for exemption from registration to specified categories of persons. Explain briefly those categories.* (4 Marks)

Answer

- (a) (i) Goods sold through inter-connected undertaking
If goods are sold only through inter-connected undertaking, the value shall be determined as per rule 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as follows:-
 - (i) When the assessee so arranges that the excisable goods are not sold by him except to or through an inter-connected undertaking, the value of goods shall

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be the “transaction value” if:-

- (a) the buyer is not a holding or subsidiary of assessee, or
- (b) buyer and seller are relatives, or
- (c) buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor, or
- (d) buyer and seller are so associated that they have interest, directly or indirectly, in the business of each other.

(ii) In any other case, price will be “normal transaction value” of buyer to unrelated person (as per rule 9 of the said rules).

(ii) Valuation in case of job work

Where the goods are manufactured by a job worker on behalf of a person, provisions of rule 10A (a new rule inserted from 1-4-2007) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 shall apply. Rule 10A provides that the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods to an unrelated buyer.

(b) Refund shall be granted by the Assistant Commissioner, on being satisfied that excise duty and interest, if any, paid on such duty is refundable, to the applicant only in the following cases:

- (i) 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) unspent advance deposits lying in the applicant's account current maintained with the Commissioner of Central Excise;
- (iii) refund of credit of duty paid on excisable goods used as inputs in accordance with rules made, or any notification issued, under the Act;
- (iv) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
- (v) duty of excise and interest, if any, paid on such duty borne by the buyer if he has not passed on the incidence of such duty to any other person;
- (vi) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by Notification in the Official Gazette, specify.

In other cases, the Assistant Commissioner shall make an order for credit of amount refundable to the "Consumer Welfare Fund".

(c) Central Board of Excise and Customs, as per the power given under section 9(2) of the Central Excise Act, 1944, vide Notification No.36/2001-CE. (NT) dated 26.06.2001, has exempted the following specified categories of persons from obtaining registration:

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- (i) Persons who manufacture the excisable goods, which are chargeable to nil rate of duty or are fully exempt from duty by a notification subject to the declaration to be made in a specified form.
- (ii) Small scale units having the slab exemption based on value of clearances under a notification. However, they have to give the declaration when their clearances touch Rs. 90 lakh.
- (iii) In respect of final products falling under chapter 61 or 62, the job-worker need not get registered if the principal manufacturer undertakes to discharge the duty liability.
- (iv) Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to certain prescribed conditions.
- (v) The person who carries on whole sale trade or deals in excisable goods except first and second stage dealer, as defined in the CENVAT Credit Rules, 2004.
- (vi) A hundred percent Export Oriented Undertaking or a unit in EPZ or a unit in SEZ licensed or appointed; as the case may be under the Customs Act, 1962.
- (vii) Persons who use excisable goods for any purpose other than the processing or manufacture of goods availing benefit of concessional duty exemption notification.
- (viii) Person who gets his goods manufactured on his account from any other person subject to the conditions that the said person authorizes the person actually manufacturing or fabricating the said goods, to comply with all procedural formalities under the Central Excise Act, 1944 and the rules made there under and to furnish information in order to enable the determination of value of the said goods.

Note: Any four points may be mentioned.

Question 5

- (a) *State the categories of cases that cannot be settled as per section 32E of the Central Excise Act, 1944.* (5 Marks)
- (b) *Write a brief note on the following with reference to the Central Excise Act, 1944:*
 - (i) *Tampering or altering MRP after removal*
 - (ii) *Remission of duty on lost/or destroyed goods.* (2×3=6 Marks)
- (c) *Under what circumstances, the appellant shall be entitled to produce before the Commissioner of Central Excise (Appeals) additional evidence as per rule 5 of the Central Excise Appeal Rules, 2002?* (4 Marks)

Answer

- (a) As per section 32E(1) of the Central Excise Act, 1944, an application for settlement is not entertained by the Settlement Commission under the Central Excise Act, in the following circumstances:

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- (i) The applicant has not filed a return showing production, clearance and central excise duty paid in the prescribed manner.
- (ii) The applicant has not received a show cause notice for recovery of duty issued by the Central Excise Officer.
- (iii) The additional amount of duty accepted by the applicant does not exceed Rs. 3 lakh.
- (iv) An application/case is pending with the Tribunal or Court.
- (v) Any excisable goods or books of account/documents are seized and 180 days have not yet expired.
- (vi) Application pertains to interpretation of classification of excisable goods.
- (vii) The applicant, while filing the application, has not deposited the additional amount of excise duty accepted by him along with interest due under section 11AB.

Note: Any four points may be mentioned.

- (b) (i) Tampering or altering MRP after removal ;
Rule 5 of the Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 provides that where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price, then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of one month before and after the date of removal of such goods. However, where the manufacturer alters or tampers the declared retail sale price resulting into more than one retail sale price available on such goods, then, the highest of such retail sale price shall be taken as the retail sale price of all such goods.
- (ii) Remission of duty on lost/destroyed goods.
“Remission” means waiver or cancellation of excise duty legally payable. Rule 21 of the Central Excise Rules, 2002 provides that where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing.
- (c) As per Rule 5 of the Central Excise (Appeal) Rules, 2001, only under following circumstances the appellant shall be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceeding before adjudicating authority:
 - (i) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or
 - (ii) where the appellant was prevented by sufficient cause from producing the evidence which was called upon to produce by the adjudicating authority; or

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- (iii) where the applicant was prevented by sufficient cause from producing before the adjudicating authority any evidence which is relevant to any ground of appeal; or
- (iv) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

PART B

Question 6

- (a) *As per section 15 of the Customs Act, 1962, briefly discuss the date for determining the rate of duty and tariff valuation of imported goods.* (3 Marks)
- (b) *Referring to section 25 of the Customs Act, 1962, discuss the following:*
 - (i) *General exemption*
 - (ii) *Special exemption* (2×2=4 Marks)
- (c) *The assessee imported capital goods and deposited them in the warehouse. The said goods were not removed from the warehouse within the period permitted under section 61(1)(a) i.e. five years. Subsequently, the assessee filed an application for relinquishment of title of such warehoused goods. The Department contended that since the assessee did not file an application for extension of warehousing period before the expiration of five years' period fixed under section 61(1)(a), after expiration of the said period, the goods could no longer be termed as 'warehoused goods'. Therefore, the assessee lost its title to the same and consequently, it lost its right to relinquish its title thereto. It was further claimed that the relinquishment of title to the said goods ought to have been made by the assessee before the expiration of the warehousing period and not thereafter and therefore the goods were 'deemed to have been improperly removed from the warehouse'. Consequently, the assessee became liable to pay duty, penalty and interest with respect to the said goods as provided under section 72(1)(b) of the Customs Act, 1962.* (5 Marks)

Discuss, whether the contention of the Department is correct, by referring to case law, if any.

- (d) *K imported some old machinery from London claiming that the machinery was fully exempted from customs duty under a notification. Assistant Commissioner of Customs, the authority in original, differed and held that the machinery so imported was covered under a different heading and attracted customs duty. Therefore, K had to furnish bank guarantee for duty payable for release of machine.*

Subsequently, the Assistant Commissioner of Customs ordered to encash the bank guarantee to realize the duty. This order was issued to K and immediately thereafter, the Customs Department invoked bank guarantee by sending request to bank for making payment to them. K contended that order of the Assistant Commissioner was appealable and the period of filing appeal was yet to expire. Hence the action of the Department

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- was not correct. You are required to comment whether the action of customs Department is correct in law based on decided case law, if any. (5 Marks)*
- (e) *Whether the right of warehouse-keeper to recover the warehousing charges from the sale proceeds of the goods kept therein is superior to the right of the Revenue to recover custom duty? Answer briefly, by referring to section 150(2)(b) of the Customs Act, 1962. (3 Marks)*

Answer

- (a) Section 15 of the Customs Act 1962 provides that the rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force-
- (a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section.;
 - (b) in the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;
 - (c) in the case of any other goods, on the date of payment of duty
- (b) (i) Special Exemption : As per section 25 of the Customs Act, 1962:
- If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty, any goods on which duty is leviable only under circumstances of an exceptional nature to be stated in such order. Further, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.
- (ii) General Exemption: As per section 25 of the Customs Act, 1962:
- If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, goods of any specified description from the whole or any part of duty of customs leviable thereon.
- (c) The facts of the given case are similar to the facts of the case of *CCus v i2 Technologies Software (P) Ltd. 2007 (217) ELT 176 (Kar.)*
- The High Court, while dismissing the Department's appeal observed that the owner of the goods (importer) though loses control over the goods when he deposits them in the warehouse, but he does not lose his title or ownership to such goods so long as they remain in the warehouse either during the continuance of the warehousing period or even after its expiration. Therefore, the High Court rejected the Department's contention that on the expiration of the warehousing period or on the expiration of extended warehousing period, the owner of the goods loses his title in respect of such goods and consequently, also loses his right to relinquish his title to such warehoused goods.

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The High Court elaborated that on a plain reading of the provisions of section 23(2), 47, 68 and the proviso to section 68 of the Customs Act, 1962, it is clear that the owner of warehoused goods has the right to relinquish his title to goods 'at any time before an order for clearance of goods for home consumption has been made in respect thereto'. There is no prohibition on relinquishing the title to such goods after the expiration of the warehousing period or after the expiration of the extended period. The High Court pointed out that the provisions of section 23(2) and proviso to section 68 make it clear that upon relinquishment of his title to any imported goods, including the warehoused goods, the owner of such goods shall not be liable to pay duty thereon and when the owner is not liable to pay duty, the question of paying any interest on the duty and penalty would not arise.

Therefore, in the instant case, the Department's contention is not correct.

- (d) Bombay High Court, in the case of *Ocean Driving Centre Ltd. v. Union of India* 2005 (180) E.L.T 313, had an opportunity to address the similar situation. In that case, the petitioner contended that he had a statutory right of appeal before the Appellate Authority and also he had a right to move an application to get the pre-deposit waived in terms of section 129E of the Customs Act, 1962. He further submitted that he had an arguable case on classification. The debatable question had resulted in release of goods subject to furnishing bank guarantee at the stage of provisional assessment. Had it not been a debatable issue, he would not have been allowed to claim release of goods on furnishing the bank guarantee, which was furnished to secure the dues of Department. The same was valid and should have been kept alive till the dispute was finally resolved. According to them, the order of assessment was not final and conclusive.

The High Court observed that it was not in dispute that the appeal period was yet to expire and that the order was an appealable order as per the Departmental circular no. 396/29/98-C.E dated 2nd June, 1998, the Department was expected not to resort to coercive action so long as the appeal period was not over. Hence, the Departmental action was contrary to their own policy. According to the High Court, it was not proper on the part of Department to encash the bank guarantee before the expiry of statutory period provided for filing appeal.

Thus, the stand taken by the Department was not tenable in law.

- (e) In the case of *Associated Container Terminals Ltd. v. Union of India* 2008 (226) E.L.T 169, Delhi High Court held that as per the words used in section 150(2)(b), the right of warehouse keeper to recover the warehousing charges from the sale proceeds appeared to be superior to the right of the Revenue to recover customs duty. The Court noted the following words used in section 150(2)(b):

"-----and other charges ,if any, payable in respect of goods sold ,to the carrier, if notice of such charges has been given to the person having custody of the goods".

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High Court observed that these words make it clear that it does not pertain to custom duty and refers to the payment of warehousing charges. So, it takes precedence over recovery of custom duty which is relatable to section 150(2)(e) of the Customs Act, 1962.

Question 7

(a) Compute the assessable value and customs duty payable from the following information:

- (i) F.O.B. value of machine 8,000 UK Pounds
- (ii) Freight paid (air) 2,500 UK Pounds
- (iii) Design and development charges paid in UK 500 UK Pounds
- (iv) Commission payable to local agent @ 2% of F.O.B., in Indian Rupees
- (v) Date of bill of entry 24.10.2007 (Rate BCD 20%; Exchange rate as notified by CBEC Rs.68 per UK Pound)
- (vi) Date of entry inward 20.10.2007 (Rate of BCD 18%; Exchange rate as notified by CBEC Rs.70 per cent UK Pound)
- (vii) C.V.D. is payable @ 16% plus education cess as applicable
- (viii) Special C.V.D. – as applicable
- (ix) Insurance charges have been actually paid but details are not available.

(6 Marks)

(b) What is 'redemption fine' in lieu of confiscation? What is the limit for imposing redemption fine under section 125(1) of the Customs Act, 1962? (4 Marks)

(c) Briefly explain the provisions of section 28BA of the Customs Act, 1962 regarding provisional attachment of property pending adjudication. (5 Marks)

Answer

7 (a) Computation of assessable value and duty thereon:

FOB value	8,000 UK pounds
Add: Design and development charges	500 UK pounds
Add: Freight (air) (Note-3)	1,600 UK pounds
Add: Insurance 1.125% of FOB (Note-4)	<u>90 UK pounds</u>
Total	<u>10,190</u>
Total in Rupees @ Rs. 68 per pound (Note-1)	Rs. 6,92,920
Add: Local agency commission	

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(2% of 8000 UK pounds)= 160 UK pounds × Rs. 68	Rs. <u>10,880</u>
C.I.F value	Rs. 7,03,800
Add: Landing charges @1%of CIF value	Rs. <u>7,038</u>
Assessable value	Rs. 7,10,838
Add: Basic custom duty @ 20% (Note-2)	Rs. <u>1,42,167.60</u>
Total	Rs. 8,53,005.60
Add: CVD @16.48%	Rs. 1,40,575.32
Add: Education cess (3% of custom duty) = 3% of (Rs. 1,42,167.60+ Rs. 1,40,575.32)=Rs. 2,82,742.92	Rs. <u>8,482.28</u>
Total for Special CVD	Rs. 10,02,063.20
Special CVD @4%	Rs. 40,082.53

Total duty payable: Rs. 1,42,167.60

Rs. 1,40,575.32

Rs. 8,482.28

Rs. 40,082.53

Rs. 3,31,307.73

or Rs. 3,31,308

Notes:

1. Exchange rate =Rs. 68 per UK pound (date of presentation of bill of entry)
2. Section 15 of the Customs Act, 1962 provides that rate of duty shall be :-
the rate in force on the date of presentation of bill of entry
or
the rate in force on the date of entry inward
whichever is later.
3. The air freight should not exceed 20% of FOB value.
4. Where the insurance charges are not ascertainable, such cost shall be 1.125% of FOB value of the goods.

(b) Redemption fine in lieu of confiscation:

Section 125 (1) of the Custom Act, 1962 provides that whenever confiscation of goods is ordered, the adjudicating officer may give option to the owner of the goods to pay fine in lieu of confiscation, if the importation or exportation of goods are prohibited under the Act or any other law for the time being in force.

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However, if importation or exportation of goods was not prohibited, the option to pay redemption fine shall be given to owner of the goods. This is called 'redemption fine'. After payment of redemption fine, the goods are returned to the owner of goods. Section 125(2) of the Customs Act makes it clear that where any fine in lieu of confiscation of goods is imposed, the owner of goods or the person from whom the goods were seized, is liable to pay duty and charges in respect of such goods, in addition to the fine.

Limit for imposing the redemption fine

As per proviso to section 125(1) of the Customs Act, 1962, redemption fine up to market price of goods less duty chargeable thereon can be imposed. In addition, duty and other charges in respect of such goods are also payable.

- (c) Section 28BA of the Customs Act, 1962 provides for provisional attachment of property pending adjudication as under:
- (1) During the pendency of any proceeding under section 28 or 28B, the proper officer may provisionally attach any property belonging to the person to whom notice is served under section 28(1) or 28(B)(2), as the case may be, in accordance with the rules made under section 142 in this respect.
 - (2) When proper officer is of the opinion that the attachment is necessary for the purpose of protecting revenue interest, only then he can do so but before that the permission in writing from the Commissioner of Customs must be obtained.
 - (3) Such an attachment can be done for a period of six months from the date of order of Commissioner of Customs permitting for such an attachment.
 - (4) The period may be extended by Chief Commissioner of Customs for a further period or periods as he may deem fit. The reasons of such an extension shall be recorded in writing. The total period of extension in any case shall not exceed two years.
 - (5) If an application for settlement of a case is made to the Settlement Commission, period from the date of making the application to the date of an order passed by the Commission under section 127C(1) shall be excluded from the extended period mentioned in point (4) above.

Question 8

- (a) *If any duty demanded or drawback paid is recoverable from a person, what is the procedure envisaged under section 142 of the Customs Act, 1962?* (5 Marks)
- (b) *Briefly discuss the provisions in relation to interest on drawback as per section 75A of the Customs Act, 1962.* (3 Marks)
- (c) *What is the time-limit provided for issuance of show-cause notice in section 28 of the Customs Act, 1962?* (4 Marks)
- (d) *What are the orders of Commissioner (Appeals) not appealable to Appellate Tribunal as per section 129A of the Customs Act, 1962?* (3 Marks)

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Answer

- (a) Section 142 of the Customs Act provides following procedure for recovery of duty demanded or drawback paid:
- a. Deducting from any amount payable by any Customs Officer to such person.
 - b. Detaining and selling goods belonging to such person, which are under control of customs authorities;
 - c. Issuing a certificate to District Collector in whose district any property of the person is situated or where he carries on business.
 - d. Distraining and detaining any property belonging to the person and selling the same.
 - e. Recovering from successor by attaching goods, materials, machinery, plant etc. transferred to successor in trade or business.
 - f. Enforcing a bond executed under the Act.

- (b) Payment of interest on delayed payment of drawback

As per section 75A, where any drawback payable to a claimant under section 74 or 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, there shall be paid to the claimant, in addition to the amount of drawback, interest at the rate fixed under section 27A from the date after the expiry of the said period of one month till the date of payment of such drawback.

Further, if any drawback has been paid erroneously to claimant or it becomes otherwise recoverable, the claimant shall within a period of 2 months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AB of the Customs Act, 1962.

- (c) As per section 28, the time limit for issuance of show cause notice is as under:

- (i) In the case of import made by an individual for his personal use or by the Government or by any educational, research or charitable institution or hospital- within one year from the relevant date;
- (ii) In any other case -within six months from the relevant date.

Where any duty has not been levied or has been short levied or interest has not been charged or has been partly paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the time period shall be extended to five years.

Where the service of the notice is stayed by an order of Court, the period of such stay shall be excluded in computing the aforesaid period of six months or one year or five years as the case may be.

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- (d) No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall have no jurisdiction to decide any appeal in respect of any order passed by the Commissioner of Appeals under section 129A, if such order relates to:
- (i) any goods imported or exported as baggage;
 - (ii) any goods loaded in conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination, if goods unloaded at such destination are short of the quantity required to be unloaded at that destination.
 - (iii) payment of drawback as provided in Chapter X and the rules made there under.

PART C

Question 9

- (a) *State with reason whether service tax liability arises in the following cases:*
- (i) *Services provided by 'angadia' in undertaking delivery of documents or goods received from a customer to another person for a consideration.*
 - (ii) *Commission received by distributors for distribution of mutual fund units.*
 - (iii) *Consultancy services in the field of computer software engineering by consulting engineer.* (3×2=6 Marks)
- (b) (i) *What is the exemption provided to practicing Chartered Accountants under Notification No.25/2006 ST dated 13.7.2006 ?* (2 Marks)
- (ii) *Define the term 'gross amount charged' as per explanation (c) to section 67 of Finance Act, 1994, as amended, with reference to associated enterprises.* (3 Marks)
- (iii) *M, an assessee fails to pay service tax of Rs.15 lakhs payable by 5th January. He pays the amount on 16th January. What is the penalty payable by M?* (4 Marks)

Answer

- (a) (i) Yes, the services provided by 'Angadia' will be covered under courier agency services. The *Circular No. 96/7/2007 ST dated 23.08.2007* clarifies that angadias are covered within the definition of 'courier agency' [section 65(33) of the Finance Act, 1994 as amended]. Therefore, such services provided by angadia is liable to service tax under courier agency service.
- (ii) Yes, the services provided by distributors for distribution of mutual funds units are liable to service tax under business auxiliary service. The *Circular No. 96/7/2007 ST dated 23.08.2007* clarifies that distributors receive commission from mutual fund for providing services relating to purchase and sale of mutual fund units. Services provided by such distributors are in the nature of commission agent and are, thus, liable to service tax under business auxiliary service [section 65(105)(zzb)].
- (iii) Yes, as per the Finance Act, 1994 as amended by Finance Act, 2008, "consulting services in the field of computer software engineering" have been included within

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the scope of taxable services provided by a 'consulting engineer'. Hence, the consultancy services provided in the field of computer software engineering by consulting engineer shall be liable to service tax.

- (b) (i) As per *Notification No.25/2006 ST dated 13.07.2006*, the taxable service provided or to be provided by a practising Chartered Accountant in his professional capacity to a client, relating to representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, is exempt from the whole of service tax leviable thereon.

- (ii) With effective from 10.05.2008, the definition of gross amount charged has been amended; now it reads as under:

Gross amount charged includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

Here, associated enterprise has the meaning assigned to it in section 92A of the Income tax Act, 1961.

- (iii) Penalty payable is:

- (a) 2% of the amount of default per month

In this case, delay is of 11 days. Therefore,

$$\text{Amount} = 2\% \text{ of } (15,00,000 \times 11/31) = \text{Rs} 10,645$$

or

- (b) Penalty @Rs. 200 per day of default

$$= \text{Rs.} 200 \text{ per day} \times 11 = \text{Rs } 2,200$$

whichever is higher

Thus, penalty payable is Rs 10,645.

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PART – A

Question 1

- (a) Determine the total amount of excise duty payable under section 4 of the Central Excise Act, 1944 from the following information:

Particulars	Rs.
(i) Price of machinery excluding taxes and duties	5,50,000
(ii) Installation and erection expenses	21,000
(iii) Packing charges (primary and secondary)	11,500
(iv) Design and engineering charges	2,000
(v) Cost of material supplied by buyer free of charge	8,500
(vi) Pre-delivery inspection charges	500

Other information:

- (a) Cash discount @ 2% on price of machinery was allowed as per terms of contract since full payment was received before dispatch of machinery.
- (b) Bought out accessories supplied along with machinery valued at Rs. 6,000.
- (c) Central excise duty rate 16% and educational cess as applicable @ 3%.

Make suitable assumptions as are required and provide brief reasons. (5 Marks)

- (b) XYZ Co. is engaged in the manufacture of water pipes. From the following details for the month of May, 2009, compute the available Cenvat credit under the Cenvat Credit Rules, 2004 :

Cenvat paid on purchases as detailed below:

Particulars	Rs.
Raw steel	22,000
Water pipe making machine	18,000
Spare parts for the above machine	7,500
Grease and oil	2,800
Office equipment	20,000
Diesel	12,000

Provide explanation for treatment of various items. (5 Marks)

The suggested answers for Indirect Tax Laws (Paper 8) are based on the provisions as amended by the Finance Act, 2008 and notifications/circulars issued up to 30.04.2009 which are relevant for November 2009 examinations.

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- (c) *Small & Company, a small scale industry, provides the following details. Determine the eligibility for exemption based on value of clearances for the financial year 2009-10 in terms of Notification No. 8/2003-CE dated 1.3.2003 as amended:*

	<i>Particulars</i>	<i>Rs. (Lakhs)</i>
(i)	Total value of clearances during the financial year 2008-09 (including VAT Rs. 50 lakhs)	870
(ii)	Total exports (including for Nepal and Bhutan Rs. 200 lakhs)	500
(iii)	Clearances of excisable goods without payment of duty to a unit in Software Technology Park	20
(iv)	Job work under Notification No. 84/94-CE dated 11.4.94	50
	Job work under Notification No. 214/86-CE dated 25.3.86	50
(v)	Clearances of excisable goods bearing brand name of Khadi and Village Industries Board (sic).	200

Make suitable assumptions and provide brief reasons for your answers where necessary.

(5 Marks)

Answer

- (a) Determination of excise duty payable:

<i>Particulars</i>	<i>Rs.</i>
Price of machinery	5,50,000
Packing charges (Note 6)	11,500
Design and engineering charges (Note 7)	2,000
Cost of material supplied by buyer (Note-3)	8,500
Pre-delivery inspection charges (Note-4)	<u>500</u>
Total	5,72,500
Less : 2% cash discount on price of machinery=550,000 x 2 % (Note-5)	<u>11,000</u>
Assessable value	<u>5,61,500</u>
Excise duty @ 16.48%	92,535.20
Excise duty rounded off	92,535

Notes :-

While computing the assessable value:-

1. installation and erection expenses will not be included [Circular No. 643/34/2002 dated 01.07.2002].
2. bought out accessories, supplied along with the machinery, will not be included.

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3. cost of material supplied by buyer free of charge will form part of assessable value as it is the additional consideration flowing from buyer to seller.
4. pre-delivery inspection charges are includible [*Circular No. 643/34/2002 dated 01.07.2002*].
5. cash discount will be allowed as deduction if actually passed on to the buyer and if transaction is on principal to principal basis [*Circular No. 643/34/2002 dated 01.07.2002*].
6. amount charged from the buyer in relation to packing, whether primary or secondary, shall be included [*Circular No. 354/81/2000 dated 30.06.2000*].
7. design and engineering charges shall be included as such payment is 'in connection with sale'.

(b) CENVAT credit admissible to XYZ Co. for the month of May, 2009:-

<i>Particulars</i>	<i>Rs.</i>
Raw Steel	22,000
Water pipe making machine (Rs. 18,000 × 50%) (Note-1)	9,000
Grease and Oil	2,800
Spare parts for the machinery (Rs. 7,500 × 50%) (Note-1)	<u>3,750</u>
CENVAT credit admissible	<u>37,550</u>

Notes :

In respect of:-

1. water pipe making machine and spare parts, being capital goods, only 50% of CENVAT credit is available [Rule 4(2) of the CENVAT Credit Rules, 2004].
2. office equipment, no credit is available since the definition of capital goods under rule 2(a)(A) of the CENVAT Credit Rules, 2004 specifically excludes any equipment/appliance used in an office.
3. diesel, no credit is available since the definition of input under rule 2(k)(i) of the CENVAT Credit Rules, 2004 specifically excludes it.

(c) Calculation of value of clearances during financial year 2008-09:-

<i>Particulars</i>	<i>Rs. (in lakhs)</i>
Total value of clearance in 2008 - 09	870
Less : VAT included in above	<u>50</u>
	820
Less : 1. Exports excluding exports to Nepal and Bhutan Rs. (500-200) lakh	300

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2. Clearances of excisable goods without payment of duty to a unit in Software Technology Park	20
3. Job work done under Notification No. 84/94-CE dated 11.04.94 and under Notification No. 214/86-CE dated 25.3.86 i.e. Rs. (50 + 50) lakh	<u>100</u>
Value of clearances	<u>400</u>

In order to claim the benefit of exemption under Notification No. 8/2003 – C.E. in a financial year, the total turnover of a unit should not exceed Rs.400 lakh in the preceding year. For the purpose of computing the turnover of Rs. 400 lakh:-

1. export turnover has to be excluded. However, export to Nepal and Bhutan cannot be excluded as these are treated as “clearance for home consumption”.
2. job work under *Notification No. 214/86 - CE* and *Notification No. 84/94-CE* is not to be taken into consideration.
3. clearances of excisable goods without payment of duty to a unit in Software Technology Park are to be deducted.
4. clearances of excisable goods bearing brand name of Khadi and Village Industries Commission are includible.

Since the value of clearances in the previous financial year 2008-09 does not exceed Rs. 400 lakh, the Small & Company is eligible to claim the benefit of *Notification No. 8/2003 dated 1st March, 2003* in the financial year 2009-10.

Question 2

- (a) *I Ltd. was a manufacturer of excisable goods such as polyester yarn. A ground plan of the factory was provided by the assessee to the jurisdictional Central Excise Officer and the same was approved. The ground plan showed the area in which the manufacturing is carried out as also the areas occupied for purpose of storage godowns, cycle sheds, canteen as well as the housing complex for staff and workers. The assessee had a captive power plant in the approved area. The electricity generated was supplied to the housing complex as well as for use in the manufacturing activity. I Ltd. claimed Cenvat credit on the duty paid on furnace oil used for generation of electricity as it was used within the factory and was covered by the expression "for any other purpose" in rule 2(k) of the Cenvat Credit Rules, 2004. The Central Excise Department wanted to deny the Cenvat credit on the duty paid on furnace oil for generation of electricity which in turn is supplied to the housing complex on the ground that it was not used in relation to manufacture of the final product. Examine, with the help of a decided case law, if the stand of the Department is correct in law. (5 Marks)*
- (b) *The assessee manufactured compressors and filters and removed them as "stand alone" items. He also manufactured and removed safety valves and filters on payment of duty.*

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The assessee also supplied bought out items like V belts, motor, pulley etc. to their buyers. The Excise Department relying on rule 2(a) of the General Interpretative Rules for classification has decided to include the value of safety valves and filters together with value of bought out items in the value of compressors for purposes of duty under section 4 of the Central Excise Act, 1944. Write a brief note, with any decided case law, whether the stand taken by the Department is correct. (5 Marks)

- (c) *The assessee's premises were searched by the Anti Evasion wing of the Excise Department. A show cause notice was issued alleging that the assessee had cleared goods without the cover of duty paid invoice and without accounting the same in the stock register. The assessee was required to pay the duty demanded with interest. The assessee filed an application before the Settlement Commission to put an end to the litigation and buy peace. The application was dismissed by the Settlement Commission on the ground that the petitioner in its petition had not admitted the entire duty liability. The assessee's contention is that Department is yet to substantiate the allegations made in the show cause notice and the dismissal order is not correct in law. Briefly discuss, with a note, whether the action of the Settlement Commission is correct in law. (5 Marks)*

Answer

- (a) The facts of this case are similar to the case of *M/s Indorama Synthetics (I) Ltd. v. CCEx.* (2008) 226 ELT A181(SC). In this case, the Supreme Court maintained the judgment of the Bombay High Court wherein it was held that the CENVAT credit of the duty paid on furnace oil used in the generation of electricity in turn used in the residential complex was not allowable. The assessee submitted that "factory" under section 2(f) of the Central Excise Act, 1944 is wide enough to cover precincts thereof, even if the manufacturing is carried out only in a part of such premises. Therefore, the electricity supplied to the residential complex situated within the factory premises must be covered within the meaning of the word 'for any other purpose' set out in the erstwhile rule 57(B)(w) of the Central Excise Rules, 1944 [similar to present rule 2(k) of the CENVAT Credit Rules, 2004]. The assessee's submission was rejected by the High Court observing that credit of duty would be available on inputs used in the generation of electricity, provided the electricity is used for manufacture of final products or for any other purpose connected with or related to manufacture of final products. In other words, the use of electricity must have nexus with the goods manufactured in the factory. The mere fact that the residential complex is situated within the licensed premises would not entitle the assessee to avail the credit of duty paid on the furnace oil used in the manufacture of electricity supplied to the residential complex. Thus, the stand taken by the Department of disallowing the CENVAT credit is correct in law.
- (b) A similar question had come up for consideration before the Supreme Court in the case of *CCEx., Delhi v. M/s Frick India Ltd.* 2007 (216) ELT 497 (S.C). In the instant case, the Supreme Court observed that rule 2(a) of the General Interpretative Rules for

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classification could not be applied in this case as:

- (i) The compressors manufactured by assessee were removed as 'stand alone' item and not in an unassembled or disassembled condition; and
- (ii) Section and Chapter notes in Tariff and the Interpretative Rules do not provide guidelines for valuation of excisable goods because they decide the classification, and valuation is different from classification.

Thus, the Supreme Court held that the parts and accessories could not be classified as 'compressors' and therefore, were independently classifiable under respective headings applicable to them. The concept of 'classification' is different from that of 'valuation'. Therefore, the contention of the Department is not correct in law.

- (c) The dismissal order is valid in law. In the case of *Cus. & C.Ex. Settlement Commission v. Mars Therapeutics & Chem. Ltd 2008 (223) ELT 363 (AP)*, the High Court held that an application made under section 32E of the Central Excise Act, 1944 could be admitted and proceeded with only when Settlement Commission was satisfied that the applicant had made a full and true disclosure of duty liability and the manner in which same was arrived at. The assessee's plea that obligation to make truthful disclosure of duty liability would arise after application was admitted and not before and that Revenue was required to first establish the stand taken in show cause notice, was not acceptable.

HC further clarified that it was only when the Settlement Commission was satisfied that the applicant had made a full and true disclosure, the application could be admitted and proceeded with. This was for the reason that the object behind the enactment of the provisions relating to settlement was the creation of a forum for self- surrender. The Settlement Commission was constituted as an extraordinary measure for providing an opportunity to such persons to make a true confession and to have matters settled once for all. The Settlement Commission was not a forum for challenging the legality of orders passed under the provisions of the Act. The Settlement Commission, in the case on hand, having found that the applicant-petitioner did not fully satisfy the mandatory requirements of full and true disclosure of its liability, was justified in rejecting the application. Thus, the validity of the dismissal order was upheld by the Court.

Question 3

- (a) Explain briefly the concept of "excisable goods" as amended by the Finance Act, 2008.
(2 Marks)
- (b) Explain briefly, how the value of goods will be ascertained for purpose of excise duty where the assessee sells the goods partly to a related person and the balance to unrelated third parties.
(2 Marks)
- (c) Write a brief note on Cenvat monthly return of information relating to principal inputs in Form ER 6.
(2 Marks)

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- (d) Briefly mention any four categories of persons who are exempted from obtaining registration under rule 9(2) of the Central Excise Rules, 2002. (2 Marks)
- (e) Write a short note on the principle of "unjust enrichment" under Central Excise Law. (2 Marks)

Answer

- (a) As per section 2(d) of the Central Excise Act, 1944, "excisable goods" means goods specified in the First Schedule and Second Schedule to the Central Excise Tariff Act, 1985 as being subject to the duty of excise and includes salt.

By Finance Act, 2008, an explanation has been added which clarifies that "goods" include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. Thus, the concept of deemed marketability is introduced by this amendment.

- (b) There is no specific rule covering such a situation. Transaction value in respect of sales to unrelated buyers cannot be adopted for sales to related buyers since as per section 4(1), transaction value is to be determined for each removal. For sales to unrelated buyers, valuation will be done as per section 4(1)(a) and for sales of the same goods to related buyers, recourse will have to be taken to the residuary rule 11 read with rule 9 (or 10). Rule 9 cannot be applied in such cases directly since it covers only those cases where all the sales are made to related buyers only [*Circular No. 643/34/2002 dated 01.07.2002*].
- (c) ER-6 is a monthly return of receipt and consumption of each of principal inputs. It is to be submitted, by the assessee by 10th of the following month. Only those assessees who are required to submit ER-5 return are required to submit ER-6 return [Rule 9A(3) of the CENVAT Credit Rules, 2004].
- (d) Central Board of Excise and Customs, as per the power given under rule 9(2) of the Central Excise Rules, 2002, vide *Notification No.36/2001-CE. (NT) dated 26.06.2001*, has exempted the following specified categories of persons from obtaining registration:
- (i) Persons who manufacture the excisable goods, which are chargeable to nil rate of duty or are fully exempt from duty by a notification subject to the declaration to be made in a specified form.
 - (ii) Small scale units having the slab exemption based on value of clearances under a notification. However, they have to give the declaration when their clearances touch Rs. 90 lakh.
 - (iii) In respect of final products falling under chapter 61 or 62, the job-worker need not get registered if the principal manufacturer undertakes to discharge the duty liability. If the job worker undertakes to pay the duty, the principal manufacturer need not get registered.

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- (iv) Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to certain prescribed conditions.
- (v) The person who carries on whole sale trade or deals in excisable goods except first and second stage dealer, as defined in the CENVAT Credit Rules, 2004.
- (vi) A hundred percent Export Oriented Undertaking or a unit in EPZ or a unit in SEZ licensed or appointed; as the case may be under the Customs Act, 1962 if they do not procure excisable goods from Domestic Tariff Area or do not remove excisable goods to Domestic Tariff Area.
- (vii) Persons who use excisable goods for any purpose other than the processing or manufacture of goods availing benefit of concessional duty exemption notification.
- (viii) Person who gets his goods manufactured on his account from any other person subject to the conditions that the said person authorizes the person actually manufacturing or fabricating the said goods, to comply with all procedural formalities under the Central Excise Act, 1944 and the rules made there under and to furnish information in order to enable the determination of value of the said goods.

Note: Any four points may be mentioned.

- (e) If the manufacturer has charged excise duty to his buyer, it is clear that he has passed on the burden to the buyer and has already recovered duty from his customer. In such cases, refund of excess duty paid to the manufacturer will amount to excess and undeserved profit to him. It will not be equitable to refund the duty to him as he will get double benefit-first from the customer and again from the Government. This is called "unjust enrichment". Accordingly, refund will be paid to the manufacturer only if he proves that he has borne the burden of duty. Otherwise, the amount will be paid to Consumer Welfare Fund.

PART - B

Question 4

- (a) *Determine the taxable turnover, input tax credit and net VAT payable by a works contractor from the details given below on the assumption that the contractor maintains sufficient records to quantify the labour charges. Assume output VAT at 12.5%:*

<i>Particulars</i>	<i>Rs. (in lakh)</i>
(i) <i>Total contract price (excluding VAT)</i>	<i>100</i>
(ii) <i>Labour charges paid for execution of the contract</i>	<i>35</i>
(iii) <i>Cost of consumables used not involving transfer of property in goods</i>	<i>5</i>
(iv) <i>Material purchased and used for the contract taxable at 12.5% VAT (VAT included)</i>	<i>45</i>

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The contractor also purchased a plant for use in the contract for Rs. 10.4 lakhs. In the VAT invoice relating to the same, VAT was charged at 4% separately and the said amount of Rs. 10.4 lakhs is inclusive of VAT. Assume 100% input credit on capital goods.

Make suitable assumption wherever required and show the working notes. (5 Marks)

- (b) Calculate the value of taxable service under 'cargo handling services' of Cargo Ltd., providing brief reasons where required with suitable assumptions based on the following information for the month of April, 2009:

Particulars	Rs. (in lakh)
(i) Total amount charged for all services	40
(ii) Receipts for services in relation to export cargo and handling of passenger baggage included in (i) above	13
(iii) Charges for storage and cleaning of empty containers of shipping lines included in (i) above	10
(iv) Charges for packing and transport of cargo included in (i) above	3
(v) Charges for handling of agricultural produce included in (i) above	2
(vi) Charges for transportation of cargo included in (i) above	5
	(5 Marks)

Answer

- (a) Under the works contract, the turnover for imposition of VAT is the sale price of the goods in which there is a transfer of property. The amount representing the labour & other charges incurred for such execution is deductible.

Computation of the taxable turnover, input tax credit and net VAT payable by the works contractor:-

Particulars	Rs.
Total contract price	1,00,00,000
Less : Deductions admissible	
1. Labour charges paid for executing the contract	35,00,000
2. Cost of consumables in which no property is transferred	<u>5,00,000</u>
Total deductions	<u>40,00,000</u>
Taxable turnover	<u>60,00,000</u>
Output VAT payable @ 12.5% (on Rs. 60,00,000)	7,50,000 (A)

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Less : Input tax credit admissible

1. On the material purchased (on Rs. 45,00,000 x 12.5/112.5)	5,00,000	
2. On the plant purchases (on Rs. 10,40,000 x 4/104)	<u>40,000</u>	
Input tax credit	<u>5,40,000</u>	(B)
Net VAT payable	<u>2,10,000</u>	(A-B)

(b) Calculation of the value of taxable service under 'cargo handling services' of Cargo Ltd.:-

<i>Particulars</i>	<i>Rs.</i>
Total receipts from services rendered	40,00,000
Less : Exemptions:-	
1. Receipts in relation to export cargo & handling baggage of passenger (Note-1)	13,00,000
2. Charges received for storage, washing etc. of empty containers of shipping lines (Note-4)	10,00,000
3. Charges received in relation to handling of agricultural produce (Note-3)	2,00,000
4. Charges received only for transportation of cargo (Note-5)	<u>5,00,000</u>
Taxable services under cargo handling	<u>10,00,000</u>

Notes:

1. The definition of 'cargo handling service' under section 65(23) specifically excludes handling of export cargo or passenger baggage. Hence, they do not form part of taxable services.
2. Charges received for packing together with transportation of cargo, Rs.3,00,000, is taxable in view of amendment made in section 65(23) by Finance Act, 2008.
3. *Notification No. 10/2002 dated 01.08.2002* exempts the taxable service provided to any person by a cargo handling agency in relation to agricultural produce or goods intended to be stored in a cold storage from payment of service tax.
4. *Circular No. B.11/1/2002-TRU dated 1/8/2002* clarifies that activity of storing/washing/repairing and handling empty containers for the shipping lines does not come within the purview of "cargo handling services".
5. It is assumed that these are the charges merely for the transportation. The definition of 'cargo handling service' under section 65(23) specifically excludes mere transportation of goods. Hence, they do not form part of taxable services.

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Question 5

- (a) *M/s M Construction Ltd. constructs, builds and sells premises/flats in a building. During the course of development and construction of the building, it enters into a flat purchase agreement in terms of which the buyers are allotted flats in the building. The buyers pay the consideration to M/s. M Construction in installments. The said 'flat purchase agreement' reflects the entire consideration for the purchase of flat. This agreement is registered and advance payments in installments are collected. The contention of M/s M Construction is that the consideration is for the purchase and sale of the entire flat/premises and the company does not carry out any construction activity. Examine, with a brief note, whether the company is liable to pay service tax in terms of the Finance Act, 1994.* (5 Marks)
- (b) *Good Luck Agencies is engaged in the purchase of lottery tickets in bulk from the State Government and sells them subsequently on behalf of the Government. However, no service tax is paid on the said activity. The Department has sought to levy service tax under the category of 'business auxiliary service' under section 65(19) as service in relation to promotion or marketing of service provided by the client. Discuss briefly, with a note and decided case law, if any, whether the action of the Department is correct in law.* (5 Marks)

Answer

- (a) The facts of the given case are similar to the case of *M/s Magus Construction Private Ltd. v. Union of India* (11) STR 225 (Gauhati), wherein it has been held by the Gauhati High Court that Circular No. 332/35/2006-TRU dated 01.08.2006 (now Circular No. 96/7/2007-ST dated 23.8.07) clarifies that when a builder, promoter or developer undertakes construction activity for own self, then, in such cases, in absence of relationship of "service provider" and "service recipient", the question of providing taxable service, to any person by any other person does not arise at all. In this case also, the facts clearly show that the construction activity undertaken by the assessee was in respect of its own work and it was only the completed construction work which was sold by the petitioner company to the buyers, who might have made agreements for sale before the construction had actually started or during the progress of the construction activity. Any advance, made by the prospective buyer or the deposit received by the company, is against the consideration of sale of flat/building to such prospective buyer and not for the purpose of obtaining service from M Construction Ltd. Therefore, the contention of M Construction Ltd. is correct in law and it is not liable to pay service tax.
- (b) The action taken by the Department is valid in law. Section 65(19)(ii), inter alia, provides that 'business auxiliary service' means any service in relation to promotion or marketing of service provided by the client. Finance Act, 2008 has inserted explanation to section 65(19)(ii) which provides that for the purpose of this sub-clause, "service in

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relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo. This makes it amply clear that services of selling the lottery tickets are liable to service tax under the category 'business auxiliary service' with effect from 16.05.2008. Consequently, Good Luck Agencies is liable to pay service tax.

Question 6

- (a) *Briefly explain whether the following are chargeable to service tax under the provisions of the Finance Act, 1994 :*
- (i) *Service provided by a person to another person in relation to information technology software for use in course or furtherance of business or commerce.*
 - (ii) *Transaction allowing another person to use goods without giving legal right of possession and control to the user of the goods.* (2 × 2 = 4 Marks)
- (b) *Write a brief note explaining the circumstances under which expenditure or costs incurred by a service provider as a pure agent of the recipient of service shall be excluded from the value of taxable services under the Service Tax (Determination of Value) Rules, 2006.* (4 Marks)
- (c) *Briefly explain the provisions in the Service Tax Rules, 1994 relating to furnishing of list of records at the time of filing of return for the first time.* (4 Marks)
- (d) *Briefly explain the following with reference to the Service Tax Rules, 1994 and the Finance Act, 1994:-*
- (i) *Gross amount charged*
 - (ii) *e-payment of service tax.* (2 × 2 = 4 Marks)
- (e) *Briefly explain the importance of VAT invoice.* (2 Marks)

Answer

- (a) (i) Information technology software means any representation of instructions, data, sound or image including source code and object code recorded in a machine readable form that is capable of being manipulated or providing interactivity to a user by means of a computer or an automatic data processing machine or any other device or equipment. Services like service provided in relation to information technology software including development of information technology software, study, analysis, design and programming, providing advice, consultancy and assistance on these matters, acquiring right to use information technology software for commercial exploitation including right to reproduce, distribute etc. and acquiring the right to use information technology software supplied electronically, have been made liable to service tax with effect from 16th May, 2008.

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- (ii) Transfer of right to use any goods is leviable to Sales tax/VAT as a deemed sale of goods. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is liable to service tax with effect from 16.05.2008. The taxable service shall include service provided to any person by any other person in relation to supply of tangible goods, including machinery, equipment, and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances.

- (b) Expenditure or costs incurred by the service provider as a pure agent of the recipient of the service shall be excluded from the value of the taxable service if all the following conditions are satisfied:-
 - (a) The service provider acts as a pure agent of the recipient of the service while making payment to the third party.
 - (b) The recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service.
 - (c) The recipient of service is liable to make payment to the third party.
 - (d) The recipient of service authorizes the service provider to make payment on his behalf.
 - (e) The recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party.
 - (f) The payment made by the service provider on behalf of the recipient of service is separately indicated in the invoice issued by the service provider to the recipient of service.
 - (g) The service provider recovers from the recipient of service only such amount as has been paid by him to the third party.
 - (h) The goods or services procured by the service provider from the third party as a pure agent are in addition to the service he provides on his own account.
- (c) Rule 5(2) of the Service Tax Rules, 1994 lays down that every assessee shall furnish to the Superintendent of Central Excise at the time of filing of return for the first time or the 31st day of January 2008, whichever is later, a list in duplicate, of
 - (i) all the records prepared or maintained by the assessee for accounting of transactions in regard to,
 - (a) providing of any service, whether taxable or exempted;
 - (b) receipt or procurement of input services and payment for such input services;
 - (c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;

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- (d) other activities, such as manufacture and sale of goods, if any.
- (ii) all other financial records maintained by him in the normal course of business.
- (d) (i) Gross amount charged:

Explanation to section 67 of the Finance Act, 1994 as amended provides that "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.
- (ii) E-payment:

The assessee who has paid service tax of Rs. 50,00,000 or above in the preceding financial year or has already paid service tax of Rs. 50,00,000 in the current financial year has to compulsorily deposit the service tax liable to be paid electronically, through internet banking [Proviso to rule 6(2) of the Service Tax Rules, 1994].
- (e) Invoices are crucial documents for administering VAT. In the absence of invoices, VAT paid by the dealer earlier cannot be claimed as set off. Invoices should be preserved with full care. In case any original invoice is lost or misplaced, a duplicate authenticated copy must be obtained from the issuing dealer.

A VAT invoice:

 - (i) helps in determining the input tax credit;
 - (ii) prevents cascading effect of taxes;
 - (iii) facilitates multi-point taxation on the value addition;
 - (iv) promotes assurance of invoices;
 - (v) assists in performing audit and investigation activities effectively;
 - (vi) checks evasion of tax.

PART – C

Question 7

Compute the duty payable under the Customs Act, 1962 for an imported equipment based on the following information:

- (i) *Assessable value of the imported equipment US \$ 10,100,*
- (ii) *Date of bill of entry is 25.4.2009. Basic customs duty on this date is 20% and exchange rate notified by the Central Board of Excise and Customs is US \$ 1 = Rs. 65.*

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- (iii) Date of entry inwards is 21.4.2009. Basic customs duty on this date is 16% and exchange rate notified by the Central Board of Excise and Customs is US \$ 1 = Rs. 50.
- (iv) Additional duty payable under section 3(1) and (2) of the Customs Tariff Act, 1975: 15%
- (v) Additional duty under section 3(5) of the Customs Tariff Act, 1975: 4%.
- (vi) Educational cess @ 2% in terms of the Finance Act (No.2), 2004 and secondary and higher educational cess @ 1% in terms of the Finance Act, 2007.

Make suitable assumptions where required and show the relevant workings and round off your answer to the nearest rupee. (5 Marks)

Answer

Computation of custom duty payable:

Particulars	Rs.
Assessable value (10,100 x 65)	6,56,500
Add: Basic custom duty @ 20%	<u>1,31,300</u>
Total	7,87,800
Add : CVD @ 15.45%	<u>1,21,715.10</u>
Total	9,09,515.10
Add : Education Cess (131300 + 121715.10) x 3%	<u>7,590.45</u>
Total	<u>9,17,105.60</u>
Additional duty u/s 3(5) @ 4%	36,684.22
Total Custom Duty Payable (131300 + 121715.10+7590.45+36684.22)	2,97,289.77
Custom Duty (rounded off to nearest rupee)	2,97,290

Notes:

- Since bill of entry was presented after grant of entry inwards, exchange rate Rs.65 per USD is applicable as it is the rate notified by CBEC on the date of presentation of Bill of Entry.
- Basic customs duty @ 20% is applicable as it is prevalent on the date of presentation of bill of entry (Section 15 of the Custom Act, 1962).

Question 8

The assessee had imported capital goods under a licence with a condition to fulfill an export obligation within a certain time limit. The assessee failed to discharge the export obligation within the said time limit. Consequently, the Department invoked the bank guarantee and realized the amount. However, subsequently the assessee was able to fulfill the export obligation and the Department cancelled the bank guarantee. The assessee thereafter filed a refund claim for the amount realized by invocation of the bank guarantee by the Department. The Department rejected the refund claim on the ground that it was barred in terms of section

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27(1)(b) of the Customs Act, 1962 as the assessee had not been able to establish that the incidence of duty had not been passed on by him to any other person. Examine briefly, with the help of any decided case law, whether the stand taken by the Department is correct in law.

(5 Marks)

Answer

In *CCus. (Exports) v. Jraj Exports (P) Ltd.* 2007 (217) ELT 504 (Mad.), the High Court observed that when the Department had accepted the fulfillment of export obligation, there was no need to invoke the bank guarantee and retain the amount. The High Court opined that the Department's claim that refund had been time barred was not sustainable as furnishing of bank guarantee in order to fulfill the export obligation could not be regarded as payment of duty.

The High Court relied on the Supreme Court's ruling in the case of *Oswal Agro Mills Ltd. and Another v. Asstt. Collector of Central Excise* 1994 (70) ELT 48 (SC), wherein it was held that furnishing of bank guarantee pursuant to an order of the Court would not be equivalent to payment of excise duty. The furnishing of bank guarantee is only a security to safeguard the interest of the Revenue. Applying the principle laid down in this case, the Court stated that the requirement to establish that the duty incidence had not been passed on by the assessee to any other person would also not get attracted since section 27 has no application to this case. Therefore, the stand of the Revenue is not correct in law.

Question 9

- (a) Explain briefly the expression 'person-in-charge' under the Customs Act, 1962. (2 Marks)*
- (b) Explain briefly the provisions of the Customs Act, 1962 relating to the powers vested in the customs officers to take samples. (2 Marks)*
- (c) Explain, with a brief note, how the duty is arrived under the Customs Act, 1962 where the imported goods consist of articles liable to different rates of duty. (2 Marks)*
- (d) Write a brief note on the 'residual method' of determination of value of imported goods under the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. (2 Marks)*
- (e) Briefly state the rights of the owner of warehoused goods under the Customs Act, 1962. (2 Marks)*

Answer

- (a) Section 2(31) provides that 'person in charge' means:
 - (a) in relation to a vessel, the master of the vessel.
 - (b) in relation to an aircraft, the commander or the pilot in charge of the aircraft.
 - (c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train.

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- (d) in relation to any other conveyance, the driver or other person in charge of the conveyance.
- (b) As per the provisions of section 144 of the Customs Act, the proper officer may, on the entry or clearance of any goods or at any time while such goods are being passed through the customs area, take samples of such goods in the presence of the owner thereof, for:
 - (a) examination or testing or,
 - (b) ascertaining the value thereof, or
 - (c) any other purposes of this Act
- (c) Where goods consist of a set of articles, duty shall be calculated as follows as per section 19 of the Customs Act, 1962:
 - (a) articles liable to duty with reference to quantity shall be chargeable to that duty;
 - (b) articles liable to duty with reference to value shall, if they are liable to duty at the same rate, be chargeable to duty at that rate, and if they are liable to duty at different rates, be chargeable to duty at the highest of such rates;
 - (c) articles not liable to duty shall be chargeable to duty at the rate at which articles liable to duty with reference to value are liable under clause (b).
- (d) Residual Method under rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007:

Subject to the provision of rule 3 of the aforesaid rules, where the value of imported goods cannot be determined under the provisions of any of the preceding rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India subject to the conditions laid down in rule 9(2) of the aforesaid rules.
- (e) With the sanction of the proper officer, and on payment of the prescribed fees, the owner of any goods either before or after warehousing the same -
 - (a) inspect the goods;
 - (b) separate damaged or deteriorated goods from the rest;
 - (c) sort the goods or change the containers for the preservation, sale, export or disposal of the goods;
 - (d) deal with the goods & their containers in such manner as may be necessary to prevent loss, deterioration or damage to the goods;
 - (e) show the goods for sale;
 - (f) take samples of the goods without entry for home consumption, if the proper officer so permits, without payment of duty on such samples.

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Attempt all questions.

PART – A

Question 1

(a) *Briefly explain the following with reference to the provisions of the Central Excise Act, 1944:*

(i) *Adjudicating authority*

(ii) *Excisable goods* (2 x 2 = 4 Marks)

(b) *Mention the last date of filing the following returns under the Central Excise Rules, 2002:*

(i) *ER-4 for the financial year 2009-10*

(ii) *ER-7 for the financial year 2009-10* (1 x 2 = 2 Marks)

(c) *Distinguish between compounded levy scheme and duty based on annual production capacity under central excise.* (4 Marks)

(d) *WM Ltd. is manufacturing a product which is captively consumed to produce a final product, which is exempt from the payment of excise duty. The intermediary product is having a distinct market of its own. The company is of the view that since the final product is exempt, no duty liability arises on intermediary product also. The department objected the view of the assessee.*

Discuss, with reference to a decided case law, if any, whether the view of company is justifiable? (5 Marks)

(e) *An assessee sold certain goods to PQR Company Limited for Rs.20,000 on 09.09.2009. The buyer is a related person as defined under section 4(3)(b) of the Central Excise Act, 1944. The buyer did not sell the goods but used it as intermediary product. The cost of production of the goods was Rs.16,000. What should be the assessable value?*

What should be the assessable value, if the goods were sold to unrelated person for Rs.20,000, who also used it as intermediary product?

You may assume that the price charged from the buyer is excluding excise duty and other taxes. (5 Marks)

The Suggested Answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2008 and Notifications/Circulars issued up to 30.04.2009 which are relevant for November 2009 examinations.

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Answer

- (a) (i) Section 2(a) of the Central Excise Act, 1944 defines adjudicating authority to mean any authority competent to pass any order or decision under this Act. However, it does not include the following:
- (a) CBEC constituted under the provisions of Central Board of Revenue Act, 1963;
 - (b) Commissioner of Central Excise (Appeals);
 - (c) Appellate Tribunal.
- (ii) Excisable goods have been defined vide section 2(d) of the Central Excise Act, 1944. It means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise and includes salt. An explanation has been added in this definition with effect from 10.5.2008 which states that for the purposes of this clause "goods" includes any article material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.
- (b) (i) ER-4 for the preceding financial year to which it relates is filed annually by 30th November of the succeeding year [Rule 12(2) of the Central Excise Rules, 2002]. Therefore, the last date for filing ER-4 for the financial year 2009-10 shall be 30.11.2010.
- (ii) ER-7 for the financial year to which it relates is filed by the 30th April of the succeeding financial year [Rule 12(2A) of the Central Excise Rules, 2002]. Therefore, the last date for filing ER-7 for the financial year 2009-10 shall be 30.04.2010.
- (c) **Compounded levy scheme:** Under compounded levy scheme, the manufacturer has to pay the prescribed duty for a specified period on the basis of certain factors relevant to production, like size of equipment employed, production capacity or some other criteria [Rule 15 of Central Excise Rules, 2002].
- Compounded levy scheme is presently applicable to stainless steel pattas/patties and aluminum circles. It is an optional scheme, i.e. the manufacturer can opt to pay duty as per normal rules.
- Duty based on production capacity:** In case of certain products, Central Government, by notification, can specify that duty on such notified products will be levied and collected on the basis of annual production capacity of the factory. [Section 3A(1) of the Central Excise Act, 1944].
- Excise duty on pan masala and gutkha is payable on the basis of annual production capacity under section 3A. The scheme is compulsory.
- (d) The duty of excise is a duty on manufactured goods which are movable and marketable. If any manufactured goods satisfies the movability and marketability conditions, it would become dutiable even if it is an intermediate product and the final product is not dutiable. Therefore, in the given case the intermediate product would be dutiable even though it is

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captively consumed and the final product is not dutiable as it has a distinct market of its own and is marketable.

The Supreme Court's view in the case of *White Machine Vs. CCEx Delhi 2008(224) ELT 347* was also the same. In the above case, the assessee manufactured C.I. Castings which were captively consumed for production of C.I Chilled Rolls. These Chilled Rolls were exempt from duty. The Apex Court opined that since the final product was exempt, the C.I Castings would become dutiable if they satisfied the marketability condition.

Therefore, the company's view is not justifiable and the Department's view is acceptable.

- (e) The proviso to rule 9 of the Central Excise Valuation (Determination of Excisable Goods) Rules, 2000 lays down that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value thereof shall be determined in the manner specified in rule 8.

Rule 8 provides that where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

Therefore, when the goods are sold to a related person, the assessable value shall be 110% of Rs.16,000 (Rs.16,000 + Rs.1,600) i.e., Rs.17,600. However, when the goods are sold to unrelated buyer, the assessable value will be Rs.20,000.

Question 2

- (a) *M/s. XYZ Ltd. shifted its factory from Sitapura to Rampur and transferred all the available inputs and capital goods to the new site. The inputs, capital goods and the balance of unutilised CENVAT credit were duly received and accounted for in the registers of the new unit.*

The said balance of unutilised CENVAT credit transferred was Rs.8,00,000. However, the quantum of CENVAT credit attributable to the inputs and capital goods so transferred to the new site was Rs.6,00,000 only. The Department raised the plea that the assessee was entitled to transfer only Rs.6,00,000 of CENVAT credit and not the entire balance of unutilized credit of Rs.8,00,000.

Explain, with the help of a decided case law, if any, whether Department's plea is justified in law? (4 Marks)

- (b) *What are the circumstances under which the certificate of registration can be revoked or suspended under Central Excise?* (3 Marks)
- (c) *To whom should the matter be referred in a case where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise and how will the matter be settled under section 35E(1) of the Central Excise Act, 1944 ?* (3 Marks)

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- (d) *Discuss in brief the powers of Settlement Commission to grant immunity from prosecution.* (3 Marks)
- (e) *What is the difference between short levy and short payment?* (2 Marks)

Answer

- (a) As per rule 10 of the CENVAT Credit Rules, 2004, if a manufacturer of the final product shifts his factory to another site with the specific provision for transfer of liabilities of such factory, he shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to the new site if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises and the inputs, or capital goods, on which credit has been availed of, are duly accounted for to the satisfaction of Assistant/Deputy Commissioner of Central Excise.

The Madras High Court in the case of *CCE, Pondicherry vs. CESTAT 2008 (230) ELT 209 (Mad.)* has also affirmed this position. In this case, the High Court has held that erstwhile Rule 8 of the CENVAT Credit Rules, 2002 (new rule 10 of the CENVAT Credit Rules, 2004) does not provide that the assessee could transfer the CENVAT credit corresponding only to the quantum of inputs or capital goods transferred to the new factory.

Thus, the plea of Department is not justified presuming that M/s. XYZ Ltd. shifted its factory from Sitapura to Rampur with the specific provision for transfer of liabilities of such factory and the inputs or capital goods on which credit has been availed of are duly accounted for to the satisfaction of Assistant/Deputy Commissioner of the Central Excise.

- (b) The certificate of registration under the Central Excise Act, 1944, can be suspended or revoked by the Deputy Commissioner or the Assistant Commissioner of Central Excise under the following circumstances.
- (i) when the assessee or any person under his employment has committed any breach of any condition of the Central Excise Act or any rules made there under.
 - (ii) the assessee or a person under his employment has been convicted of an offence under Section 161 read with section 109 or section 116 of the Indian Penal Code.
- (c) The Finance Act, 2008 has added a proviso to section 35E(1) to cover a case where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise. In such a case the Committee shall state the point or points on which it differs and make a reference to the Board which after considering the facts of the order, if is of the opinion that the decision or order passed by the Commissioner of Central Excise is not legal or proper may direct such Commissioner or any other Commissioner to apply to Appellate Tribunal for determination of such points arising out of decision or order.
- (d) The Settlement Commission, subject to certain provisions, has the power to grant immunity from prosecution in respect of the case covered by the settlement, if the applicant has co-operated with the Commission and has made full and complete disclosure. If the payment is not made as per the settlement order or any particulars are

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concealed or any false evidence is given, the immunity is withdrawn [Sub-sections (2) and (3) of section 32K].

Immunity can be granted only in respect of prosecution for any offence under the Central Excise Act and not in respect of prosecution for any offence under the Indian Penal Code or any other Central law. However, the immunity from prosecution for any offence under the Indian Penal code or any other central law can be granted in cases filed upto 31-05-2007 [Section 32K(1) of the Central Excise Act].

If prosecution has already been launched before submission of application for settlement, the immunity cannot be granted [Proviso to section 32K(1) of the Central Excise Act].

- (e) Short levy: Short levy arises when the charge itself is done at a lower rate. It may arise out of wrong classification.

Short payment : Short payment arises out of a short levy or short payment of a correct levy. It is a case of less payment of excise duty than what is due.

Question 3

- (a) *M/s. Silver Enterprises is manufacturing packing material namely printed cartons of paper and paper board with brand name of another company. Its turnover for the year 2008-09 was Rs.2 crore and in the year 2009-10 it is expected to increase by 50%.*

The firm has approached you as a consultant whether it is eligible for concession under Notification No. 8/2003 dated 01.03.2003 as amended. Is exemption available to the firm? If yes, what is the limit of turnover, for which the exemption is available for both the years, i.e. 2008 - 09 and 2009 -10? (5 Marks)

- (b) *Which reasons shall not be considered as special and adequate for awarding sentence of imprisonment for a term of less than six months as per section 9(3) of the Central Excise Act, 1944?* (4 Marks)
- (c) *How can the goods kept in a warehouse for the purpose of export be diverted for home consumption? Explain briefly.* (4 Marks)
- (d) *Can the Department file an appeal in respect of same assessee, if in respect of some years, no appeal was filed involving identical dispute?* (2 Marks)

Answer

- (a) Yes, the SSI exemption will be available to M/s. Silver Enterprises as *Notification No. 8/2003 CE dated 01.03.2003* has been amended w.e.f. 01.09.2008 to provide that SSI exemption will be available to packing material including printed cartons of paper or paper board affixed with brand name of another company. It has been presumed that the turnover of M/s. Silver Enterprises for the year 2007-08 was less than Rs.400 lakh.

For the year 2008-09, the exemption will be available for turnover of first Rs.90 lakh from 01.09.2008 onwards.

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Since, in the year 2008-09, the turnover of M/s. Silver Enterprises is Rs. 2 crore which is less than Rs.400 lakh, it is eligible for small scale exemption in the year 2009-10. For the year 2009-10, turnover upto Rs.150 lakh will be fully exempt, if M/s. Silver Enterprises does not avail CENVAT on inputs.

- (b) As per section 9(3) of the Central Excise Act, 1944, for the purposes of section 9(1) or 9(2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely:
- (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 (too young or too old)
- (c) The goods kept in a warehouse for being exported can be diverted for home consumption in the following manner:
- (i) With the permission of the Deputy or Assistant Commissioner of Central Excise, the goods can be cleared for home consumption on invoice prepared under rule 8 on payment of duty, interest and any other charges on TR-6 challans. Necessary entries are to be made in the export warehouse register maintained by the exporter in the warehouse.
 - (ii) Credit will be permitted in the Running Bond Account equivalent to the duty involved in the goods so diverted, which shall not exceed amount of duty debited on the basis of ARE-3 on which such goods were received in the warehouse.
 - (iii) Goods can also be diverted for home consumption even after clearance of goods from warehouse under ARE- 1. The documents will be cancelled as per *Notification No. 46/2001 CE (NT) dated 26.6.2001* as amended. The intimation of such cancellation is to be given to Deputy/Assistant Commissioner having jurisdiction over the warehouse. Credit in Running Bond Account will be permitted in the same manner as mentioned above.
 - (iv) The exporter has to pay an interest @ 24% p.a on the amount of duty payable on such goods from the day of clearance from the factory of production or any other premises approved till the date of payment of duty and clearance.

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- (d) It has been held by the Supreme Court in the case of *C.K Gangadharan v. CIT, Cochin, 2008 (228) ELT 497 (SC)* that merely because in some cases Revenue has not preferred an appeal that does not operate as a bar for the Revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher Court when divergent views are expressed by the different High Courts. However, the Supreme Court in the case of *CIT vs. J.K. Charitable Trust 2008 (232) ELT 769 (SC 3 members bench)* has held that if in respect of some years, in respect of same assessee, no appeal was filed involving an identical dispute, revenue can be precluded from filing an appeal if the fact situation in subsequent years remains the same.

PART – B

Question 4

- (a) Briefly explain the following with reference to the Customs (Determination of Value of Imported Goods) Rules, 2007:
- (i) Goods of the same class or kind
 - (ii) Computed value (3 + 3 = 6 Marks)
- (b) Mr. Vasu, the assessee, was summoned under section 108 of the Customs Act, 1962, to give his statement in an inquiry. He filed the application for anticipatory bail in the District and Sessions Court which was disposed on the ground of being premature. However, he later moved to the High Court, which granted him anticipatory bail with a direction to the authorities that he should not be arrested without giving a seven day's prior notice to him.
- The Revenue contended that the order passed by the High Court was illegal and erroneous. Explain, with the help of a decided case law, if any, whether the stand taken by the Revenue is sustainable in law? (5 Marks)
- (c) Goods manufactured or produced in India, which were earlier exported and thereafter imported into India will be treated at par with other goods imported into India. Is the proposition correct or any concession is provided on such import? Discuss briefly. (5 Marks)
- (d) Ascertain whether the exporter is entitled to duty drawback in the following independent cases and if yes, what is the quantum of such duty drawback:
- (i) FOB value of goods exported is Rs.50,000. Rate of duty drawback on such export of goods is 1%.
 - (ii) FOB value of 2,000 kgs goods exported is Rs.2,00,000. Rate of duty drawback on such export is Rs.30 per kg. Market price of goods is Rs.50,000 (in wholesale market) (2 + 2 = 4 Marks)

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Answer

- (a) (i) As per rule 2(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, goods of the same class or kind, means imported goods that are within a group or range of imported goods produced by a particular industry or industrial sector and includes identical goods or similar goods.
- (ii) As per rule 2(1)(a) of the said rules, computed value means the value of imported goods determined in accordance with rule 8.
- As per rule 8, subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of –
- (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
 - (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to India;
 - (c) the cost or value of all other expenses under sub-rule (2) of rule 10.
- (b) The stand taken by the Revenue is valid. A similar issue has been dealt by the Supreme Court in the case of *Union of India v. Padam Narain Aggarwal 2008 (231) ELT 397*, wherein the Apex Court has observed that the power to arrest by a Custom Officer under section 104 of the Customs Act, 1962 is statutory in character and cannot be interfered with.
- Supreme Court pronounced that the direction to issue 10 days prior notice before arrest even in case of a non-bailable offence could not be said to be legal or in consonance with law. Firstly, the order passed by the High Court was a blanket one and granted protection to respondents in respect of any non-bailable offence. Secondly, it illegally obstructed, interfered and curtailed the authority of Custom Officers from exercising statutory power of arresting a person said to have committed a non-bailable offence by imposing a condition of giving 10 days' prior notice, a condition not warranted by law. Hence, the order of the High Court was set aside.
- Therefore, in the given case, it can be concluded that the stand taken by the revenue is sustainable in law.
- (c) The given proposition is correct i.e., goods produced in India, which were earlier exported and thereafter imported into India will be treated at par with other goods imported into India [Section 20 of the Customs Act, 1962]. However, the following concessions are being provided in this regard:
- (i) Maximum import duty will be restricted to duty drawback or rebate availed at the time of export – *Notification No. 94/96 Cus. dated 16.12.1996*.
 - (ii) Where the goods were originally exported for repairs, the duty on re-importation is restricted to the fair cost of repairs (including cost of materials used in repairs, insurance and freight charges, both ways) done abroad, whether such costs are actually incurred or not.

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The above two concessions are given subject to the condition that:

- (a) the re-importation is done within 3 years or 5 years if time is extended.
- (b) the exported goods and re-imported goods must be the same.

In case of point (ii), the ownership of the goods should also not have changed.

However, these concession are not applicable in case of exports from EPZ or EOU and if repair amounts to re-manufacture - *Notification No. 94/96 Cus dated 16.12.1996.*

- (iii) When exported goods come back for repairs and re-export, the re-imported goods can avail exemption from paying of import duty subject to the following conditions:

- (i) the re-importation is for repairs only
- (ii) the time limit is 3 years
- (iii) the goods must be re-exported after repairs
- (iv) the time limit for export is 6 months (extendable to one year).

Notification No. 158/95 Cus. dated 14.11.1995.

- (d) (i) As per rule 8(1) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, no amount of drawback shall be allowed if the rate of drawback is less than 1% of the FOB value, except where the amount of drawback per shipment exceeds Rs.500. Further, as per section 76(1)(c) of the Customs Act, 1962 drawback is not allowed where the drawback due in respect of any goods is less than Rs.50.

In the given case, since the rate of duty drawback is not less than 1% and drawback due is Rs.500 (1% of FOB value) which is more than Rs.50, duty drawback shall be allowed.

- (ii) Section 76(1)(b) of the Customs Act, 1962 *inter alia* provides that no drawback shall be allowed in respect of any goods, the market price of which is less than the amount of drawback due thereon. In this case, the market price of the goods is Rs.50,000, which is less than the amount of duty drawback, i.e. 2,000 kgs x Rs.30 = Rs.60,000. Hence, no drawback shall be allowed.

Question 5

- (a) *Assessable value of certain goods imported from USA is Rs.10,00,000. The packet contains 10,000 pieces with maximum retail price of Rs.200 each. The goods are assessable under section 4A of the Central Excise Act, 1944, after allowing an abatement of 40%. The excise duty rate is 8% ad valorem. Calculate the amount of additional duty of customs under section 3(1) of the Customs Tariff Act, 1975 assuming basic customs duty @ 10% ad valorem.* (4 Marks)
- (b) *What are the provisions made under the Customs Act, 1962 regarding control of customs over the warehoused goods?* (4 Marks)

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- (c) What are the orders that are appealable to the High Court under the Customs Act, 1962? Can the delay in filing an appeal be condoned by the High Court? (4 Marks)
- (d) What are the provisions made under the Customs Act, 1962, regarding personal hearing and order under advance ruling? (4 Marks)

Answer

- (a) As the goods are assessable under section 4A of the Central Excise Act, 1944, additional duty of customs will be payable on the basis of maximum retail price printed on the packing; less abatement as permissible [proviso to section 3(2) of the Customs Tariff Act.]

	Rs.
Maximum retail price Rs.200 x 10,000	20,00,000
Less : Abatement 40%	<u>8,00,000</u>
Assessable value under section 3(2)	<u>12,00,000</u>
Additional duty of customs @ 8%	96,000
Add : Education cess @ 2%	1,920
Secondary and higher education cess @ 1%	<u>960</u>
Additional customs duty payable	<u>98,880</u>

- (b) Section 62 of the Customs Act, 1962 provides for the control of customs over the warehoused goods. The provisions are discussed as follows:
- (i) All warehoused goods shall be subject to the control of the proper officer.
 - (ii) No person shall enter a warehouse or remove any goods therefrom without the permission of the proper officer.
 - (iii) The proper officer may cause any warehouse to be locked with the lock of the customs department and no person shall remove or break such lock.
 - (iv) The proper officer shall have access to every part of a warehouse and power to examine the goods therein.
- (c) As per section 130(1) of the Customs Act, 1962, an appeal can be made to the High Court against the order of the Tribunal if the case involves substantial question of law, except in cases relating to rate of duty and valuation.

Sub-section (2) of section 130 *inter alia* lays down that an appeal can be made to the High Court within 180 days from the date on which the order appealed against is received by the Commissioner of Customs or the other party. There is no provision in the Act to condone the delay in filing an appeal. This view has been confirmed in *CC v. Hongo India (2009) 236 ELT 417 (SC 3 member bench)*. Hence, the High Court cannot condone the delay in filing an appeal.

- (d) The provisions regarding personal hearing and order under advance ruling are contained in section 28-I of the Customs Act, 1962. Section 28-I *inter alia* provides that if an

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application for advance ruling is received, the authority of advance ruling will examine the material submitted by the applicant or obtained by the authority and issue an order either allowing or rejecting the application. However, no application shall be rejected unless an opportunity has been given to the applicant of being heard.

Where an application is allowed, personal hearing can be given before the pronouncement of the advance ruling, if requested by the applicant. Such hearing can be given to the applicant himself or to his duly authorised representative.

Authority then pronounces its advance ruling within ninety days of the receipt of the application. Copy of the order, signed by members of authority and certified in the prescribed manner is sent to the applicant and the Commissioner.

PART – C

Question 6

- (a) State with reasons in brief, whether service tax is payable in the following cases:
- (i) Services provided to Special Economic Zone (SEZ) unit and SEZ developer, except where services are wholly consumed within SEZ.
 - (ii) Services provided by SEZ to DTA (Domestic Tariff Area).
 - (iii) Services provided by Indian agents undertaking marketing in India of goods of a foreign seller. (2 x 3 = 6 Marks)
- (b) Briefly state the concept of export of taxable services under rule 3 of the Export of Services Rules, 2005. (3 Marks)
- (c) Ascertain whether the refund of service tax paid on input services can be claimed in the following case:
- | | | |
|---|-----------|-----------|
| Total credit of service tax on input services | Rs. 6,000 | |
| Total turnover of output service | Rs.30,000 | |
| Output service exported | Rs.20,000 | (3 Marks) |
- (d) Explain the provisions of best judgement assessment provided under section 72 of the Finance Act, 1994 as amended. (3 Marks)

Answer

- (a) (i) With effect from 03.03.2009, service tax is payable on the services provided to SEZ unit or SEZ developer irrespective of whether services are wholly consumed within SEZ or not. However, the SEZ unit or SEZ developer can get the refund of service tax paid by them by filing a refund claim as per the procedure prescribed in Notification No. 9/2009-ST dated 03.03.2009.
- (ii) Yes. CBE&C vide Circular No. 105/08/2008 ST dated 16.09.2008 has clarified that a special economic zone unit will be liable to pay service tax on services provided by it to a domestic tariff area unit.

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- (iii) Rule 2 of the Export of Services Rules, 2005 *inter alia* provides that the provision of any taxable service specified in sub-rule (1) is treated as export of service when such service is provided from India and used outside India.

In this regard, CBE&C vide *Circular No. 111/05/2009 ST dated 24.2.2009* has clarified that 'used outside India' means 'benefit should accrue outside India'. A service can be treated as exported even if all relevant activities take place in India, so long as the benefit of these services accrue outside India.

Thus, services provided by Indian agents undertaking marketing in India of goods of a foreign seller are 'export of service' on the presumption that the services provided by Indian agents are exported in accordance with Export of Services Rules, 2005 and hence service tax is not payable on them.

- (b) As per rule 3 of the Export of Services Rules, 2005, the following are export of services:-
- (i) When the service is provided in respect of immovable property which is situated outside India.
 - (ii) When the service is performed outside India.
 - (iii) When the service is provided from India but the recipient of service is outside India.

- (c) Rule 5 of CENVAT Credit Rules, 2004 *inter alia* provides that the CENVAT credit in respect of the input services used in providing output services which are exported shall be allowed to be utilized towards payment of service tax on taxable output services. However, where such adjustment is not possible, the refund of credit shall be allowed.

In this case the service tax liability on taxable services of Rs.10,000 (Rs.30,000 - Rs.20,000) is Rs.1030 @10.3%. Therefore, there is an excess credit of Rs.4,970 (Rs.6,000 – Rs.1,030) which can not be utilized. Thus, the refund of such credit can be claimed. However, the refund will be restricted to the extent of ratio of export turnover to the total turnover for the given period, i.e. Rs.4,000 [$\text{Rs.6,000} \times (\text{Rs.20,000}/\text{Rs.30,000})$].

- (d) Section 72 provides that best judgement assessment can be done by the Central Excise Officer if :
- (i) the assessee fails to furnish the return under section 70;
 - (ii) the assessee files the return but fails to assess service tax as per the provisions of the Finance Act, 1994 and rules made thereunder.

For making best judgement assessment, the Central Excise Officer may ask the assessee to produce such accounts, documents or other evidence as he may deem necessary. After taking into account all the relevant material, the Central Excise Officer shall make the assessment of the value of taxable service to the best of his judgement and determine the sum payable by, or refundable to, the assessee. He shall pass the order in writing, after giving an opportunity of being heard to the assessee.

PAPER – 8 : INDIRECT TAX LAWS

Answer **all** questions.

PART A

Question 1

- (a) Compute the assessable value and amount of excise duty payable under the Central Excise Act, 1944 and rules made thereunder from the following information:

	Particulars	No. of units	Price at factory per unit	Price at depot per unit	Rate of duty ad valorem
(i)	Goods transferred from factory to depot on 8 th February	1,000	Rs. 200	Rs. 220	10%
(ii)	Goods actually sold at depot on 18 th February	750	Rs. 225	Rs. 250	8%

(5 Marks)

- (b) M/s Royal Industries started its production activities on 15th March, 2010. In the month of March, 2010, 1,000 units of raw material were purchased at Rs.150 per unit, paying excise duty @ 8%. 800 units of raw material were consumed in manufacturing process and finished output was sold for Rs.1,40,000 (excluding excise duty @ 8%). For simplification, you may ignore the conversion cost and assume the rates of excise duty to be inclusive of education cess

Pass the Journal entries in the books of the assessee and show the balances in Balance Sheet as on 31.3.2010.

(5 Marks)

- (c) Mahesh Ltd., which is engaged in manufacturing of excisable goods, started its business on 1st June, 2009. It availed SSI exemption during the financial year 2009-10. The following are the details available to you:

		Rs
(i)	12,500 kg of inputs purchased @ Rs. 1,190.64 per kg (inclusive of Central excise duty @ 8.24%)	1,48,83,000
(ii)	Capital goods purchased on 31.5.2009 (inclusive of excise duty @ 14.42%)	80,09,400
(iii)	Finished goods sold (at uniform transaction value throughout the year)	3,00,00,000

The suggested answers for Indirect Tax Laws (Paper 8) are based on the provisions as amended by the Finance Act, 2009 and notifications/circulars issued up to 31.10.2009 which are relevant for May 2010 examinations.

PAPER – 8 : INDIRECT TAX LAWS

You are required to calculate the amount of excise duty payable by M/s Mahesh Ltd. in cash, if any, during the year 2009-10. Rate of duty on finished goods sold may be taken as 12.36% for the year and you may assume the selling price exclusive of central excise duty.

There is neither any processing loss nor any inventory of input and output. Out input ratio may be taken as 2:1. (5 Marks)

Answer

- (a) According to rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, in cases where the goods are not sold at factory gate, but they are transferred by the assessee to his depot, the assessable value for the goods cleared from factory and sold from depot shall be normal transaction value of such goods at the depot at or about the same time at which the goods being valued are removed from the factory.

Assessable Value = 750 units x Rs. 220 = Rs. 1,65,000

Calculation of Central excise duty:-

Basic excise duty @ 10% (Rs. 1,65,000 × 10%)	16,500
Education cess @ 2%	330
Secondary and higher education cess @ 1%	<u>165</u>
Total duty payable	<u>16,995</u>

Note: It has been assumed that the price at depot on 8th February is the normal transaction value for sale to independent buyers.

- (b) **Journal entries in the books of M/s. Royal Industries:-**

On the date of purchase	Purchases A/c Dr.	1,50,000	
	CENVAT Credit Receivable A/c Dr.	12,000	
	To Sundry Creditors A/c		1,62,000
	(Purchase of 1,000 units of raw material & CENVAT credit receivable on it)		
At the time of sale	Sundry Debtors A/c Dr.	1,51,200	
	To Sales A/c		1,40,000
	To Excise Duty A/c		11,200
	(Sold goods & excise duty payable on it)		
On payment of duty	Excise Duty A/c Dr.	11,200	
	To CENVAT Credit Receivable A/c		11,200
	(Excise duty paid out of CENVAT credit available)		

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**Balance sheet as on 31st March, 2010
(Relevant portion of Assets side only)**

Current Assets, Loans and Advances		Amount (Rs.)
(A)	Current Assets	
	Inventory of raw material	30,000
(B)	Loans and Advances	
	CENVAT Credit Receivable	800

Note: Other balances are not shown here

- (c) **Computation of the excise duty payable by M/s. Mahesh Ltd. during the financial year 2009-10:-**

Excise duty on dutiable clearances:-

Particulars	Amount (Rs.)
Clearances of finished goods made during the year	3,00,00,000
Less : Exemption of Rs. 150 lakh under Notification No. 8/2003 dated 01-03-2003	<u>1,50,00,000</u>
Dutiable clearances	<u>1,50,00,000</u>
Excise duty @ 12.36% (Rs. 1,50,00,000 × 12.36%)	<u>18,54,000</u>

CENVAT credit available on inputs:-

(Used in the manufacture of dutiable clearance. No CENVAT credit will be available in respect of exempt clearances)

% of dutiable goods in the finished goods sold = $\frac{1,50,00,000}{3,00,00,000} \times 100$	50%
Excise duty paid on the value of inputs consumed in manufacture of dutiable clearances = $\left(\frac{\text{Rs. } 1,48,83,00 \times 8.24}{108.24} \right) \times 50\%$ (Since output input ratio is fixed)	5,66,500

CENVAT credit available on capital goods:-

(CENVAT credit will be available @ 50% of total excise duty in current financial year 2009-10; balance credit to be availed during the next financial year 2010-11)

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Particulars	Amount (Rs.)
(50% of Rs. 80.094 lakh) x $\frac{14.42}{-114.42}$	Rs. 5,04,700
CENVAT credit can be availed on capital goods, but can be utilized only in respect of duty payable on clearances after first clearances of Rs. 150 lakhs	

Excise duty payable

Particulars	Amount (Rs.)
Excise duty on dutiable goods	18,54,000
Less: CENVAT credit available on inputs	5,66,500
Less: CENVAT credit available on capital goods	<u>5,04,700</u>
Excise duty payable	<u>7,82,800</u>

Question 2

- (a) An assessee classified his product as per Central Excise Tariff subject to nil rate of duty. The Department contended that when the entries in the Harmonized System of Nomenclature (HSN) and the Central Excise Tariff are not aligned, reliance should be placed upon HSN for the purpose of classification of goods under the said Tariff. Relying upon the HSN for the purpose of classification of the impugned product, the Department classified it under another heading attracting 8% duty. Do you think that Department's plea is valid in law? Discuss briefly, with reference to a decided case law, if any. (5 Marks)
- (b) M/s Evasions Unlimited, manufacturing excisable goods, paid the differential duty, suo motu, to the Department as the prices of the said goods were revised with retrospective effect. The Revenue took the view that the assessee was liable to pay interest on differential duty under section 11AB of the Central Excise Act, 1944 and penalty thereof. The assessee replied that there was no question of charging interest and penalty as the payment of differential duty was made by it at the time of issuing supplementary invoices to the customers. Discuss, with reference to a decided case law, if any, whether the view taken by the Revenue is justifiable. (5 Marks)
- (c) An assessee made an application under section 32E of the Central Excise Act, 1944 to the settlement commission. The settlement commission was not satisfied saying that the applicant had not made a true and full disclosure of his duty liability and the manner in which same was arrived at was also not correct and rejected the application. The assessee contended that obligation to make truthful disclosure of duty liability would arise only after the application was admitted and not before that. Is plea taken by the assessee acceptable in law? Explain in brief, with the help of a decided case law, if any. (5 Marks)

Answer

- (a) No, the Department's plea is not valid in law. Central Excise Tariff is based upon HSN, but it is not a copy of HSN. In case of *Camlin Ltd. v. CCEx. Mumbai* (2008) 230 ELT 193 (SC), the

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Supreme Court ruled that when the entries in HSN and the Excise Tariff are not aligned, reliance cannot be placed upon HSN for the purposes of classification of goods. Central Excise Tariff of India should be followed in such cases. It should be appreciated that since the entries under the HSN and the entries under the said Tariff were completely different, the Department could not base its decision on the entries in the HSN.

- (b) The demand of interest by Revenue is justified, but penalty cannot be levied in the present case. The Apex Court, in a similar case of *CCEx. v. SKF India Ltd. 2009 (239) E.L.T. 385 (S.C.)*, has noted that section 11A, relating the recovery of duties, can be divided in two parts-
- (i) Where the non-payment or short payment etc. of duty is not intentional and for a reason other than deceit, such cases are dealt with under sub-section (2B) of section 11A.
 - (ii) Where the non-payment or short payment etc. of duty is intentional, deliberate and/or by deceitful means, such cases are dealt with under sub-section (1A) of section 11A.

The Apex Court, over ruling the Tribunal's decision in the said case, held that the present case clearly falls under the provision of sub-section (2B) of section 11A of the Central Excise Act, 1944. Further, from the combined reading of explanation 2 to section 11A(2B) and section 11AB, it can be concluded that the person who has paid the duty under sub-section (2B) of section 11A, shall, in addition to the duty, be liable to pay interest. No penalty is attracted.

- (c) The applicant is not correct.

The matter of the case is similar to the case of *Customs & Central Excise Settlement Commission v. Mars Therapeutics & Chemicals Ltd. 2008 (223) ELT 363 (HC)*. The High Court held that the application made under section 32E of the Central Excise Act, 1944 could be admitted and proceeded with only when Settlement Commission is satisfied that the applicant has made true and full disclosure of the duty liability and the manner in which the same was arrived at.

The High Court clarified that the onus is on the applicant to make full and true disclosure of the duty liability and the manner in which the same was arrived at. And the Settlement Commission will admit the application only when the Commission is satisfied on the true and full disclosure of the duty liability and the manner it was arrived at. The High Court also clarified that the object behind the enactment of the provisions of Settlement Commission is the creation of a forum of self surrender and true confession and to have matter settled once for all. The Settlement Commission is not a forum to challenge the legality of the order passed under the provisions of the Act. The Settlement Commission, in the case on hand, having found that the applicant did not fully satisfy the mandatory requirements of full and true disclosure of its duty liability, can reject the application.

Question 3

- (a) Differentiate between "non-excisable goods" and "non-dutiable goods". (3 Marks)
- (b) Under Excise Audit, 2000, the selection of unit for audit is based on 'risk factors'. Explain in brief the term 'risk factors' giving any two examples. (3 Marks)

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- (c) Explain the validity of the following statements with reference to the Central Excise Laws, as amended:
- (i) Records seized by Department during investigation but not relied upon in the show cause notice should be returned within 30 days of issue of show cause notice.
 - (ii) Special audit under section 14A and 14AA can be done by a cost accountant only.
 - (iii) Authority of Advance Ruling under the Income Tax Act, 1961 will be authority for purposes of Central excise also.
 - (iv) High Court is empowered to condone delay in filing appeal and cross objection filed under sections 35G and 35H of the Central Excise Act, 1944, beyond the prescribed period. (4 × 1 = 4 Marks)

Answer

- (a) Section 2(d) of the Central Excise Act, 1944 defines 'excisable goods' as goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

Goods which are not listed in Tariff or goods which are mentioned in Tariff, but the column of rate of duty is blank are **non-excisable** goods, e.g. water (there is no entry in Tariff). Excise law is not applicable on non excisable goods.

Non dutiable goods are excisable goods listed in Excise Tariff. Excise law is applicable to them, but they are not liable to excise duty. Non dutiable goods may be of two types-

- (i) Nil duty goods, i.e Tariff rate is nil, and
 - (ii) Exempted goods, i.e. 100% exemption under section 5A.
- (b) 'Risk factors' under Excise Audit, 2000 means that the assessee who have a bad track record are taken up for audit on priority as opposed to those who enjoy a clean track record.

For example:

- (i) assessee having past duty evasion cases
- (ii) late payment of duty/late filing returns
- (iii) major audit objections against them
- (iv) no cash payment of duty (all CENVAT adjustment)
- (v) past duty dues, etc

Note : Any two examples may be given.

- (c) (i) Yes, the statement is valid as per rule 24A of the Central Excise Rules, 2002 inserted w.e.f. 7.7.2009.
- (ii) No, the statement is not valid. As per amendment made by the Finance (No.2) Act, 2009, Chartered Accountants, in addition to a cost accountant, are also eligible for special audits under sections 14A and 14AA of the Central Excise Act, 1944.

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- (iii) Yes, the statement is valid as per the amendment made by the Finance (No.2) Act, 2009 which has substituted the definition of authority by a new definition [Section 23A(e)].
- (iv) Yes, the statement is valid as per amendment made by the Finance (No.2) Act, 2009, i.e. sub-section (2A) inserted after sub-section (2) of section 35G and sub-section (3A) inserted after sub-section (3) of section 35H, thereby empowering the High Court to condone the delay in filing appeal and cross objections filed under sections 35G and 35H of the Central Excise Act, 1944 after the expiry of the prescribed period.

PART B

Question 4

- (a) Mr. Happy, a service provider, has provided services of Rs. 1,00,00,000. Out of this, Rs. 70,00,000 are taxable output services and Rs. 30,00,000 are exempt output services. Mr. Happy has opted not to maintain separate inventory and accounts and pay prescribed amount on value of exempt output services.

Service tax paid on his input services, excluding education cess and secondary and higher education cess (EC & SAHEC) is Rs. 6,00,000 which does not include any service specified in rule 6(5) of the CENVAT Credit Rules, 2004. Rate of service tax, excluding EC and SAHEC, is 10%. Calculate the total amount payable including service tax, EC and SAHEC by Mr. Happy by GAR-7 challan. (5 Marks)

- (b) The particulars regarding sale, purchase etc. of Shubham Udyog for the last quarter of the year 2009 -10 are as under:

			Rs.
1.		Purchases of raw material within the State	
	(i)	taxable @ 1%	40,00,000
	(ii)	taxable @ 4%	60,00,000
	(iii)	taxable @ 12.5%	10,00,000
2.		Sale of goods manufactured from raw material purchased @ 4% tax rate	
	(i)	Taxable sale within the State (tax rate 4%)	20,00,000
	(ii)	Exempted sale within the State	10,00,000
	(iii)	Sale in the course of Inter-State trade or commerce (tax rate 4%)	10,00,000
3.		Sale of raw material purchased @ 1% tax rate	44,00,000
4.		Goods manufactured from the raw material purchased @ 12.5% tax rate were given on lease. The deemed sale price of such goods is Rs. 12,00,000, taxable @ 12.5%.	

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You may assume that input tax credit of tax on raw material used in manufacture of leased goods is available immediately. Compute the amount of Value Added Tax (VAT) payable by M/s Shubham Udyog for the relevant quarter. There was no opening or closing inventory.

How can he utilise the balance of input tax credit available, if any? (5 Marks)

Answer

- (a) **Calculation of service tax and total amount payable under rule 6(3)(i) of the CENVAT Credit Rules, 2004:-**

Particulars	Rs.
Service tax payable on taxable services (Rs. 70,00,000 × 10%)	7,00,000
Education cess @ 2% (Rs. 7,00,000 × 2%)	14,000
Secondary and higher education cess @ 1% (Rs. 7,00,000 × 1%)	7,000
Amount payable on exempt services under rule 6(3)(i) (Rs. 30,00,000 × 6%) [Note (1)]	<u>1,80,000</u>
Total	<u>9,01,000</u>

Particulars	Service tax and amount payable under rule 6(3)(i)	Education cess	Secondary and higher education cess
Amount payable (A)	Rs. 7,00,000 + Rs. 1,80,000 = Rs. 8,80,000	Rs. 14,000	Rs. 7,000
Less: CENVAT credit (B)	Rs. 6,00,000	Rs. 6,00,000 × 2% = Rs. 12,000	Rs. 6,00,000 × 1% = Rs. 6,000
Net amount payable = (A) - (B)	Rs. 2,80,000	Rs. 2,000	Rs. 1,000

Amount payable by GAR-7 challan = Rs. 2,80,000 + Rs. 2,000 + Rs. 1,000 = Rs. 2,83,000

Notes :

- (1) Education cess & secondary and higher education cess are not payable on 'amount' payable @ 6% of the value of exempt services under rule 6(3)(i) of the CENVAT Credit Rules, 2004.
- (2) Credit of education cess and secondary and higher education cess on input services can be utilized only for the payment of education cess and secondary and higher education cess payable on output services (or on excisable goods) respectively [First and second proviso to rule 3(7)(b) of the CENVAT Credit Rules, 2004].

- (b) **Computation of VAT payable for the quarter ending 31st March, 2010:-**

	Particulars	Rs.
(A)	Output tax payable	
(i)	On sale of taxable finished goods within the state (Rs. 20,00,000 × 4%)	80,000

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(ii)	On raw material (Rs. 44,00,000 × 1 %)	44,000
(iii)	On leased goods (Rs. 12,00,000 × 12.5%) (Deemed sale)	<u>1,50,000</u>
	Total (A)	<u>2,74,000</u>
(B)	Input tax credit available	
(i)	On raw material purchased @ 1% (Rs. 40,00,000 × 1%)	40,000
(ii)	On raw material purchased @ 4% (Rs. 60,00,000 × 4%) × 75% (Note-1)	1,80,000
(iii)	On raw material purchased @ 12.5% (Rs. 10,00,000 × 12.5%)	<u>1,25,000</u>
	Total (B)	<u>3,45,000</u>
	Net VAT payable = (A)-(B)	(71,000)
	CST payable on inter state sale adjusted (Rs.10,00,000 × 4%)	<u>40,000</u>
	Balance of input tax credit carried forward to next quarter (Rs. 40,000-Rs. 71,000)	<u>31,000</u>

Notes :

1. If the goods manufactured from raw material are exempt from tax, no input tax credit is available on such raw material. Out of total sales of Rs. 40,00,000 of goods manufactured from raw material purchased @ 4%, credit will not be allowed in respect of the inputs used in the manufacture of exempted goods sold. It has been assumed that the amount of raw material used in the manufacture of exempted goods is proportionate to amount of the exempted sale in the total sales of goods manufactured from raw material purchased @ 4% assuming the input output ratio to be constant. Hence, input tax credit has been allowed to the extent of 75%.
2. If finished goods are sold in the course of inter-state trade and commerce, credit is allowed.

Question 5

- (a) The term 'business auxiliary service' was inserted by Finance Act, 2003 which came into force on 1.7.2003. The Parliament by Finance Act, 2008 inserted an explanation in the relevant sub-clause (ii) of section 65(19) stating that for the purpose of this sub-clause -

"Service in relation to promotion or marketing of service provided by the client includes any service provided in relation to marketing of games of chance, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo."

Discuss, whether the explanation appended to sub-clause (ii) of section 65(19) is clarifactory in nature so as to be construed having retrospective effect and retroactive operation. You may take help of a decided case law, if any. (5 Marks)

- (b) Mr. Yes is the owner of a collection centre with facilities and trained employees for collection of human blood, urine and stool samples for biological testing. He sends the samples collected to its principal lab for actual test to be done. The assessee receives 25% of the price charged by the principal lab as commission for work of collection. The Revenue wants

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to charge service tax on such collection service as it amounts to promotion or marketing of services provided by its principal lab. Mr. Yes seeks your advise in this regard with reference to a decided case law, if any. (5 Marks)

Answer

- (a) The Apex Court, in a case of *Union of India and Others v. Martin Lottery Agencies Ltd.* (2009) 14 STR 593 (SC), ruled that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. Subject to the constitutionality of the Finance Act, 1994 in view of the explanation appended to this, the Apex Court opined that the service tax, if any, would be payable only with a prospective effect and not with retrospective effect.

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

- (b) The facts of the given case are similar to the case decided by High Court i.e. *CCE v. Dr Lal Pathological Lab (P) Ltd* 2007 (8) STR 337 (P&H).

The High Court held that merely because the assessee renders incidental services like putting across or dropping of the name of the principal company, it would not amount to business auxiliary services. The High Court also observed that the activity conducted by the assessee was covered by the exception postulated by the provision of section 65(106) of the Finance Act, 1994 which excluded any testing or analysis service provided in relation to human beings or animals from the scope of the taxable technical testing and analysis service.

It affirmed the decision of the Tribunal that the service provided by the assessee is incidental to testing and analysis service. Drawing of samples and producing for testing and analysis are inter-connected services or incidental to testing and analysis. Hence, these services are exempted from service tax.

Hence, the contention of the Department is not correct.

Question 6

- (a) State, with reasons in brief, whether the following services are taxable, under the provisions of the Finance Act, 1994 relating to service tax:
- (i) Services in relation to production of alcoholic liquor on job work basis.
 - (ii) Service of transport of goods in container by Government Railway. (2 × 2 = 4 Marks)
- (b) Whether the value of material supplied by the contractee to the contractor for use in the execution of the works contract shall be included in the value of works contract for payment of service tax under the composition scheme? What is the present rate of service tax under this scheme? Can the service provider avail CENVAT credit also? (4 Marks)

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- (c) *What is the general exemption available to small service providers? Who are the persons excluded from this exemption?* (4 Marks)
- (d) *Explain in brief the disadvantages of composition scheme available for small dealers under VAT system.* (4 Marks)
- (e) *What is VAT invoice? What are the mandatory provisions to be complied with while issuing a VAT invoice by a registered dealer?* (4 Marks)

Answer

- (a) (i) Yes, as per amendment made by the Finance (No. 2) Act, 2009, the definition of business auxiliary service under section 65(19) of the Finance Act, 1994 has been amended to exclude any activity that amounts to manufacture of excisable goods. Therefore, services provided in relation to manufacture of alcoholic liquor, which is not excisable, for or on behalf of the client shall attract service tax.
- (ii) No, as per section 65(105)(zzp), transport of goods in container by rail by any person other than Government railway is liable to service tax. Therefore, services of transport of goods in container by Government Railway shall not attract service tax.
- (b) Yes, according to amended explanation to rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the gross amount charged for the works contract shall include the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise.
- Present rate of service tax under the composition scheme is 4.12% (inclusive of education cess and secondary and higher education cess) of gross amount charged for the works contract. The assessee cannot avail CENVAT credit of inputs. However, he can avail CENVAT credit of input services and capital goods.
- (c) A small service provider is eligible to avail exemption from service tax on aggregate value of taxable services not exceeding Rs. 10 lakh in any financial year subject to the condition that during the preceding financial year, the aggregate value of all taxable services provided by him did not exceed Rs. 10 lakh.
- Such general exemption is not applicable in following cases-
- (i) The taxable services provided by a person under a brand name or trade name, whether registered or not, of another person.
- (ii) If the provider of taxable service is availing the CENVAT credit of service tax paid on any input services.
- (iii) Where the service receiver is liable to pay service tax as per provisions of section 68(2) read with rule 2(1)(d) of the Service Tax Rules, 1994.
- (d) Small dealers with annual gross turnover not exceeding Rs. 50 lakh who are otherwise liable to pay VAT, shall have the option for a composition scheme with payment of tax at small percentage of his gross turnover. The dealers opting for this scheme will not be entitled to input tax credit.

As VAT chain is broken under the composition scheme, following are its disadvantages –

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1. The purchaser shall not get any tax credit for the purchases made by him from the dealer operating under the composition scheme. Hence, the dealers who have desired to avail input tax credit on their purchases may not prefer to buy from composition dealers.
 2. The dealer cannot avail input tax credit in respect of input tax paid by him. He will not be able to pass on the benefit of input tax credit, which will add to the cost of goods.
- (e) VAT invoice is a document listing goods sold with price, tax charged and other details as may be prescribed and issued by a dealer authorized under the Act.

Mandatory provisions to be complied with:

- (i) Every registered dealer whose turnover of sales exceeds the specified amount shall issue to the purchaser a serially numbered tax invoice, cash memo or bill with the prescribed particulars.
- (ii) The VAT invoice shall be dated and signed by the dealer or his regular employee, showing the required particulars.
- (iii) The dealer shall keep a counterfoil or duplicate of such VAT invoice duly signed and dated.

Exception: Composition scheme dealer cannot issue a VAT invoice.

PART C

Question 7

- (a) Miss Priya imported certain goods weighing 1,000 kgs. with CIF value US\$ 40,000. Exchange rate was 1 US\$ = Rs. 45 on the date of presentation of bill of entry. Basic customs duty is chargeable @ 10% and education cess as applicable. There is no excise duty payable on these goods, if manufactured in India.

As per Notification issued by the Government of India, anti-dumping duty has been imposed on these goods. The anti-dumping duty will be equal to difference between amount calculated @ US \$ 60 per kg and 'landed value' of goods. You are required to compute custom duty and anti - dumping duty payable by Miss Priya. (5 Marks)

- (b) M/s Marwar Industries imported finishing agents, dye - carriers, printing paste etc. to be used for manufacture of textile articles. The importer claimed exemption for additional duty of customs (CVD) leviable under section 3 of the Customs Tariff Act, 1975, on the ground that there was an exemption for excise duty in respect of said goods used in the 'same factory' for manufacture of textile articles. The Department contended that CVD is payable on the ground that the goods which were to be used must also be manufactured in the 'same factory'. You are requested to comment upon the contention of Department, with reference to a decided case law, if any. (5 Marks)

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Answer

(a) Computation of customs duty payable:-

Particulars	Rs.
Total CIF value in INR = US \$ 40,000 x Rs. 45	18,00,000
Add: Landing charges @1%	<u>18,000</u>
Assessable value (AV)	<u>18,18,000</u>
Basic customs duty (BCD) @10%	1,81,800
Education cess (EC) @ 2% on BCD	3,636
Secondary and higher education cess (SAHEC) @ 1% on BCD	<u>1,818</u>
Landed value of imported goods	<u>20,05,254</u>
Total customs duty payable (BCD + EC+ SAHEC)	<u>1,87,254</u>

Computation of Anti dumping duty payable:-

Particulars	Rs.
Value of goods in INR as per Notification = 1,000 Kgs x US \$ 60 x Rs. 45	27,00,000
Less : Landed value of goods	<u>20,05,254</u>
Anti-dumping duty payable	<u>6,94,746</u>

- (b) The contention of the Department is not valid in law. The Supreme Court in a similar case of *CCus. v. Malwa Industries Ltd.* (2009) 235 ELT 214 (SC) held that literal meaning should be avoided if it leads to absurdity. When the goods are imported, obviously, the same would not be manufactured in the same factory and therefore, it would become impossible to apply the provision of section 3(1) of the Customs Tariff Act, 1975. It was observed that the object of countervailing duty (CVD) is that importer should not be placed at some more advantageous position vis-a-vis purchaser/manufacturer of similar goods in India.

Considering the purpose of exemption, it was held that 'same factory' means imported goods should be used in factory belonging to importer where manufacturing activity takes place. Hence, the exemption will be available to imported goods also and CVD is not applicable.

Question 8

- (a) Explain in brief the duty exemption to baggages under section 79(1) of the Customs Act, 1962. (3 Marks)
- (b) Can an application be withdrawn in the following cases? If yes, state the time limit for withdrawal of such application:
- application for advance ruling
 - application for settlement. (4 Marks)

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- (c) *Clearly mention the relevant date in the following cases of goods warehoused under bond:*
- (i) *Rate of exchange, when goods are removed for home consumption.*
 - (ii) *Rate of duty, when goods are removed for home consumption.*
 - (iii) *Rate of duty if the goods are not removed from warehouse within the permissible period.*
- (4 Marks)*

Answer

- (a) Section 79(1) of the Customs Act, 1961 exempts the bona fide baggage of the passengers. Following baggage is passed free of duty-
- (i) articles in use by passenger/crew for the minimum period prescribed by the Baggage Rules, 1998.
 - (ii) articles for use by passenger or his family or bona fide gifts or souvenirs within the limits prescribed in the aforesaid rules.
- (b) (i) Application for advance ruling can be withdrawn within 30 days from the date of application **[Section 28H(4) of the Customs Act, 1962]**.
- (ii) Application once made cannot be withdrawn in case of settlement **[Section 127B(4) of the Customs Act, 1962]**.
- (c) (i) The relevant date for rate of exchange is the date on which the bill of entry is presented for warehousing under section 46 of the Customs Act, 1962 and not when bill of entry is presented under section 68 for clearance from warehouse.
- (ii) As per section 15(1)(b) of the Customs Act, 1962 rate of duty as prevalent on date of presentation of bill of entry for home consumption for clearance from warehouse is applicable and not the rate prevalent when goods were removed from customs port.
- (iii) Goods which are not removed within the permissible period are deemed to be improperly removed on the day it should have been removed. Thus, duty applicable on such date i.e. last date on which the goods should have been removed is relevant and not the date on which the goods were actually removed.

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Attempt **all** questions

PART – A

Question 1

- (a) (i) Briefly explain with reference to the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 the provision relating to "return of goods to supplier".
- (ii) Explain briefly the expression 'assessee' with reference to the Central Excise Rules, 2002. (2 x 2 = 4 Marks)
- (b) With reference to the Central Excise Rules, 2002, mention the time limits prescribed for the following cases:
- (i) Filing of Annual Installed Capacity Statement
- (ii) Return of seized records that have not been relied upon by the Department (2 x 2 = 4 Marks)
- (c) Explain briefly the provisions relating to registration under central excise where a person has more than one premises requiring registration. (4 Marks)
- (d) What are the grounds on which remission of duty can be granted under the Central Excise Rules, 2002? When should such application be submitted to the Central Excise officer? Write a brief note. (4 Marks)
- (e) Explain with a brief note (giving reasons for your answer) the correctness of the following statements with reference to the Central Credit Rules, 2004:
- (i) CENVAT credit is not available on cement, angles, channels, centrally twisted deform bar (CTD) or thermo mechanically treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods.
- (ii) Rule 6(3) gives an option to the manufacturer opting not to maintain separate accounts to pay an amount equal to 5% of the price of the exempted goods. (2 x 2 = 4 Marks)

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance (No. 2) Act, 2009 and Notifications/Circulars issued up to 31.10.2009 which are relevant for May 2010 examinations.

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Answer

- (a) (i) Proviso to rule 6 of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 provides that if the subject goods on receipt are found to be defective or damaged or unsuitable or surplus to the needs of the manufacturer, he may return the subject goods to the original manufacturer of the goods from whom he had obtained these.

The original manufacturer will add each such returned goods to his non-duty paid stock (in Daily Stock Account) and then deal with it accordingly.

- (ii) As per Rule 2(c) of the Central Excise Rules 2002, "assessee" means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored and includes an authorized agent of such person.
- (b) (i) Rule 12(2A) of the Central Excise Rules, 2002 provides that the Annual Installed Capacity Statement declaring the annual production capacity of the factory for the financial year to which the statement relates should be submitted to the Superintendent of Central Excise in Form ER-7 by 30th April of the succeeding year.
- (ii) Rule 24A of the Central Excise Rules, 2002 *inter alia* provides that seized records that have not been relied upon by the Department for the issue of notice under the Central Excise Act or the Rules made thereunder shall be returned within 30 days of the issue of the said notice or within 30 days from the date of expiry of the period for issue of the said notice.
- (c) Clause (2) of *Notification No. 35/2001 CE(NT) dated 26.6.2001* prescribes that if a person has more than one premises requiring registration, separate registration certificate shall be obtained for each of such premises.

However, a person manufacturing or carrying on trade in textile and textile articles falling under chapter 50 to 63 of the First Schedule to the Central Excise Tariff Act may obtain single registration for more than one premises, if all the premises fall within the jurisdiction of one Commissioner of Central Excise, and he has submitted the details of all such premises along with the application for registration.

Further, a person manufacturing compressed natural gas falling under heading 2711 of the Central Excise Tariff may also obtain a single registration for all premises which fall within the jurisdiction of one Chief Commissioner of Central Excise by submitting the application to any of the jurisdictional Commissioner with details of all the premises subject to the condition that prior intimation shall be given before starting any additional premises subsequent to obtaining such registration.

- (d) As per rule 21 of the Central Excise Rules, 2002, remission of duty can be granted in the following cases:
- (i) where the goods have been lost or destroyed by natural causes; or
- (ii) where the goods have been lost or destroyed by unavoidable accident; or

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(iii) where the goods are claimed by manufacturer as unfit for consumption or for marketing.

Application for remission should be submitted before removal of goods from the factory and after they are fully manufactured and entered in 'daily stock account'.

- (e) (i) The statement is correct. Explanation 2 to rule 2(k) of the CENVAT Credit Rules, 2004 provides that inputs include goods used in the manufacture of capital goods which are further used in the factory of manufacturer. The explanation has been amended vide *Notification No. 16/2009 CE (NT) dated 07.07.2009* so as to specifically provide that cement, angles, channels, centrally twisted deform bar, thermo mechanically treated bar and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods are excluded from the definition of inputs. Thus, credit on such items cannot be availed.
- (ii) The statement is not correct. As per rule 6(3) of the CENVAT Credit Rules, 2004, a manufacturer using common inputs/input services for manufacturing dutiable and exempted goods and opting not to maintain separate accounts is required to pay an amount equal to 5% of the **value** of the exempted goods, and not 5% of the **price** of the exempted goods.

Note: The reference to Central Credit Rules, 2004 in the question may be read as CENVAT Credit Rules, 2004.

Question 2

- (a) An assessee moved an application on 01.01.2009 under section 35C(2) of the Central Excise Act, 1944 for rectification of mistake in an order passed on 04.07.2008. The Tribunal took up the application on 01.01.2010 and dismissed the same on the ground that the Tribunal cannot entertain an application for rectification beyond a period of 6 months. Explain briefly with reference to any decided case law whether the Tribunal's decision is correct in law. (3 Marks)

- (b) Compute the assessable value under the Central Excise Act, 1944 in the following case:

Production	:	2,000 units on 1.1.2010
Quantity sold	:	450 units @ Rs. 200 per unit
	:	650 units @ Rs. 190 per unit
Samples clearances	:	50 units
Balance in stock	:	850 units (at the end of factory day for 1.1.2010)

Assume that the rate per unit is exclusive of central excise duty. (3 Marks)

- (c) Hero Automobiles is engaged in the manufacture of motor cars. Compute the amount of CENVAT credit admissible from the following particulars with suitable explanations where required:

	Goods purchased	Duty paid at the time of purchase of goods (Rs.)
(i)	Raw Steel	5,00,000

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(ii)	Batteries	2,00,000
(iii)	Cutting oil	70,000
(iv)	Electric lamps for lighting manufacturing area	80,000

(4 Marks)

- (d) *M/s Punctual Ltd. (manufacturing watches) has cleared goods of the value of Rs. 120 lakhs during the financial year 2009 -10 exclusive of duties and taxes. The goods attract 8% ad valorem excise duty plus education cess as applicable. Determine the excise duty liability when the assessee opts for CENVAT facility and also in the case when the assessee decides not to avail CENVAT benefit. The turnover of the assessee in the previous year 2008-09 was Rs.100 lakhs.*

(5 Marks)

Answer

- (a) Section 35C(2) of the Central Excise Act, 1944 *inter alia* states that the Appellate Tribunal may at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1). Since, in the present case, the application has been made within 6 months from the date of the order, it is not relevant for the purpose of limitation as to when the Tribunal takes up the same for hearing and disposal.

This view has been confirmed by the Supreme Court in the case of *Sree Ayyanar Spinning and Weaving Mills Ltd. vs. CIT 2008 (229) E.L.T. 164 (SC)*. In this case, Supreme Court while interpreting similar provisions in relation to Income-tax Act has ruled that once the assessee has moved the application within the period prescribed under the statute, the Tribunal cannot reject the application on the ground that the statutory period for amending the order has elapsed when taken with the period of pendency before the Tribunal.

Therefore, in this case, since the assessee has moved the application within 6 months from the date of the order, the Tribunal cannot reject the application for rectification of mistakes on the ground of limitation. Thus, the Tribunal's decision is not correct in law.

(b) Computation of Assessable Value

Quantity	Sold/Cleared	Rate per unit (Rs.)	Assessable value (Rs.)
Sold	450 units	200	90,000
	650 units	190	1,23,500
Sample clearance [See Note]	50 units	190	9,500
Total Assessable Value			2,23,000

Note: Circular No. 813/10/2005 CX dated 25.04.2005 has clarified that valuation of samples should be done on the basis of rule 4 of the Central Excise (Determination of

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Price of Excisable Goods) Rules, 2000 i.e., on the basis of value of goods cleared at or around the same time.

However, since the information relating to value of goods sold at the time nearest to the time of removal of samples is not available, valuation may be done on the basis of rule 11 read with rule 4 and rule 7. Therefore, normal transaction value of goods sold at or about the time nearest to the time of removal of samples will be the assessable value of the samples. Normal transaction value is the value at which the greatest aggregate quantity of goods is sold. Since, in the given case, the greatest aggregate quantity viz., 650 units are sold at Rs. 190, the normal transaction value would be Rs. 190.

(c) Computation of CENVAT credit admissible

	Rs.
Raw steel [Refer Note 1]	5,00,000
Batteries [Refer Note 2]	2,00,000
Cutting oil, coolants [Refer Note 3]	70,000
Electric lamps [Refer Note 4]	—
Total CENVAT credit admissible	7,70,000

Notes:

- (1) Raw steel is an input for the manufacture of cars.
 - (2) Though batteries are finished products in themselves but they will be considered as raw material (inputs) for motor cars [Telco v. State of Bihar (1994) 74 ELT 193 (SC)].
 - (3) Cutting oil and coolants are specifically included in the definition of inputs as per rule 2(k) of the CENVAT Credit Rules, 2004.
 - (4) Inputs which facilitate manufacture but are not integrally connected with manufacturing process are not eligible inputs. Hence, electric lamps used for lighting the manufacturing area are not eligible for CENVAT credit [Kanoria Sugar v. CCE 1996 (87) ELT 522 (CEGAT)].
- (d) Units whose turnover is less than Rs.400 lakh in the preceding year are eligible for SSI exemption in the current year vide *Notification No. 8/2003 CE dated 01.03.2003*. Under the SSI exemption scheme, if the unit does not avail CENVAT on inputs, turnover up to Rs.150 lakh is fully exempt. However, if the unit avails CENVAT on inputs, it has to pay normal duty on all clearances and no SSI exemption is available. SSI exemption is available only in respect of the goods that are covered by *Notification No. 8/2003*. Watches with MRP exceeding Rs.500 are not covered by the said notification.

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Thus, M/s. Punctual Ltd. cannot opt for SSI exemption though its turnover is less than Rs.400 lakh in the previous year, on the presumption that MRP of the watches manufactured by it exceeds Rs.500.

Hence, the duty liability can be calculated as follows:

	Rs. (In lakh)
Basic excise duty = Rs.120 lakh x 8%	9.600
Education cess =Rs.9.6 lakh x 2%	0.192
Secondary and higher education cess = Rs.9.6 lakh x 1%	0.096
Total excise duty payable	9.888

Since, M/s. Punctual Ltd. cannot opt for SSI exemption scheme, question of not availing CENVAT would not arise. Thus, CENVAT credit of excise duty paid on inputs may be used to pay excise duty of Rs.9.888 lakh payable on final products.

Question 3

- (a) *Aarogya Products Ltd. is manufacturing tooth powder called 'Dantmanjan'. The product is manufactured exclusively in accordance with the formulae prescribed in Ayurvedic texts that are authoritative and in the First Schedule to the Drugs and Cosmetics Act, 1940. The assessee has contended that the product 'Dantmanjan' is a medicament. The Department has taken a stand that the said product is a tooth powder i.e., cosmetic/toiletry preparation. You are required to write a brief note whether the stand taken by the Department in the matter of classification under the First Schedule to the Central Excise Tariff is correct in law.*
(5 Marks)
- (b) *Machchar Khalas is engaged in the manufacture of liquid mosquito destroyer. It obtains concentrated alletherin and dilutes the same by adding solvents, deodorized kerosene oil, perfume (as a masking agent) and a stabilizing agent. Briefly examine with a note whether the addition of stabilizing agent, masking agent etc. amounts to manufacture within the meaning of section 2(6) of the Central Excise Act, 1944.*
(5 Marks)
- (c) *What is Consumer Welfare Fund? How is this fund utilized? Write a brief note with reference to the provisions of the Central Excise Act, 1944.*
(5 Marks)

Answer

- (a) The stand taken by the Department is correct as held by the Supreme Court in the case of *CCE Nagpur vs. Shree Baidyanath Ayurved Bhawan Ltd.* 2009 (237) ELT 225 (SC). The Supreme Court has held that the primary object of the Central Excise Act is to raise revenue for which various products are differently classified in the Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used.

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The Supreme Court has further held that as per common parlance test, which is one of the well recognized tests and which has been consistently followed by the Supreme Court, 'Dantmanjan' is a tooth powder and not an ayurvedic medicine.

- (b) No, the activity does not amount to manufacture. Mere processing of the goods is not manufacture. To fall within the definition of manufacture, a new substance should emerge. It has been held by the Supreme Court in many judgements that a process, in order to amount to manufacture must lead to the emergence of a new product.

The High Court, in a similar case of *CCE v. Karam Chand (2009) 236 ELT 647(HP)* has held that by addition of solvents, deodorized kerosene oil, perfume and a stabilizing agent, no new substance is formed and only a diluted form of original substance is formed and packaged. Alletherin in its concentrated form is an insecticide. The final product manufactured by the assessee is a diluted form of insecticide-alletherin which would only kill small insects like mosquitoes. Hence, only the potency of the insecticide has been reduced. Therefore, it could not be termed to be manufacture.

Note: Reference to section 2(6) of the Central Excise Act, 1944 in the question should be read as section 2(f) of the Central Excise Act, 1944.

- (c) The consumer welfare fund has been established by the Central Government under the provisions of section 12C of the Central Excise Act, 1944 wherein the following amounts are credited:-
- (i) refund of duty of excise under section 11B(2), section 11C(2) or section 11D(2) of the Central Excise Act which is not to be granted to the applicant;
 - (ii) refund of amount of duty of customs under section 27(2), section 28A(2) or section 28B(2) of the Customs Act which is not to be paid to the applicant;
 - (iii) any income from investment of the amount credited to the fund and any other moneys received by the Central Government for the purposes of this fund;
 - (iii) surplus amount of service tax referred to in section 73A(6) of the Finance Act, 1994.

Section 12D of the Central Excise Act, 1944 provides that any moneys credited to the fund shall be utilized by the Central Government for the welfare of consumers in accordance with the Consumer Welfare Fund Rules, 1992. The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such manner as may be prescribed in consultation with the Comptroller and Auditor General of India.

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PART – B

Question 4

- (a) Explain briefly the following with reference to the Customs Act, 1962:
- (i) Assessment
 - (ii) Imported goods (2 x 2 = 4 Marks)
- (b) Briefly explain the methodology for calculation of export duty after the introduction of the 'transaction value' concept under section 14 of the Customs Act, 1962. (4 Marks)
- (c) Discuss with a brief note the distinction between the functioning of Inland Container Depots (ICD) and Container Freight Stations (CFS). (4 Marks)
- (d) Briefly examine with a note, the correctness of the following statement with reference to the Customs Act, 1962:
- "Interest under section 47 is chargeable only after the expiry of warehousing period specified under section 61(1) of the Customs Act, 1962".* (4 Marks)
- (e) Briefly explain the term 'export' for the purpose of duty drawback under section 75 of the Customs Act, 1962. Is duty drawback available if the goods do not reach the destination? (4 Marks)

Answer

- (a) (i) As per section 2(2) of the Customs Act, 1962, the term "assessment" is defined to include provisional assessment, reassessment and any order of assessment in which the duty assessed is nil.
- Assessment is the name given to the process of determining the tax liability in accordance with the provisions of this Act.
- (ii) The term "imported goods" has been defined in section 2(25) of the Customs Act, 1962 to mean any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.
- (b) With effect from 01.01.2009, for the purpose of calculation of export duty, the transaction value, that is to say the price actually paid or payable for the goods for delivery at the time and place of exportation under section 14 shall be the FOB price and the export duty shall be charged as a percentage of FOB price.
- In case the transaction is on CIF basis, the FOB price may be deduced from the CIF value and then the export duty may be calculated as percentage of such FOB price.

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- (c) The differences between the functioning of Inland Container Depot (ICD) and Container Freight Station (CFS) are:
- (i) An ICD is a place where containers are aggregated for onward movement to or from the ports whereas CFS is a place where containers are stuffed, unstuffed and aggregation/segregation of cargo takes place.
 - (ii) ICDs are normally located outside the port towns whereas no site restrictions apply to CFS.
 - (iii) An ICD may have a CFS attached to it and CFS is treated as an extension of a port/ICD/air cargo complex.

- (d) No, it is not always correct to say that interest at the rate specified under section 47 of the Customs Act, 1962 is chargeable only after the expiry of warehousing period specified in section 61(1) of the Customs Act, 1962 as interest under section 47 is payable even if the goods have not been put in a warehouse. Interest under section 47 becomes payable when the importer fails to pay the import duty assessed on the bill of entry under section 47(1) within 5 days from the date on which bill of entry is returned to him for payment of duty.

Moreover, even in the case of warehoused goods, this statement is not absolutely correct. It is correct only in case of goods intended for use in 100% EOU as in this case, interest is chargeable after the expiry of five years or three years which are the permissible warehousing periods for capital goods and other goods respectively. However, in case of other goods this statement is not correct as interest is chargeable after the expiry of ninety days, though the permissible warehousing period for such goods is one year.

- (e) As per rule 2(c) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, 'export with its grammatical variations and cognate expressions, means-
- (i) taking out of India to a place outside India, or
 - (ii) taking out from a place in Domestic Tariff Area (DTA) to a special economic zone (SEZ), and includes
 - (iii) loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port.

Export is defined as taking out of India to a place out of India and India includes Indian Territorial Waters. Hence, export is complete when goods leave territorial waters of India. Drawback is available once 'export' is complete i.e., the goods cross the territorial waters even if they do not reach the destination or they are destroyed. However, if goods are destroyed in territorial waters of India, drawback will not be available as the export is not complete [UOI v. Rajindra Dyeing and Printing Mills (2005) 180 ELT 433(SC)].

Question 5

- (a) Compute the assessable value for purpose of determination of customs duty from the

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following data:

	US \$
Machinery imported from USA by air (FOB price)	4,000
Accessories compulsorily alongwith the machinery	1,000
Air freight	1,200
Insurance charges	Actuals not available
Local agent's commission to be paid in Indian currency	Rs. 9,300
Transportation from Indian airport to factory	Rs. 4,000

Exchange rate US \$ 1 = Rs. 48

Provide explanations where necessary.

(5 Marks)

- (b) Tony India imported various components in different consignments separately on the basis of valid import licences. The Department has taken a stand that in view of the provision in Rule 2(a) of the Interpretative Rules, the goods will attract import duty as if they were finished goods and the benefit of an exemption notification exempting only the components will not be available. Write a brief note with reference to decided case law whether the stand taken by the Department is correct in law. (5 Marks)
- (c) Briefly write a note on whether an exporter who has been held guilty of exporting 'prohibited goods' is entitled to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962. (5 Marks)

Answer

(a) Computation of Assessable Value of Machinery and Accessories

	Accessories	Machinery
	US \$	US \$
FOB price	1,000.00	4,000.00
Add : Air Freight (restricted to 20% of FOB price) [Note 2]	200.00	800.00
Add : Insurance charges (1.125% of FOB price) [Note 3]	11.25	45.00
Total CIF price excluding agent's commission	1,211.25	4,845.00
Exchange rate 1US \$ = Rs. 48		
	Rs.	Rs.
Total in Indian currency	58,140.00	2,32,560.00
Add : Local agent's commission (allocated on <i>pro-rata</i> basis) [Note 4]	2,325.00	6,975.00
CIF value	60,465.00	2,39,535.00
Add : Landing charges @1% of CIF value (Note 5)	604.65	2,395.35
Assessable value	61,069.65	2,41,930.35

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Notes :

- (1) Since the price of the accessories is not included in the price of the machinery and is charged separately, the accessories will not be charged at the same rate as applicable to the machinery. Hence, separate assessable values for the machinery and accessories have been computed [Proviso (a) to section 19 of the Customs Act, read with Accessories (Condition) Rules, 1963]
 - (2) If the goods are imported by air, the freight cannot exceed 20% of FOB price [Second proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
 - (3) Insurance charges are taken as 1.125% of FOB price if actual charges are not known [Clause (iii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
 - (4) The commission paid to local agent is includible as it is not a buying commission [Rule 10(1)(a)(i)].
 - (5) Even if there is no information regarding landing charges, still they are charged @ 1% of CIF value [Clause (ii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
 - (6) Transportation charges from Indian airport to factory of importer are not includible in the assessable value.
- (b) No, the stand taken by the Department is not correct in law. Rule 2(a) of the Interpretative Rules applies when all the components are imported at the same time and when a simple process is required for assembly. This view was also confirmed by the Supreme Court in *CC v. Sony India (2008) 231 ELT 385 (SC)*, wherein it has been held that rule 2(a) applies only if all the components are presented at the same time for custom clearance.

In the given case, since the various components are imported in different consignments separately at different points of time, rule 2(a) will not apply. Therefore, import of components will be treated as import of components and not of finished goods for the purpose of benefit of exemption notification.

- (c) As per section 125 of the Customs Act, 1962, whenever confiscation is ordered, the adjudicating officer *may* provide an option to the owner of the goods to pay redemption fine in lieu of confiscation if the importation or exportation of goods is prohibited. However, if importation or exportation of goods is not prohibited, the option to pay redemption fine *shall* be given to the owner of goods.

Therefore, an exporter guilty of exporting prohibited goods is not *entitled as such* to an option to pay fine in lieu of confiscation under section 125 of the Customs Act, 1962. It is at the discretion of the adjudicating officer to give or not to give such an option to the exporter guilty of exporting prohibited goods. However, the owner of the goods importing or exporting non-prohibited goods shall be entitled to such an option.

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PART – C

Question 6

- (a) *Examine briefly whether any service tax liability would arise in the following cases:*
- (i) *Services provided by one scheduled bank to another scheduled bank in relation to inter-bank transactions of purchase and sale of foreign currency.*
 - (ii) *Services provided to or from installations, structures and vessels in the entire continental shelf and exclusive economic zone of India.*
 - (iii) *Services provided to any person by Government Railways in relation to transport of goods by rail.* (2 x 3 = 6 Marks)
- (b) *Write a brief note whether the Commissioner of Central Excise is empowered to revise or review the orders pertaining to service tax passed by an adjudicating authority subordinate to him.* (2 Marks)
- (c) (i) *State briefly the position under rule 5 of the Taxation of Services Provided from Outside India and Received in India) Rules, 2006 the circumstance when such service could be treated as input service.*
- (ii) *Briefly indicate the provisions under the Finance Act, 1994 relating to interest under section 75.* (2 x 2 = 4 Marks)
- (d) *Briefly explain with a note the time period for filing a claim for refund of service tax by an exporter of goods and sanction of refund claim by the Department.* (3 Marks)

Answer

- (a) (i) No. Services provided by one scheduled bank to another scheduled bank in relation to inter-bank transactions of purchase and sale of foreign currency have been exempted from whole of the service tax payable thereon vide *Notification No. 19/2009 ST dated 07.07.2009*.
- (ii) Yes. Services provided to or from installations, structures and vessels in the entire continental shelf and exclusive economic zone of India have been brought within the ambit of the provisions relating to service tax vide *Notification No. 21/2009 ST dated 07.07.2009*.
- (iii) No. *Notification No. 33/2009 ST dated 01.09.2009* has exempted the service provided or to be provided by Government Railways in relation to transport of goods by rail, whether in container or otherwise.
- (b) Section 84 of the Finance Act, 1994 has been amended by Finance (No.2) Act, 2009 so as to abolish the power of revision of the Commissioner of Central Excise prescribed therein. However, the Commissioner of Central Excise may review the order passed by the adjudicating authority subordinate to him and direct such authority or any other central excise officer subordinate to him to file an appeal before the Commissioner of Central Excise (Appeals). Therefore, though the commissioner of Central Excise can

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now review the orders passed by an adjudicating authority subordinate to him, he can not revise such orders.

- (c) (i) As per Rule 5 of the Taxation of Service (Provided from Outside India and Received in India) Rules, 2006, the taxable services provided from outside India and received in India shall be treated as input service i.e., the credit of service tax paid on such service can be availed, if such service is used as an input service for providing any taxable output service or used in relation to the manufacture of final products.

It may be noted that the taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availing credit of duty of excise paid on any input or service tax paid on any input service under CENVAT Credit Rules, 2004 i.e., CENVAT credit cannot be utilized for paying service tax leviable on such services. The service tax leviable on such services will have to be paid in cash.

Note: For better clarity, the question to the above answer may be read as under:

State, with reference to rule 5 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, the circumstance when such service could be treated as input service.

- (ii) Section 75 of the Finance Act, 1994 provides for interest on delayed payment of service tax. Failure to pay service tax, including a part thereof, in time attracts simple interest at a rate not below 10% per annum but not exceeding 36% per annum as may be notified by the Central Government.

Currently, the interest rate of 13% has been notified vide *Notification No. 26/2004 S.T. 10.09.2004*.

- (d) The time period for filing a refund claim is one year from the date of export of goods. The exporter can file a refund claim anytime after export of goods. Sanction of refund claims shall be made by the Department officials within one month from the receipt of the claim without any pre audit.

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Question No. 1 is compulsory

Answer any **five** questions from the remaining **six** questions.

Question 1

(a) Determine the assessable value for purpose of excise duty under the Central Excise Act, 1944 in the following cases:

- (i) An assessee sells his excisable goods for ₹ 120 per piece and does not charge any duty of excise in his invoice. Subsequently, it was found that the goods were not exempted from excise duty, but were liable at 20% advalorem. (1 Mark)
- (ii) Certain excisable goods were sold for ₹ 120 per piece and 20% advalorem is the rate of excise duty. Subsequently, it was found that the price cum duty was in fact ₹ 140 per piece as the assessee had collected ₹ 20 per piece separately. (2 Marks)
- (iii) The cum duty price per piece was ₹ 120 and the assessee had paid duty at 20% advalorem. Subsequently, it was found that the rate of duty was 30% advalorem and the assessee had not collected anything over and above ₹ 120 per piece. (2 Marks)

(b) T Ltd. imported some goods from LMP Inc. of United States by air freight. You are required to compute the value for purposes of customs duty under the Customs Act, 1962 from the following particulars:



CIF value	US \$ 6,000
Freight paid	US \$ 2,000
Insurance cost	US \$ 700

The bank had received payment from the importer at the exchange rate of US \$ 1 = ₹ 46 while the CBEC notified exchange rate on the relevant date was US \$ 1 = ₹ 45.5

(Make suitable assumptions where required and provide brief explanations to your answer) (5 Marks)

(c) From the following particulars, arrive at the VAT liability for the month of January 2010 and also determine the amount of input tax credit to be carried forward for the next month:

- (i) Input tax rate 5% and output tax rate is 15% in the State.
- (ii) Inputs purchased in the month from within the State – ₹ 48,00,000.
- (iii) Output sold to buyers within the State during the month – ₹ 15,00,000.
- (iv) Output sold during the month to buyers as interstate sales – ₹ 3,00,000.
(CST rate 2% against C Form).

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The suggested answers for Indirect Tax Laws (Paper 8) are based on the provisions as amended by the Finance (No.2) Act, 2009 and notifications/circulars issued up to 30.04.2010 which are relevant for November 2010 examination.

- (v) Inputs purchased from other States as interstate purchases against C Form @ 2% - ` 2,00,000.

(Provide suitable explanations where required with appropriate assumptions, if necessary). (5 Marks)

- (d) X Bank Ltd., furnishes the following information relating to services provided and the gross amount received:

	` (lakhs)
Merchant banking services	8
Asset Management (including portfolio management)	3
Service charges for services to the Government of India	1.5
Interest on overdraft and cash credits	2
Banker to the issue	5
Locker rent	2
Repayment of financial lease made by the customer to the bank ` 80 lakhs which includes a principal amount of ` 50 lakhs.	
Compute the value of taxable service under "banking and other financial services" under the Finance Act, 1994 and the service tax liability of X Bank Ltd., considering the rate of service tax at 10.3%. (5 Marks)	

Answer

- (a) Assessable Value

$$(i) \frac{\text{Price cum duty}}{1 + \frac{\text{Rate of Excise duty}}{100}} = \frac{120}{1.2} = \text{Rs. } 100$$

Assessable Value

$$(ii) \frac{\text{Price cum duty}}{1 + \frac{\text{Rate of Excise duty}}{100}} = \frac{120 + 20}{1.2} = \text{Rs. } 116.67$$

(Note: Additional consideration has to be added to price)

Assessable Value

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$$(iii) \frac{\text{Price cum duty}}{1 + \frac{\text{Rate of Excise duty}}{100}} = \frac{120}{1.3} = \text{Rs. } 92.30$$

(b) Computation of assessable value of the goods imported by T Ltd.:-

CIF value	6,000 US \$
Less: Freight	2,000 US \$
Less: Insurance	<u>700 US \$</u>
Therefore, FOB value	<u>3,300 US \$</u>
FOB value	3,300 US \$
Add : Freight (20% of FOB value)	660 US \$

(See Note - 1)

Add: Insurance (actual)	<u>700 US \$</u>
CIF for customs purpose	4,660 US \$
Add: Landing charges (1% of CIF value)	

(See Note - 2)

Value for customs purpose	<u>4,706.60 US\$</u>
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Exchange rate as per CBEC = Rs. 45.50 per US \$

(See Note - 3)

Assessable Value = Rs. 45.50 × 4,706.60 US \$ = Rs. 2,14,150.30

Notes :

1. As the material has been imported by air, the freight has been restricted to 20% of FOB value i.e. 660 US \$.

[Second proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]

2. Landing charges at the rate of 1% of the CIF value of the imported goods shall be added, whether ascertainable or not. **(First proviso of aforementioned rule)**
3. As per the **explanation to section 14(1)**, the exchange rate shall be the rate as notified by CBEC. Therefore, applicable exchange rate would be Rs. 45.50 per US \$ as notified by CBEC.

(c) Calculation of VAT liability for the month of January' 10 and amount of input tax credit to be carried forward to next month:

- (i) Input tax credit available on the purchase of inputs from within the State will be 5% of Rs. 48 lakh, i.e. Rs. 2,40,000.
- (ii) No input tax credit will be available on inputs purchased from other States.

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- (iii) VAT payable on sales within the State – 15% of Rs. 15 lakh, i.e. Rs. 2,25,000.
- (iv) State VAT liability will be nil as the input tax credit (Rs. 2,40,000) is more than the output VAT of the State (Rs. 2,25,000).
- (v) CST to be paid is Rs. 6000, i.e. 2% of inter-State sales of Rs. 3 lakh. This amount can be paid from the balance credit of Rs. 15,000 (i.e. Rs. 2.40 lakh-2.25 lakh)
- (vi) The amount available for carry forward to next month will be Rs. 9,000, i.e. Rs. (15000-6000).

(d) Calculation of value of taxable services of X Bank Ltd.

Particulars	Rs.	Rs.
Amount received for merchant banking services		8,00,000
Amount received for asset management (including portfolio management) services		3,00,000
Service charges for services provided to Government of India		Nil
(Note – 1)		
Interest received on overdraft and cash credits (Note – 2)		Nil
Amount received for acting as banker to an issue		5,00,000
Amount received as locker rent		2,00,000
Installment amount received towards repayment of financial lease	80,00,000	
Less: Principal amount included in the above installments	<u>50,00,000</u>	
Interest on financial lease	30,00,000	
10% of the interest amount [Rs. 30,00,000 × 10%] (Note – 3)		<u>3,00,000</u>
Total value of taxable services		<u>21,00,000</u>
Service tax payable thereon @ 10%		2,10,000
Education Cess @ 2%		4,200
Secondary and Higher Education Cess @ 1%		<u>2,100</u>
Total service tax payable including Cess		<u>2,16,300</u>

Notes:

- Service charges for banking and other financial services provided to Government of India are exempt from service tax (**Notification No. 13/2004 ST dated 10-09-04**).
- Interest received on cash credit and overdraft is exempt from service tax (**Notification No. 29/2004 ST dated 22-09-2004**).
- Service tax is payable only on 10% of the interest on financial lease. The interest is the difference between the installment paid towards repayment of the lease amount and the principal amount contained in such installment (**Notification No. 4/2006 ST dated 01-03-2006**).

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Question 2

- (a) XYZ Co. engaged in the service of over burden removal in mines had acquired some tipper trucks and taken CENVAT credit to the extent of the excise duty paid on the said trucks acquired by them. Subsequently, on becoming aware that the said trucks do not qualify as capital goods or inputs under the CENVAT Credit Rules, 2004, the said XYZ Co. reversed the credit taken, all of which had remained unutilized. The Department has issued a show cause notice that interest under section 11AB on the amount of credit taken, but not utilised should be paid. Write a note whether the action of the Department is correct in law. (2 Marks)
- (b) "Pure & Lovely" are manufacturers of 'hair oil' falling under Chapter 33 of the Central Excise Tariff (CET). Disputes arose in respect of two other categories 'edible oil' or 'coconut oil'. The Department contends that the coconut oil falling under these two categories are meant for sale as hair oil and should be classified under Chapter 33 of the CET. The manufacturers contend that they are not printing the specific use of such oil as 'hair oil' and this should be classified as vegetable oil under Chapter 15 of the CET irrespective of its use by the consumer. Chapter Note 2 of Chapter 33 prescribes a condition that Heading No. 3305 (which covers hair oil) applies to products put up in packing of a kind sold by retail for such use. Section Note 2 to Section VI provides that goods falling in Heading 3305 by reason of being put up for retail sales are to be classified in the said Heading. Briefly discuss whether coconut oil packed in larger packs generally used by consumers for edible purposes would merit classification under Chapter 15. (4 Marks)
- (c) Sona Ltd., purchased a lathe machine at a cum-duty price of ` 18,63,680. The excise duty rate charged on the said machine was 16% plus education cess 2% plus secondary and higher education cess 1%. The machine was purchased on 1-7-2007 and was disposed of on 30-09-2009 for a price of ` 10,00,000 in working condition as second hand machine. Calculate the amount of CENVAT credit allowable for the financial years 2007-08 and 2008-09 and also specify the amount payable towards CENVAT credit already taken at the time of disposal of the machinery in the year 2009-10. (5 Marks)
- (d) Y Ltd. (raw material supplier) supplies raw material to a job worker (manufacturer) Z Ltd. The job worker after completion of the job delivers 5000 packets of finished goods to Y Ltd. In all these packets retail sale price (maximum) of ` 30 per packet is marked. The product in packaged form is subject to excise duty on the basis of MRP under section 4A of the Central Excise Act, 1944 and in respect of the same, 30% abatement has been prescribed. Determine the assessable value for purpose of excise duty after considering the following particulars:
- | | |
|--|----------|
| Cost of raw material supplied | ` 45,000 |
| Job charges including profit | ` 15,000 |
| Transport charges for dispatch to job worker | ` 4,000 |

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Transport charges for return of finished product ` 4,000

(Provide brief explanation and make assumptions where required.) (5 Marks)

Answer

- (a) Yes, the action of the Department is correct in law. Rule 14 of the CENVAT Credit Rules, 2004 provides for recovery of CENVAT credit wrongly taken or utilized wrongly or erroneously refunded. Earlier, there was a view that if an assessee had taken the credit but not utilised the same for payment of taxes or duty, then no interest payment is required. The Central Board of Excise and Customs has clarified that where credit is taken or wrongly utilised or erroneously refunded, the same along with interest should be recovered from the manufacturer or provider of output service. Hence, in this case, XYZ Co. having taken the credit wrongly will have to pay interest under section 11AB even if the credit has not been utilised.

- (b)** Yes, the coconut oil packed in larger packs generally used by consumers for edible purposes would merit classification under Chapter 15. The dispute in this case with the Department is restricted to 'edible oil' or 'coconut oil'. The assessee 'Pure & Lovely' pays excise duty under Chapter 33 in respect of all packages that are marked for use as 'hair oil'.

The Section Note 2 to Section VI supports the interpretation that although a product is capable of being classified under more than one heading, owing to the nature of its retail packing which is indicative of its use as hair oil, the classification under heading 3305 would get priority.

What follows is that if the same coconut oil is packed in larger packs of say 1 litre or 2 litre generally used by consumers for edible purposes (even though some customers may use it as hair oil), it would be classified under Chapter 15. Hence, the classification of coconut oil would depend upon the fact as to how the majority of the customers use the product. Equally, if the oil is put in packages generally meant for sale as 'hair oil', then it would be classified under Chapter 3305 even though some consumers may use it as edible oil.

- (c) Amount of CENVAT credit allowable for financial years 2007-08 and 2008-09:-**

Cum duty price of the machinery	Rs. 18,63,680
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Rate of duty including education cess and secondary and higher education cess	16.48%
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$$\text{Duty paid on machinery} = \text{Rs. } 18,63,680 \times \frac{16.48}{116.48} \quad \text{Rs. } 2,63,680$$

CENVAT credit allowable during the

Financial Year	2007-08 @ 50%	Rs. 1,31,840
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Financial Year	2008-09 @ 50%	Rs. 1,31,840
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Amount payable towards CENVAT credit on disposal of machinery during the year 2009-10

Total CENVAT credit availed on the machinery Rs. 2,63,680

Less: Amount of reduction from the said credit on

(i) First 50% = $[1,31,840 \times 2.5\%] \times 9$ quarters Rs. 29,664

(ii) Next 50% = $[1,31,840 \times 2.5\%] \times 6$ quarters Rs. 19,776

Amount payable on disposal of machinery **Rs. 2,14,240**

Notes:

1. In respect of capital goods, CENVAT credit shall be taken only for an amount not exceeding 50% of duty in the same financial year and balance may be taken in any subsequent year **[Rule 4(2)(a) of the CENVAT Credit Rules, 2004]**.
 2. If capital goods are removed after being used, the manufacturer shall pay an amount equal to CENVAT credit taken on the said capital goods reduced by 2.5% of each quarter of a year or part thereof from the date of taking the CENVAT credit **[Second proviso to rule 3(5) of the CENVAT Credit Rules, 2004]**.
 3. It is assumed that first 50% of the CENVAT credit has been taken on 01.07.2007 and the balance 50% of the credit has been taken on 01.04.2008.
- (d) Section 4A of the Central Excise Act, 1944 provides for valuation of excisable goods with reference to retail sale price.

Sub section (2) of this section provides that where the goods specified under sub-section (1) are excisable goods and are chargeable to duty with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

Thus, the provisions of section 4A of the Central Excise Act, 1944 are overriding provisions, i.e., if a product is covered under provisions of section 4A, valuation will be done on the basis of section 4A and not on the basis of material cost plus job charges.

Hence, in this case, the assessable value of the product will be computed as follows:-

Particulars	Rupees
Retails sale price per packet	30
Less: Abatement of 30% = Rs. $\frac{30}{100} \times 30$	<u>9</u>
Assessable value of each packet	<u>21</u>
Assessable value for the purpose of excise duty = Rs. 21 × 5,000 packets	1,05,000

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The information pertaining to raw material cost, job charges, profit, transport charges etc. need not to be considered.

Question 3

- (a) Write a brief note on whether input tax credit of the VAT paid on purchases of goods that are stock transferred is available. (2 Marks)
- (b) X Ltd. is having a manufacturing unit at Faridabad. In the financial year 2008-09, the value of total clearances from the unit was ` 850 lakhs as per the following details:
- (i) Exports to USA : Rs. 100 lakhs; to Nepal : ` 50 Lakhs
 - (ii) Clearances to a 100% export oriented unit : ` 75 lakhs
 - (iii) Clearances as loan licensee of goods carrying the brand name of another upon full payment of duty: ` 200 lakhs
 - (iv) Clearance exempted vide Notification No. 214/86-C.E. dated 25.3.86: ` 125 lakhs.
 - (v) Balance clearances of goods in the normal course : ` 300 lakhs.

You are required to state with reasons whether the unit is entitled to the benefit of exemption under Notification No. 8/2003-C.E. dated 1.3.2003 as amended for the financial year 2009-10. (4 Marks)

- (c) Briefly explain the documents required for filing claim of rebate of duty on export of goods under rule 18 of the Central Excise Rules, 2002. (5 Marks)
- (d) An assessee had cleared goods without payment of excise duty. However, on coming to know from his sources that a show cause notice demanding duty on such clearances is likely to be issued but before actual issue of such notice the assessee made full payment of excise duty with interest. A show cause notice was issued subsequently as to why the assessee should not be subject to mandatory penalty equal to the excise duty sought to be evaded under section 11 AC of the Central Excise Act, 1944. Briefly examine, with a note, the conditions for levy of penalty under section 11AC and state whether there is any discretion to reduce such penalty. (5 Marks)

Answer

- (a) Inter State transfers do not involve sale and are therefore are not subjected to sales tax. The same position continues under VAT. However, tax paid on the purchases of goods which are stock transferred will be available as input credit after retention of 2% of such tax by the State Government.
- (b) As per **Notification No. 8/2003 dated 01.03.2003**, in order to claim exemption as small scale industry in the financial year 2009-10, the total eligible clearances of the manufacturing unit should not exceed Rs. 400 lakh in the previous financial year 2008-09.

For the purpose of computing the eligible clearances:-

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- (i) Export turnover of Rs. 100 lakh to USA would be excluded, while the export to Nepal of Rs. 50 lakh would be included.
- (ii) Clearances of Rs. 75 lakh without payment of duty to a 100% EOU would be excluded.
- (iii) Clearances of Rs. 200 lakh as a loan licensee of goods carrying the brand name of another on payment of duty would not be included.
- (iv) Clearances of Rs. 125 lakh exempt under *Notification No. 214/86* would be excluded.
- (v) Normal clearances of excisable goods of Rs. 300 lakh would be considered.

Thus, the eligible turnover for exemption is as follows:-

=Rs. 850 lakh – Rs. 500 lakh (100 + 75 + 200 + 125)

=Rs. 350 lakh

Since the eligible clearances do not exceed Rs. 400 lakh in the financial year 2008-09, the manufacturing unit will be entitled for SSI exemption in financial year 2009-10.

(c) The following documents are required for filing claim of rebate:-

- (i) A request on the letterhead of the exporter containing claim of rebate, A.R.E.1 numbers and dates, corresponding invoice numbers and dates on each A.R.E.1 and its calculations.
- (ii) Invoice issued under rule 11.
- (iii) Self attested copy of shipping bill
- (iv) Self attested copy of Bill of Lading
- (v) Disclaimer Certificate (in case where the claimant is not the exporter).
- (vi) Original copy of the A.R.E.1

After satisfying himself that goods were actually exported based on original and duplicate copies of A.R.E.1 duly certified by Customs and that goods are of duty paid character as certified in the triplicate copy of A.R.E.1 received from the jurisdictional Superintendent of Central Excise, rebate sanctioning authority would sanction the rebate in part or full.

(d) The conditions and the circumstances that would attract the imposition of penalty under section 11AC of the Central Excise Act, 1944 have been laid down by the Apex Court in case of ***UOI v. Rajasthan Spinning and Weaving Mills 2009 (238) ELT 3 (SC)***.

In the instant case, the Apex Court, overruling the decision of the Tribunal, held that mandatory penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty.

In order to levy the penalty under section 11AC, conditions mentioned in the said section should exist. Supreme Court ruled that the Tribunal was not justified in striking down the levy of penalty against the assessee on the ground that the assessee had deposited the

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balance amount of excise duty (that was short paid at the first instance) before the show cause notice was issued.

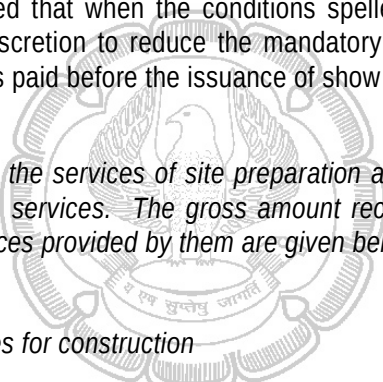
The Apex Court elaborated that the payment of the differential duty, whether before/ after the show cause notice is issued, cannot alter the liability for penalty. The conditions for penalty to be imposed are clearly spelt out in section 11AC of the Act.

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

Further, Central Board of Excise and Customs vide **Circular No. 889/09/2009 CX dated 21.05.2009** has clarified that when the conditions spelled out under section 11AC are fulfilled, there is no discretion to reduce the mandatory penalty which is equal to duty even though the duty is paid before the issuance of show cause notice.

Question 4

- (a) *D & Co. is engaged in the services of site preparation and clearance, excavation, earth moving and demolition services. The gross amount received during the quarter ended 30.6.2009 for the services provided by them are given below:*



Core extraction services for construction	1,80,000
Land reclamation work	80,000
Services in relation to agriculture	2,00,000
Renovating or restoring water sources	3,50,000
Horizontal drilling of passage of cables or drain pipes	1,00,000
Soil stabilization	90,000
Construction of transport terminals	55,000

Calculate the value of taxable services under 'Site preparation and clearance, excavation, earth moving and demolition services' under the Finance Act, 1994 and the service tax payable at 10.3%. (Provide brief explanations where required.) (4 Marks)

- (b) *State with reference to the provisions of the Finance Act, 1994 whether service tax is leviable in the following cases:*
- (i) *Taxable services rendered in the Special Economic Zone and consumed therein.*
 - (ii) *Services provided in the Continental Shelf of India and Exclusive Economic Zone of India.* (2 x 2 =4 Marks)

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- (c) Write a brief note with reference to the Service Tax Rules, 1994 in the following cases:
- (i) Advance payment of service tax.
 - (ii) Time limit for preservation of records. (4 Marks)
- (d) S Ltd. provides management consultancy services that are subject to service tax under the Finance Act, 1994. In respect of the services rendered during the month of December, 2009, the service tax of `15 lakh was remitted to Government treasury on January 20, 2010. Arrive at the penalty under section 76 of the Finance Act, 1994 which is leviable in this case. (4 Marks)



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Answer

(a) Computation of value of taxable services provided of D & CO.:-

Gross amount received	Rs.
for core extraction services for construction	1,80,000
for land reclamation work	80,000
for horizontal drilling for passage of cables or drain pipes	1,00,000
for soil stabilization	<u>90,000</u>
Total value of taxable services	<u>4,50,000</u>
Service tax payable on above @ 10%	45,000
Education cess @ 2%	900
Secondary and higher education cess @ 1%	<u>450</u>
Total service tax payable	<u>46,350</u>

Notes:

1. Amount received for site formation and clearance, excavation and earth moving and demolition services provided in relation to agriculture and for renovating or restoring water sources are specifically excluded from the definition of "site formation and clearance, excavation and earth moving and demolition" under section 65(97a) of the Finance Act, 1994.
 2. Amount received for such services provided in the course of construction of transport terminals is exempt from whole of service tax vide **Notification No. 17/2005 ST dated 07.06.2005**.
- (b) (i) **Notification No. 15/2009-ST dated 20-05-2009** has amended **Notification No. 9/2009-ST dated 3-3-2009** to provide for unconditional exemption from service tax to services consumed wholly within the SEZ. Developer or unit of SEZ has to maintain proper accounts of receipt and utilisation of taxable services for which exemption is claimed.
- It further provides that exemption can be claimed by way of refund of service tax paid on services consumed partially or wholly outside the SEZ.
- (ii) **Notification No. 14/2010-ST dated 27-2-2010** provides that construction and operation of installations, structures and vessels for purpose of prospecting or extraction/production of minerals oils and natural gas in the whole of exclusive economic zone and continental shelf of India, any service provided or to be provided by or to such installations, structures and vessels and for supply of any goods connected with these activities would be within the purview of service tax under the Finance Act, 1994.
- (c) (i) As per the provisions of rule 6(1A) of the Service Tax Rules, 1994, a facility has been provided to the assesses to make advance payment of service tax on his own and adjust the amount so paid against the service tax which he is liable to pay for the subsequent period. Such facility shall be available when the assessee:

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- (i) intimates the details of the amount of service tax paid in advance, to the Superintendent of Central Excise having jurisdiction within a period of 15 days from the date of such payment, and
 - (ii) indicates the details of the advance payment made, and its adjustment, if any, in the subsequent return to be filed under section 70.
- (ii) As per the provisions of rule 5(3) of the Service Tax Rules, 1994, all records maintained by the assessee shall be preserved **at least for a period of five years** immediately after the financial year to which such records pertain.

For the purposes of this rule, “**registered premises**” includes all premises or offices from where an assessee is providing taxable services.

- (d) **Section 76** of the Finance Act, 1994 provides for penalty for failure to pay service tax, as under:

- (i) Rs. 200 per day during which such failure continues

or

- (ii) Amount computed at the rate of 2% of such tax, per month

whichever is higher.

It is computed from the first day after the due date till the date of actual payment. Total amount of penalty under this section shall not exceed the service tax payable.

Computation of amount of penalty payable

Amount of penalty will be **higher** of the following:

- (i) 15 days ´ Rs.200 = Rs. 3,000 (Since the period of delay is 15 days)
- (ii) 2% of Rs. 15 lakh for 15 days

$$= \text{Rs. } \frac{2}{100} \times 15,00,000 \times \frac{15}{31}$$

$$= \text{Rs. } 14,516.13$$

Thus, X & Co. will have to pay the penalty of Rs. 14,516.13.

Question 5

- (a) Write a brief note on the deficiencies of the VAT system. (4 Marks)
- (b) A private agency has built a canal system on build-own-operate-transfer basis under a contract with the State Government. User charges at commercial rates are levied by the private agency and the revenue so generated is utilized for servicing and repayment of the capital investment.

Briefly write a note with reference to ‘commercial or industrial construction service’ under the Finance Act, 1994 whether the user charges collected by the private agency is liable to service tax. (4 Marks)

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- (c) *Briefly explain the provisions under the Service Tax Rules, 1994 regarding late fee for delayed filing of returns.* (4 Marks)
- (d) *State briefly with reference to section 66A of the Finance Act, 1994 who is liable to pay service tax for services provided from outside India.* (4 Marks)

Answer

- (a) 1. One of the key deficiencies in the current system is that there is lack of uniformity in rates of VAT across the states. Distortions also arise on account of differences in classification of the product and concessions or exemptions like composition schemes, exempted category of goods in certain States.
2. The other feature is that central sales tax (which is an origin based tax) has been allowed to coexist with VAT (which is essentially destination based tax) in a system where central sales tax payments are not eligible for set off in the receiving State.
3. There is a burden of record keeping for small traders even though they could switch over to a simplified composition scheme without the benefit of input credit. This could add to the supply chain cost because of the non availability of input credit when the goods pass through a small trader under the composition scheme.
4. The administration cost to the State owing to increase in the number of dealers could go up and at the same time, the States are also concerned about any possible avenues that may be adopted by the traders in the availment of input credit that could need to revenue leakages.
5. Another possible weak point in the introduction of VAT, which will have an adverse impact is that, since the tax is to be imposed or paid at various stages and not on last stage, it would increase the working capital requirements and the interest burden on the same. In this way, it is considered to be non-beneficial as compared to the single stage-last point taxation system.
6. It is claimed that the tax is regressive, i.e. its burden falls disproportionately on the poor since the poor are likely to spend more of their income than the relatively rich person. There is merit in this argument, particularly if it attempts to replace direct or indirect taxes with steep, progressive rates.

Note: Any four points may be given.

- (b) **Circular No. 116/09/2009 ST dated 15.09.2009** clarifies that as per section 65(25b) of the Finance Act, 1994, "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry.

As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

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In this case, the canal system is built by a private agency and user charges are collected at commercial rates. Hence, the user charges collected by the private agency, in the given case, will be subject to service tax.

(c) Late fee for delayed return [Rule 7C of the Service Tax Rules, 1994]

The prescribed late fee for furnishing a delayed return is given in the following table:

S. No.	Period of delay	Late fee
(a)	15 days from the date prescribed for submission of the return	Rs.500
(b)	Beyond 15 days but not later than 30 days from the date prescribed for submission of the return	Rs.1,000
(c)	Beyond 30 days from the date prescribed for submission of the return	An amount of Rs.1,000 plus Rs.100 for every day from the 31 st day till the date of furnishing the said return

Maximum late fees

Total late fee for delayed submission of return shall not exceed Rs.2,000.

Further, where the assessee has paid the prescribed late fee for delayed submission of return, the proceedings, if any, in respect of such delayed submission of return shall be deemed to be concluded.

Late fee may be reduced/waived where service tax payable is nil

Where the gross amount of service tax payable is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filling the return, reduce or waive the penalty (late fee) [Proviso to rule 7C].

(d) Section 66A of the Finance Act, 1994 provides a separate mechanism for levy of service tax on services received from outside India. It has to be read with the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

Section 66A provides that where any services specified under section 65(105) are rendered by a person who has established a business or has a fixed establishment from which the service is provided or has a permanent address or usual place of residence in a country other than India and such services are received by a person (recipient) who has his place of business, fixed establishment, permanent address or usual place of residence in India, then such service shall be a taxable service.

Such service shall be treated as if the recipient had himself provided the service in India. However, the provisions of this section would not apply to a service received by an individual for a purpose other than for use in business or commerce. A person carrying on a business through a branch or agency in a country shall be treated as having a business establishment in that country.

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Question 6

Answer any **four** of the following:

- (a) Discuss with a brief note the provisions of section 129E of the Customs Act, 1962 regarding deposit of duty and interest or penalty levied pending appeal. (4 Marks)
- (b) Write a brief note on sanctioning of refund of customs duty under section 27(2) of the Customs Act, 1962 under which refunds will not be credited to the consumer welfare fund. (4 Marks)
- (c) Write a brief note with specific reference to rule 1 of the Rules of Interpretation of the First Schedule to Customs Tariff Act, 1975. (4 Marks)
- (d) Certain goods were brought to the export shed on 5.10.2009. The goods were examined and 'let export order' was issued on the same day by noting of the shipping bill. Computer processed shipping bill was issued on 6.10.2009. DEPB rate was lowered on 6.10.09 and the Department allowed DEPB at the rate prevailing on 6.10.2009. The goods were permitted for clearance and loading on 5.10.2009. It is the assessee's case that under the Customs Act, 1962, they are entitled for the higher rate of DEPB prevailing on 5.10.2009. Write a brief note whether the assessee's stand is correct in law. (4 Marks)
- (e) Briefly explain the provisions relating to transshipment of goods without payment of duty under Section 54 of the Customs Act, 1962. (4 Marks)

Answer

- (a) As per section 129E where, in any appeal, the decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, first deposit the duty and interest demanded or penalty levied with the proper officer.

However, such deposit may be waived by the Commissioner (Appeals) or the Appellate Tribunal if he or it is of the opinion that deposit of duty and interest demanded or penalty levied would cause undue hardship to such person. Such waiver may be allowed subject to conditions as he or it may deem fit to impose so as to safeguard the interest of revenue.

- (b) In view of the provisions of unjust enrichment in the Customs Act, 1962, the amount found refundable has to be transferred to the Consumer Welfare Fund.

However, the amount of duty and interest found refundable, instead of being credited to the Fund, is to be paid to the applicant if the amount is relatable to:-

- (a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

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- (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (d) the export duty as specified in section 26;
- (e) drawback of duty payable under sections 74 and 75;
- (f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify

Note: Any four points may be given.

- (c) Rule 1 of the general rules for interpretation states that the titles of sections, chapters and sub-chapters in the First Schedule to the Customs Tariff Act, 1975 are provided for ease of reference only. For legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and provided such headings or chapter notes do not otherwise require, according to the subsequent rules.
- (d) In this case, the goods were brought to export shed on 5.10.09 and were examined on the same day when the noting of the shipping bill was also completed. The goods were permitted for clearance and loading on the same day.

Section 16(1)(a) of the Customs Act, 1962 deals with date for determination of rate of duty and tariff valuation of export goods. It states that in the case of goods entered for export under section 50, the rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51.

Section 50 deals with entry of goods for exportation by presenting a shipping bill and section 51 deals with the permission to clear and load the goods.

Since, in the given case, both the events have taken place on 5.10.09, the rate of duty for DEPB purposes shall be the rate prevailing on 5.10.09 which is the higher rate. The assessee's stand in this case is correct.

- (e) Provisions relating to transshipment of goods without payment of duty under section 54 of the Customs Act, 1962 are as follows:-
 - (1) Where any goods imported into a customs station are intended for transshipment, a bill of transshipment shall be presented to the proper officer in the prescribed form. Where the goods are being transhipped under an international treaty or bilateral agreement between the Government of India and Government of a foreign country, a declaration for transshipment instead of a bill of transshipment shall be presented to the proper officer in prescribed form.
 - (2) Subject to the provisions of section 11, where any goods imported into a customs station are mentioned in the import manifest or the import report, as the case may

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be, as for transhipment to any place outside India, such goods may be allowed to be so transhipped without payment of duty.

- (3) Where any goods imported into a customs station are mentioned in the import manifest or import report, as the case may be, as for transhipment:
- (a) to any major port as defined in the Indian Ports Act, 1908 (15 of 1908), or the customs airport at Mumbai, Calcutta, Delhi or Chennai or any other customs port or customs airport which the Board may, by notification in the Official Gazette, specify in this behalf, or
 - (b) to any other customs station and the proper officer is satisfied that the goods are bona fide intended for transhipment to such customs station.

the proper officer may allow the goods to be transhipped, without payment of duty, subject to such conditions as may be prescribed for the due arrival of such goods at the customs station to which transhipment is allowed.

Question 7

- (a) *UPT Ltd., are manufacturers of electrical transformers, switch gears falling under Chapter Heading 85042200 and Chapter Heading 85352121 of Central Excise Tariff. The manufacturers cleared excisable goods valued at ` 30 lakhs against Served from India Scheme Certificate (SFIS) at nil rate of duty availing the exemption by way of debit to SFIS under Notification No. 34/2006-CE dated 14.6.2006. As separate accounts for purpose of sub-rule (3) of rule 6 of the Cenvat Credit Rules, 2004 were not maintained by the assessee (M/s UPT Ltd.), they were required to pay 5% of the value of the exempted goods of ` 1.5 lakhs ( ` 30 lakhs @ 5%) on the basis that the goods cleared under SFIS scheme are to be treated as exempted goods. Discuss with reference to the definition of exempted goods under rule 2(d) of the Cenvat Credit Rules, whether the stand taken by the Department is correct. (Assume that debit to SFIS is a method of payment of appropriate duty). (4 Marks)*
- (b) *Briefly state the provisions of the Central Excise Rules, 2002 relating to electronic payment of excise duty and electronic filing of returns. (4 Marks)*
- (c) *Hand blender manufactured by the assessee was cleared as gift along with each unit of juicer, mixer and grinder (JMG). The MRP of ` 750 though printed on the 'hand blender box' contains clear indication that it is supplied free of cost. The package of JMG also shows this. The hand blender is not sold separately. The Department has issued a show cause notice that duty should be paid on the hand blender. Write a brief note with reference to section 4A of the Central Excise Act, 1944 whether the notice is sustainable in law. (4 Marks)*
- (d) *State briefly with reference to the provisions of the Finance Act, 1994 whether the following services are liable to tax:*
- (i) *Permanent transfer of intellectual property rights.*

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- (ii) *Services provided in relation to handling, storage and warehousing of empty containers under storage and warehousing service.* (4 Marks)

Answer

- (a) Sub-rule (3) of rule 6 of the CENVAT Credit Rules, 2004 provides that a manufacturer of goods opting not to maintain separate accounts shall have the option
- (i) to pay an amount equal to five percent of the value of the exempted goods or
 - (ii) pay an amount equivalent to the CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods subject to the procedure in sub-rule 3A.

In this case, the Department has demanded the amount under the first option i.e. 5% of the value of the exempted goods. The demand raised by the Department is questionable. The issue which requires consideration is as to whether the goods cleared in this case against debit entries in the SFIS certificate could be treated as 'exempted goods'.

Rule 2(d) of the said rules defines exempted goods as excisable goods which are exempt from the whole of the duty of excise leviable thereon and includes goods which are chargeable to NIL rate of duty.

Considering the facts of the case, it may be inferred that both the said goods are not exempted goods. Firstly, the transformers and switchgears are not exempt from the duty leviable because the relevant debit entries made in the SFIS are towards appropriate duty levied on the said goods. Secondly, the goods in question are not eligible for Nil rate of duty and the debit entry in the SFIS certificate is in discharge of the appropriate duty liability on the said goods.

The aforesaid view has also been supported by the Tribunal in case of *Universal Power Transformer Pvt. Ltd. v. CCEx., Bangalore 2010 (256) E.L.T. 244 (Tri. - Bang.)* wherein the Tribunal held that the duty liability debited in SFIS scrip amounts to discharge of liability and not amounts to exemption.

Thus, the stand taken by the Department to classify the said goods as 'exempted goods' and demand 5% of the value of the same is not correct in law.

- (b) With effect from 1.4.2010, CBEC has reduced the quantum of excise duty, for electronic payment of duty from Rs. 50 lakh to Rs. 10 lakh. It has amended the third proviso to rule 8(1) of the Central Excise Rules, 2002 to provide that where an assessee, who has paid duty of ten lakh rupees or more, including the amount of duty paid by utilization of CENVAT credit, in the preceding financial year shall thereafter, deposit the duty electronically through internet banking.

Further, it has inserted a proviso after second proviso to rule 12(1) of the aforesaid rules to provide that where an assessee has paid total duty of rupees ten lakh or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall file the monthly or quarterly return, as the case may be, electronically.

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- (c) No, the notice issued by the Department is not sustainable in law. In this case, though the MRP of Rs. 750 is printed on the 'hand blender box', there is a clear indication that it is supplied free of cost. This is merely a sale promotion measure in order to augment the demand.

In *Sony India Ltd. v. CCE 2004 (167) ELT 385 (SC)*, Supreme Court held that the offer of gifts was only incidental benefit and not the part of the consideration to be paid in regard to television sets (main product) as such. Similar view has been expressed by Tribunal in case of *Gujtron Electronics Pvt. Ltd. v. CCEx. & Cus. 2009 (241) E.L.T. 371 (Tri. - Ahmd.)*.

It is also clear that hand blender would be given free with every purchase of JMG and there is no sale of the same.

Hence, it can be concluded that the duty under section 4A will have to be paid on the JMG and the 'hand blender' provided as a gift will not be again subject to duty on the MRP because there is no sale of the hand blender.

- (d) (i) The term '**intellectual property service**', has been defined in section 65(55b) of the Finance Act, 1994 as:-

- (i) transferring, temporarily; or
- (ii) permitting the use or enjoyment of, an intellectual property right.

Hence, permanent transfer of intellectual property right does not attract service tax.

- (ii) **Master Circular No. 96/7/2007 ST dated 23.08.2007** has clarified that empty containers are covered within the meaning of 'goods' as per section 65(50). Thus, services provided in relation to storage and warehousing of empty containers is liable to service tax under 'storage and warehousing service'.

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Question No. 1 is compulsory.

Attempt any five from the remaining **six** questions.

Question 1

- (a) XYZ & Co., a SSI unit, manufactures different products and the value of clearances for the financial year 2008-09 is given below:

		(Rs. in lakhs)		
S. No.	Product	AA	AB	AC
(i)	Clearance for home consumption	55	40	60
(ii)	Captive consumption in the manufacture of excisable goods	100	80	60
(iii)	Export to U.S.A.	90	80	Nil
(iv)	Export to Nepal	50	40	39
(v)	Job work done under Notification No. 214/86-C.E.	55	30	60
(vi)	Goods manufactured in rural area with brand name of others	45	35	35

The unit seeks your advice as to whether they are eligible for SSI exemption for the year 2009-10.

Explain the basis for your conclusions. (5 Marks)

- (b) (i) Indicate the central excise authorities who can accept bonds executed for various purposes and obligations of exporter in respect of bond acceptance while filling in ARE-1 form. (3 Marks)
- (ii) What is the meaning of "normal transaction value" according to Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000? (2 Marks)
- (c) From the particulars given below, find out the assessable value of the imported goods under the Customs Act, 1962:

	US \$
(i) Cost of the machine at the factory of the exporting country	10,000
(ii) Transport charges incurred by the exporter from his factory to the port for shipment	500

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance (No. 2) Act, 2009 and Notifications/Circulars issued up to 30.04.2010 which are relevant for November 2010 examinations.

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- | | |
|---|-------|
| (iii) Handling charges paid for loading the machine in the ship | 50 |
| (iv) Buying commission paid by the importer | 50 |
| (v) Freight charges from exporting country to India | 1,000 |
| (vi) Exchange rate to be considered : 1\$ = Rs. 45 | |

(5 Marks)

- (d) How do you classify a taxable service, which is, *prima facie* classifiable under more than one sub-clause of clause (105) of Section 65 of Finance Act, 1994? (3 Marks)
- (e) Who are the service tax assesseees required to compulsorily deposit service tax through internet banking? (2 Marks)

Answer

- (a) XYZ & Co. unit will be entitled to exemption in the year 2009 -10, if its turnover in the year 2008-09 was less than Rs.400 lakhs. As per *Notification No. 8/2003 CE dated 01.03.2003*, which governs the provisions relating to small scale exemption, following items will not be included for calculating the turnover limit of Rs.400 lakh of previous year:

- (i) Captive consumption in the manufacture of excisable goods
- (ii) Export to USA
- (iii) Job work done under *Notification No.214/86 CE*

Only the goods bearing the brand name of others, which are *ineligible* for the grant of SSI exemption, are excluded for the purpose of said limit. Since, goods manufactured in rural area with brand name of others are eligible for SSI exemption; the same will not be excluded for calculating the said limit.

Therefore, the turnover to be considered for the limit of Rs.400 lakh will be computed as under:

Product	Clearance for home consumption	Export to Nepal	Goods manufactured in rural area with brand name of others	Total Turnover
(Rs. in lakhs)				
AA	55	50	45	150
AB	40	40	35	115
AC	60	39	35	134
				399

Since turnover of the unit during the year 2008-09 is less than Rs.400 lakh, the unit is entitled to SSI exemption from excise duty in the year 2009-10.

- (b) (i) Bonds may be accepted by any of the following officers:

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- (i) Assistant/Deputy Commissioner of Central Excise having jurisdiction over the factory or warehouse or any other premises approved by the Commissioner for storing non-duty paid goods
- (ii) Jurisdictional Maritime Commissioner in case of exports or
- (iii) Deputy/Assistant Commissioner of Central Excise (Export) as officers authorized by the Board for this purpose.

Exporters are required to indicate on the ARE-1 the complete address of the authority before whom the bond is executed and to whom the documents are to be submitted for admission of proof of export.

- (ii) As per rule 2(b) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, 'normal transaction value' means the transaction value at which the greatest aggregate quantity of goods are sold.

(c) Computation of Assessable Value of the Imported Goods

	US \$
(i) Cost of the machine at the factory	10,000
(ii) Transport charges upto port	500
(iii) Handling charges at the port	<u>50</u>
F.O.B.	10,550
(iv) Freight charges upto India	1,000
(v) Insurance charges @ 1.125% of F.O.B.	<u>118.69</u>
C.I.F.	11,668.69
C.I.F. in Indian rupees @ Rs.45/- per \$	Rs.5,25,091
(vi) Add: Landing charges @ 1% of CIF	Rs.5,250.91
Assessable Value	Rs.5,30,342

Notes:

- (1) Buying commission is not included in the assessable value [Rule 10(1)(a)(i) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
- (2) Transport charges incurred by the exporter from his factory to the port for shipment have been included as it is logical to presume that the same have been recovered separately from the importer.
- (3) Insurance charges and landing charges have been included @ 1.125% of FOB value of goods and 1% of CIF value of goods respectively [First proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
- (d) If prime facie, a taxable service is classifiable under two or more sub-clauses of section 65(105), classification shall be effected as follows:

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- (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
 - (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
 - (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.
- (e) According to Notification No. 01/2010 ST dated 19th February, 2010, an assessee who has paid a total service tax of Rs.10,00,000 or more including the amount paid by utilization of CENVAT credit, in the preceding financial year, is required to compulsorily deposit the service tax liable to be paid by him electronically, through internet banking.

Question 2

- (a) *BCD Auto parts Ltd. is manufacturing rail assembly front seat, adjuster assembly slider seat, rear lock assembly used in motor vehicles for fitment along with seats. Assessee classified the items under Chapter Heading No. 8708 – parts and accessories of motor vehicles of the First Schedule to Central Excise Tariff Act, 1985. Department's contention is that goods manufactured are integral parts of seats and hence have to be classified under Chapter Heading No. 9401.00 – seats.*
- Examine whether contention of the department is correct by referring to case law, if any, and principles for classification of goods. (5 Marks)*
- (b) *Examine whether the rules for interpretation of tariff schedules applicable to classification of goods are also applicable to interpretation of exemption notification or to determination of the eligibility of goods for exemption under an exemption notification. (3 Marks)*
- (c) *AB Exim Ltd. exported a full container load of readymade shirts. The goods were inspected, samples were drawn and container was sealed by Central Excise Officers and container was allowed to be loaded by customs after ensuring that seal on the container was intact. However, while filing shipping bill, by mistake the declaration that drawback is being claimed was not made. AB Exim Ltd. has approached you for advice. What will be your advice? (2 Marks)*
- (d) *An importer filed bill of entry after 60 days of filing Import General Manifest. The Deputy Commissioner of Customs imposed a penalty of Rs. 10,000 by endorsement on the bill of entry. Since importer wanted to clear the goods he paid the penalty. Can penalty be imposed for late filing of bill of entry? Examine the issue in the light of relevant statutory provisions. (4 Marks)*
- (e) *Examine whether manufacture of non-excisable goods for or on behalf of a client attracts levy of service tax or not. (2 Marks)*

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Answer

- (a) The facts of the given case are similar to the case of *CCEx. Delhi v. Insulation Electrical (P) Ltd. 2008 (224) ELT 512 SC* wherein the Apex Court held that the products manufactured by the assessee cannot be considered as parts of a seat. The rail assembly front seat, adjuster assembly slider seat etc. manufactured by the assessee were used to facilitate fitment of seat, in the motor vehicle and helped the driver and passenger of vehicle in adjusting the seat. The seat was complete and fully functional without rail assembly or adjuster assembly. None of the items manufactured could be considered as part of the seat.

Thus, in view of the above-mentioned decision of the Supreme Court, Department's contention is not correct.

- (b) This issue has been dealt by the Supreme Court in the case of *CCEx. Jaipur v. Mewar Bartan Nirman Udyog 2008 (231) ELT 27 (SC)*. In the instant case, the Apex Court clarified that it is a well settled position in law that exemption notification has to be read strictly and interpreted in terms of its language. Where the language is plain and clear, effect must be given to it. The rules of interpretation applicable in the cases of classification under the Tariff cannot be applied to interpretation of exemption notification.
- (c) AB Exim Ltd. will be advised to make an application to Commissioner of Customs to exempt it from the requirement of making a declaration in the shipping bill by exercising his power under Rule 12 of the Drawback Rules, 1995 explaining the facts and circumstances and also pointing out that goods have been examined and samples have been drawn.
- (d) The Customs Act, 1962 does not prescribe any statutory time limit for filing Bill of Entry. However, under section 48 of the Customs Act, 1962, if imported goods are not cleared within 30 days from the date of unloading, goods can be disposed off by the custodian. Therefore, since no offence is committed by late filing of bill of entry, penalty cannot be imposed for the same. However, the custodian after giving notice to the importer and with the approval of the proper officer can sell the goods.

In the instant case, the importer can file an appeal before Commissioner (Appeals) since endorsement of penalty on the bill of entry can be considered as part of assessment.

- (e) The Finance (No.2) Act, 2009 has amended the definition of business auxiliary service under section 65(19) of the Finance Act, 1994 so as to exclude from its ambit any activity that amounts to manufacture of excisable goods. Therefore, manufacture of non-excisable goods for or on behalf of client attracts service tax.

Question 3

- (a) *M/s R & Co. Ltd. have cleared their manufactured final products during April, 2010 and the duty payable is Rs.2,40,000 plus education cesses as applicable. Given below are the details of excise duty paid by them during the month at the time of purchase of goods:*

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	Rs.	
(i) On inputs (RM)	1,00,000	(Invoice for excise duty of Rs. 20,000 paid was received by the assessee on 04.05.2010)
(ii) On input service	20,000	
(iii) On welding electrodes for repairs and maintenance of capital goods	5,000	
(iv) Fuel (excluding HSD/Petrol)	6,000	
(v) Storage Tank	8,000	
(vi) Tubes and Pipes (used in the factory)	14,000	
(vii) Air-conditioner for the office of the Factory Manager	12,000	

Note: all the above payments are exclusive of education cesses as applicable.

Find the total duty payable by the assessee for the month of April, 2010 after taking into account the CENVAT credit available. (8 Marks)

- (b) What are the provisions relating to effective date of notifications issued under Section 25 of the Customs Act, 1962? (3 Marks)
- (c) Who are the residents eligible to file an application for advance ruling under the Customs Act, 1962? (3 Marks)
- (d) Compute value of taxable service under "intellectual property service" using the details given below:

	Rs.
(1) Royalty for providing designs and patents @ 5%	20,00,000
(2) Lumpsum royalty for permanent transfer of trademark	25,00,000
(3) Royalty under brand licensing arrangement for use of brand name	15,00,000

(2 Marks)

Answer

(a) CENVAT credit available for the month of April, 2010

S. No.	Particulars	Excise Duty/service tax	Education Cess	Secondary and Higher Education Cess
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	Rs.	Rs.	Rs.
1. Inputs [Refer Note 1]	80,000	1600	800
2. Input service	20,000	400	200
3. Welding Electrodes [Refer Note 2]	5,000	100	50
4. Fuel [Refer Note 3]	6,000	120	60
5. Storage Tank [Refer Note 4]	4,000	80	40
6. Tubes and Pipes [Refer Note 4]	7,000	140	70
7. Air-conditioner [Refer Note 5]	-	-	-
Total credit available	1,22,000	2,440	1220
Excise duty payable for the month April, 2010	<u>2,40,000</u>	<u>4,800</u>	<u>2,400</u>
Payable in cash after set off of the credit	<u>1,18,000</u>	<u>2,360</u>	<u>1,180</u>

Notes:

- (1) Since invoice for Rs.20,000 was not received as on 30.04.2010, credit thereon has not been considered [First proviso to rule 3(4) read with rule 9(1) of the CENVAT Credit Rules, 2004].
- (2) CENVAT credit is available on welding electrodes as per Rajasthan High Court's decision in the case of *Hindustan Zinc Ltd. 2008 (228) ELT 517*.
- (3) It has been assumed that fuel excludes light diesel oil also.
- (4) Storage tank and tubes and pipes are capital goods [Rule 2(a)(A)(vii) and Rule 2(a)(A)(vi) of the CENVAT Credit Rules, 2004 respectively]. Hence, only 50% credit is allowed [Rule 4(2)(a) of the CENVAT Credit Rules, 2004].
- (5) Air conditioner is not an eligible capital goods as it is used in the office of the factory manger [Rule 2(a)(A)(1) of the CENVAT Credit Rules, 2004].

PS: The second line of the question may be read as under:

"Given below are the details of excise duty/service tax paid by them during the month at the time of purchase of goods/procurement of input services:"

- (b) Date of effect of every notification issued will be the date of its issue by the Central Government for publication in the Official Gazette, unless provided otherwise in the notification. It shall be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the CBEC.

A notification may come into force from a date later than the date of issue if so provided in the notification. In such a case it shall be published and offered for sale on or before the date on which it comes into force.

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The above rules do not apply to exemptions granted through special orders. Special orders are issued separately for each case and communicated to the beneficiary directly by the Government.

- (c) Under section 28E(c) of the Customs Act, following residents can apply for advance ruling-
- (i) A resident setting up a joint venture in India in collaboration with a non-resident who proposes to undertake any business activity in India;
 - (ii) A wholly owned subsidiary Indian company, of which the holding company is a foreign company, which proposes to undertake any business activity in India;
 - (iii) A public sector company as defined in section 2(36A) of Income-tax Act – Notification No. 124/2009-Cus. (NT) dated 20.8.2009;
 - (iv) Resident importing goods under project import scheme under heading 9801 – Notification No. 124/2009-Cus. (NT) dated 20.8.2009;
 - (v) A joint venture in India.

In case of joint venture, an application for advance ruling can be made only when one of the partners is non-resident.

(d)

Computation of value of taxable service

	Rs.
1. Royalty for providing designs and patents	20,00,000
2. Lump sum royalty for permanent transfer (Permanent transfer is not a service, but a sale, hence not taxable)	Nil
3. Royalty under brand licencing arrangement	<u>15,00,000</u>
Value of Taxable Service	35,00,000

Question 4

- (a) *Pinkcity Zinc Ltd. (PZ Ltd.) was engaged in the manufacture of lead and zinc concentrates. At the time of carrying out the physical stock taking, some shortage of stock was found. According to PZ Ltd., the shortage was due to de-bagging, shifting of concentrates, seepage of rain water, storage and loading on trucks. PZ Ltd. applied for remission of duty under rule 21 of the Central Excise Rules, 2002. Revenue claimed that the shortage could have been avoided or minimized by the assessee, as these were neither due to natural causes, nor due to unavoidable accident. Thus, the prayer for remission was declined.*

You are requested to examine the validity of the Revenue's claim with the help of decided case law. (5 Marks)

- (b) *Duty demand of Rs. 10 lakh was made in terms of an order in original dated 25.02.2009 against XYZ Ltd. with interest as applicable on the ground of clandestine removal of the*

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products manufactured by the assessee in the month of June, 2008. Penalty equal to duty demanded was also imposed. On an appeal filed by XYZ Ltd., the Commissioner (Appeals) required it to deposit an amount of Rs. 5 lakh as pre-deposit which was duly deposited on 03.06.2009. The case against XYZ Ltd. was finally decided and duty demand of Rs. 3,20,000 was confirmed and penalty was set aside on 30.06.2009. XYZ Ltd. filed a refund claim on 15.09.2009. Refund was sanctioned on 10.12.2009. Calculate the amount of refund admissible. (3 Marks)

- (c) M/s Pipli Imports Ltd. imported certain goods, which were unloaded in the customs area on 01.10.2010. When order for clearance was passed by proper officer on 05.10.2010, it was found that there was some pilferage of such goods. As the imported goods were in the custody of Port Trust, the Department demanded duty from the custodian under Section 45(3) of the Customs Act, 1962, on such pilferage. The Port Trust denied such demand contending that it was not an approved custodian falling under Section 45 but possession of goods by it was by virtue of powers conferred under the Major Port Trust Act, 1963. Hence, it is not liable for customs duty on pilfered goods.

The importer has also asked the custodian to make good the loss of goods. Examine, whether the demands made by the Department and importer are justified in law, referring to decided case law. (6 Marks)

- (d) Is CENVAT credit of service tax paid in relation to renovation or repair of premises of provider of output service admissible? Give reasons. (2 Marks)

Answer

- (a) The Revenue's claim is not valid in law. The facts of the given case are similar to the case of *UOI v. Hindustan Zinc Ltd.* 2009 (233) ELT 61 (Raj) wherein the High Court held that the expressions 'natural causes' and 'unavoidable accident' are required to be given reasonable and liberal meaning, otherwise the provisions of rule 21, so far as they relate to admissibility of remission, on these two grounds, would be rendered altogether ineffective.

The Court noted that if the contention of Revenue was accepted no loss or destruction would fall under these two categories as in either case, grounds may be projected on the anvil of requirement of appropriate storage, or safety measures, and so on and so forth. Even in case of 'unavoidable accident', it could always be claimed that the accident could have been avoided by taking recourse of one or more measures. Thus, a bit liberal, rather more practical, approach is required to be taken in matter.

Thus, the prayer of PZ Ltd. for remission of duty may be accepted by Revenue under Rule 21. However, the aspect of satisfaction under Rule 21 is essentially a subjective satisfaction of the authority concerned.

- (b) As the Commissioner (Appeals) has confirmed the duty demand of Rs.3,20,000 and set aside the penalty, only Rs.1,80,000 will be payable as refund to XYZ Ltd. Interest would also be payable as per the provisions of section 35FF as the pre-deposit is not refunded within three months from the date of communication of such order to the adjudicating authority. Interest would be payable @ 6% on such refund after the expiry of three

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months from the date of the communication of the order of the appellate authority (01.10.2009) to the adjudicating authority till the date of refund of such amount (10.12.2009) i.e., for 71 days in total. It has been assumed that the order was communicated to the adjudicating authority on the same day (30.06.2009).

$$\begin{aligned}\text{Interest payable} &= \frac{6}{100} \times \frac{71}{365} \times 1,80,000 \\ &= \text{Rs.}2,101\end{aligned}$$

$$\begin{aligned}\text{Total refund admissible} &= \text{Rs.}1,80,000 + \text{Rs.}2,101 \\ &= \text{Rs.}1,82,101\end{aligned}$$

- (c) The facts of the case are similar to the case of *Board of Trustees v. UOI* (2009) 241 ELT 513 (Bom HC DB), wherein the Court held that considering the language of section 45(3), the liability to pay duty is of the person, in whose custody the goods remain as an approved person under section 45 of the Act. Therefore, section 45(3) applies only to the private custodians who are required to be approved by Commissioner of Customs under section 45(1). Accordingly, the major ports and airports covered under Major Port Trust Act, 1963 who do not require any approval under section 45(1), are not covered by section 45(3).

However, the Board vide its *Circular No.13/2009-Cus. dated 23.2.2009* has clarified that major ports and airports would be required to discharge the responsibilities cast upon them as specified in Customs Areas Regulations, 2009 (which include the responsibility to pay customs duty on pilferage of goods).

Section 45(3) holds the custodian responsible only in respect of the customs duty in respect of pilfered goods. It does not extend to the value of goods lost. However, in case of *IAA v. Ashok Dhawan* (1999) 106 ELT 16 (SC), it was held that if the custodian has no explanation at all to show how the loss occurred in respect of goods in its custody, applying the principle *res ipo locquitor*, the custodian is liable for loss of goods.

- (d) Admissible. As per Rule 2(I)(ii) of CENVAT Credit Rules, 2004, services used in relation to setting up, modernization, renovation or repairs of a factory, premises of output service provider or an office relating to such factory or premises are input services.

Question 5

- (a) How should value of samples, which are distributed free as part of marketing strategy, or as gifts or donations, or distributed as physicians' samples be determined according to the latest circular issued by Central Board of Excise & Customs? Indicate whether the procedure requires a change when products are notified for MRP based assessment.

(4 Marks)

- (b) Write a brief note on taxable event for levy of excise duty. Quote the relevant Supreme Court decision.

(4 Marks)

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- (c) *Importer BOPP Ltd. imported two consignments of ethyl alcohol which were allowed to be cleared for home consumption on execution of a bond undertaking to produce licence within a month. Since appellants failed to fulfill the obligation, proceedings were initiated which culminated in confiscation of the goods under Section 111(d) of the Customs Act, 1962 and imposition of penalty on the importer under Section 112(a) of Customs Act, 1962. Examine the correctness of the decision in terms of statutory provisions. (4 Marks)*
- (d) *Give description of the goods which have been fully exempted from additional customs duty under Section 3(5) of the Customs Tariff Act, 1975 (i.e., 4% special CVD). (2 Marks)*
- (e) *Penalty under Section 78 of the Finance Act, 1994 is mandatory when demand for service tax evaded has been confirmed on the ground of suppression, misdeclaration, fraud, collusion, etc. and no authority other than High Courts/Supreme Court has the power to waive the penalty. Examine the correctness of this statement. (2 Marks)*

Answer

- (a) *Circular No. 813/10/2005 CX dated 25.04.2005 clarifies that value of samples which are distributed free as part of marketing strategy, or as gifts or donations, or distributed as physicians' samples should be determined under Rule 4 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.*

Circular No. 915/05/2010 CX dated 19.02.2010 has clarified that even when the products are notified for MRP based assessment under section 4A of the Central Excise Act, 1944, samples thereof would be assessed under Rule 4 of the valuation rules by taking into consideration the deemed value under section 4A(1). Accordingly, the value for payment of excise duty for samples notified for MRP based assessment would be the value determined under section 4A for the similar goods (subject to adjustment for size and pack etc.).

- (b) *As per section 3 of the Central Excise Act, 1944, the taxable event for charge of central excise duty is manufacture of the goods. However, collection of duty is postponed to the stage of removal of goods as per rule 4 of the Central Excise Rules, 2002.*

According to the decision of the Apex Court in the case of Vazir Sultan Tobacco Co. Ltd. v. CCE (1996) 83 ELT 3, exempted goods will be chargeable to duty if, subsequent to manufacture but before removal exemption is withdrawn. However, goods which are not listed in the Schedules to Central Excise Tariff Act, 1985 will not be liable to excise duty if they are subjected to levy after they are manufactured. The test for determining the liability is whether goods were covered in the tariff when they were manufactured. Therefore, date of removal is relevant only if levy was there at the time of manufacture.

- (c) *When goods are confiscated ownership of the goods vests in the Government. If goods are not in possession of the importer or with Government, confiscation will have no meaning. Imposition of redemption fine also would not be possible since when fine is paid, importer can redeem the goods and when goods are not there question of fine does not arise.*

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However, when goods have been provisionally released, confiscation would be possible since release is provisional and importer gets conditional possession. The Supreme Court in the case of *Weston Components Ltd. v. CC 2000 115 ELT 278* has also held that goods released under bond can be confiscated and redemption fine can be imposed. Thus, confiscation of goods imported by BOPP Ltd. is in consonance with the provisions of the Customs Act, 1962.

Penalty under section 112 can be imposed *inter alia* when a person omits to do any act which would render such goods liable for confiscation under section 111. Thus, penalty can also be imposed on BOPP Ltd. as the confiscation of goods is justifiable.

- (d) In respect of following goods, additional duty leviable under section 3(5) of the Customs Tariff Act has been fully exempted:
- (i) All pre-packaged goods intended for retail sale covered under Standards of Weights and Measures Act, 1976
 - (ii) Wrist watches, pocket watches and other watches including stop watches
 - (iii) Telephones for cellular networks or for other wireless networks
 - (iv) Articles of apparel and clothing accessories
 - (v) Electrical energy
 - (vi) Parts, components and accessories for the manufacture of mobile phones, battery chargers and hands-free headphones if the importer follows the procedure set out in the Customs (Import of Goods at Concessional rate of Duty for Manufacture of Excisable Goods) Rules, 1996
- (e) The statement is not correct. Section 80 of the Finance Act, 1944 provides that no penalty under sections 76, 77 or 78 of the Finance Act, 1944 shall be imposed if the assessee proves that there was "reasonable cause" for the failure referred to in the said sections. It is mandatory on the part of the department to follow the principles of natural justice i.e., to hear the other party before imposition of the penalty and provide the assessee an opportunity to prove that there was reasonable cause.

Question 6

- (a) *M/s. Cool and Kool Ltd. has two units, one in Jaipur and another in Delhi. Jaipur unit manufactures condensing units which are cleared to Delhi unit on payment of appropriate excise duty. Delhi unit procures cooling units manufactured locally and combines the same with such condensing units. After conducting quality control test and affixing the brand name, the Delhi unit clears the complete units along with pipe kits, electrical cord, remote control, etc. The Department contends that the process being carried out by Delhi unit amounts to manufacture as it is not a mere process of assembly whereas, the assessee argues that putting together various duty paid articles in a carton with a brand name to be marketed as 'air conditioner' is not manufacture. No process is involved except that all the items are put together in one box.*

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Explain, with the help of decided case law, whether the contention of the Department is correct in law? (5 Marks)

(b) *Indicate headings under which excise audit procedure is explained in EA – 2000.*

(3 Marks)

(c) *Section 26A of Customs Act, 1962 provides for refund of import duty paid if goods are found defective or not as per specifications. Discuss the conditions governing such refund in brief.* (6 Marks)

(d) *"Service tax is leviable on hire purchase finance transaction". Discuss the validity of the above statement.* (2 Marks)

Answer

(a) Yes, the contention of the Department is correct in law. The facts of the given case are similar to the case of *Fedders Lloyd Corporation Ltd. v. CCE*. (2008) 221 ELT 3 (SC) wherein it was held that neither the condensing unit nor the cooling unit by itself, was a complete air conditioner. It was only when these two were put together that the complete unit of air conditioner fit for use came into existence. The air conditioner, so cleared by Delhi branch was a commercially new article. Hence, the process amounted to manufacture.

Processing and assembly of various parts and components may amount to manufacture if a new and identifiable product known in the market emerges, which is movable and marketable.

(b) The headings under which excise audit procedure under EA-2000 is outlined are:

- (i) Selection of assessee
- (ii) Desk review
- (iii) Documenting information
- (iv) Tour of the factory
- (v) Audit plan
- (vi) Verification
- (vii) Audit objection and audit plan
- (viii) Audit report

(Any six points out of the above points may be mentioned)

(c) Section 26A of the Customs Act, 1962 makes provision for refund of import duty paid on clearance of imported goods capable of being easily identified as such imported goods, if following conditions are fulfilled:

- (i) the goods are found to be defective or otherwise not in conformity with the specification agreed upon between the importer and the supplier of goods;

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- (ii) the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;
 - (iii) the goods are identified to the satisfaction of Assistant/Deputy Commissioner of Customs as the goods which were imported;
 - (iv) the importer does not claim drawback under any other provision of this Act; and
 - (v) the goods are exported or the importer relinquishes his title to the goods and abandons them to customs or such goods are destroyed/rendered commercially valueless in the presence of proper officer in prescribed manner within 30 days from the date on which the order of clearance of imported goods for home consumption is made by the proper officer. This period of 30 days can be extended up to 3 months.
 - (vi) An application for refund of duty shall be made before the expiry of 6 months from the relevant date in prescribed form and manner.
 - (vii) This section shall not apply to the goods regarding which an offence appears to have been committed under this Act or any other law.
 - (viii) No refund shall be allowed in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage before use period.
- (d) The statement is not valid. The Apex Court in the case of *CCE v. Bajaj Auto Finance Ltd. (2008) (10) STR 433* has held that service tax is not leviable on hire purchase finance transactions. Hire purchase finance is different from hire purchase and hire-purchase finance is not covered under category of 'banking and other financial services'.

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

Question 7

Answer any **four** out of sub-questions (a) to (e) :

- (a) (i) Section 13 of Central Excise Act, 1944 relates to power to arrest. According to this Section, who has the power to arrest and subject to what conditions? (3 Marks)
- (ii) What is the meaning of 'fund' according to Section 2(ee) of Central Excise Act, 1944? (1Mark)
- (b) Explain the procedure for warehousing of excisable goods removed from a factory or a warehouse. (4 Marks)

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- (c) (i) *Examine the validity of the statement “Commissioner of Central Excise (Appeals) can enhance the amount of duty demanded or fine in lieu of confiscation or penalty while deciding appeal filed by an assessee”. (2 Marks)*
- (ii) *For the purposes of valuation of taxable service, what is the meaning of a ‘pure agent’? (2 Marks)*
- (d) *On the package, received as a post parcel from abroad, contents are indicated as calculators valued at Rs. 1,000. However, when the parcel was opened, it was found to contain ten mobile phones valued at Rs.2,50,000. A show cause notice has been issued to the importer proposing to confiscate the goods and impose penalty on the importer. Examine the legality of action proposed in terms of statutory provisions under Customs Act, 1962. (4 Marks)*
- (e) *State the points of difference between valuation of imported goods under Customs Act, 1962 and imported services under Finance Act, 1994 and valuation of imported goods and services, as per relevant Accounting Standard. (4 Marks)*

Answer

- (a) (i) According to section 13 of the Central Excise Act, 1944, any central excise officer not below the rank of Inspector of Central Excise has the power to arrest a person whom he has reason to believe to be liable to punishment under Central Excise Act or Rules. Prior approval of Commissioner of Central Excise is required for arrest.
- (ii) As per section 2(ee) of the Central Excise Act, 1944, ‘fund’ means the consumer welfare fund established under section 12C.
- (b) 1. The consignor (i.e. the manufacturer or the registered person of the warehouse) shall prepare an application for removal of goods from a factory or a warehouse to another warehouse in quadruplicate in the specified Form.
2. The consignor shall also prepare an invoice in the manner specified in Rule 11 of the said Rules in respect of the goods proposed to be removed from his factory or warehouse.
3. The consignor shall send the original, duplicate and triplicate application and duplicate invoice along with the goods to the warehouse of destination.
4. The consignor shall send quadruplicate copy of the application to the Superintendent-in-charge of his factory or warehouse within twenty-four hours of removal of the consignment.
5. On arrival of the goods at the warehouse of destination, the consignee (i.e. the registered person of the warehouse who receives the excisable goods from the factory or a warehouse) shall, within twenty-four hours of the arrival of goods, verify the same with all the three copies of the application. The consignee shall send the original application to the Superintendent-in-charge of his warehouse, duplicate to the consignor and retain the triplicate for his record.
6. The Superintendent-in-charge of the consignee shall countersign the application

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received by him and send it to the Superintendent-in-charge of the consignor.

7. The consignor shall retain the duplicate application duly endorsed by the consignee for his record.
- (c) (i) The statement is valid. Section 35A provides that Commissioner (Appeals) can enhance penalty or fine in lieu of confiscation or duty demanded after making further enquiry as may be necessary and after giving an opportunity of being heard to the appellant. Further, enhancement of duty demand shall be subject to time limit under section 11A of the Central Excise Act, 1944.
- (ii) 'Pure agent' is a person, who
- incurs expenditure or costs on behalf of service recipient in terms of a contract
 - does not hold any title to goods or services procured or provided as pure agent of the recipient of services
 - does not use such goods or services
 - receives only actual amount incurred to procure such goods or services.
- (d) The proposed action is legal. According to section 82 of Customs Act, 1962, in the case of a post parcel, any label or declaration accompanying the goods which contains description, quantity and value is deemed to be an entry for import. Therefore in this case, goods become liable to confiscation under section 111 of Customs Act, 1962 since they are not covered by the entry for import. Importer becomes liable to penalty unless he is able to show that he was not responsible for import.
- (e) As per the customs provisions, the rate of exchange used for conversion of foreign currency in to Indian currency for valuation purposes is the rate declared by the Central Board of Excise and Customs. However, as per AS 11 the rate of exchange for conversion of foreign currency into reporting currency in respect of a transaction is the rate prevalent at the date of the transaction. Thus, while valuing the imported goods for the purpose of paying customs duty, rate declared by CBEC is used whereas while recording the value of such goods in the books of accounts the exchange rate prevalent on the date of transaction as declared by the RBI is used.

Further, there may be more difference between the value of imported goods derived as per the customs provisions and the value computed as per the accounting principles. The differences may be on account of various additions or deductions made to/from the invoice value in terms of section 14 of the Customs Act, 1962 and Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. For example, customs laws provide for the addition of commission and brokerage, licence or royalty fees etc. to the value of the imported goods. Also, price reduced after importation is not considered for customs purposes whilst the same is considered for recording the value of the goods in the account books.

As regards imported services, there are no statutory provisions similar to customs in the service tax law which provide for the rates of conversion of currency for the purpose of converting consideration of taxable services received in foreign currency into Indian currency.