

Number of case laws listed here have already been done in the class whereas few have not been. So you need to cover those marked in the class as well as the ones stated here.

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

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

2. UOI v/s Customs & Excise Settlement Commission 2010 (258) ELT 476 (Bom)

Proceeding were initiated by the Revenue by issuing show-cause-notice, *inter alia*; for recovery of duty drawback amounting to Rs. 2,07,71,436/- with interest, said to have been obtained fraudulently, the goods exported were "Solvent Mixture", which do not qualify for duty drawback.

Instead of responding to the SCN, they preferred to file an application before the Settlement Commission under Section 127B(1) of the Customs Act for settlement of the case. In the said application, they admitted additional duty liability of Rs. 2,07,71,436/- i.e. amount of drawback received with a view to put end to the litigation by a peace of mind.

The Revenue appeared and objected to the jurisdiction of the Commission to entertain and consider the case relating to recovery of duty drawback erroneously granted; contending that such type of cases do not fall within the definition of 'case' stipulated under Section 127A(b) of the Act. The Commission vide its final order settled the case at duty liability of Rs. 2,07,71,436/- with interest thereon at the rate of 10% per annum for the time lag i.e. between the date of receipt of duty drawback amount and the date of its pay back. Immunity from fine, penalty and prosecution also granted to all the applicants under the said order.

On a writ to the High Court, the High Court ruled that:

The plea taken by the Department that recovery of drawback does not involve levy, assessment and collection of Customs duty, hence Settlement Commission not having jurisdiction not tenable. Rather provisions relating to refund of duty also extend to drawback as drawback is return of Customs duty. Drawback as defined in Rules and also Section 74 of Customs Act is nothing but remission of duty on account of statutory provisions in Act and Scheme framed. Therefore Commission has jurisdiction to deal with question relating to recovery of drawback erroneously paid.

3. CCE v INDIAN OIL CORPORATION 2010 (258) E.L.T. 504 (Kar.)

Mere absence of express provision for extending stay does not mean CESTAT does not have powers for granting extension. Express provision to extend period of stay is not required. Tribunal having power to grant stay is also empowered to extend such stay. Tribunal having power to grant stay as incidental and ancillary to its appellate jurisdiction. Tribunal entitled to grant order of stay of impugned order even in the absence of express provision.

Tribunal empowered to extend stay based on application made therefor if assessee not at fault and Tribunal unable to dispose appeal within 180 days from grant of stay for reasons beyond its control. However, order of stay and order for extension of stay not automatic. The Tribunal should apply mind and find out reasons for not disposing appeal in 180 days when application for extension of stay filed. Extension of stay not deniable if conduct of assessee not the cause for delay in passing of appeal.

4. Commissioner v Karnataka Vidyuth Karkhane Ltd. - 2010 (258) E.L.T. A108 (S.C.)

The Supreme Court indirectly affirmed the order of the Tribunal, wherein the Tribunal had taken a view that while repairing old transformers, the newly wound coil which emerges in course thereof does not amount to manufacture and hence was not dutiable. Further, some stray instance of sale of coil does not prove manufacture, marketability and liability of payment of duty

5. CCE v PALAV SYNTHETICS 2010 (258) E.L.T. 59 (Guj.)

The High court affirmed the order of the Tribunal that the option to pay penalty at 25% of duty if it was paid within 30 days of communication of its order.

The Tribunal while relying on the judgement in the case of Rama Synsilk Mills Pvt. Ltd.¹, had ruled that where an appeal was preferred against an adjudication order and the Appellate Authority (Commissioner (A)) passed the appellate order against the assessee, if the assessee paid the duty involved within 30 days of the communication of the Commissioner(A) order, he would still have an option to pay 25% penalty.

Further in another case on a similar matter

Commissioner v Balaji Exports - 2010 (258) ELT A108 (Guj)

If an assessee desires to go in appeal and if stay petition is allowed, the benefit of reduction of 25% would shift to stage of appellate order and so on. The assessee would be entitled to reduction of mandatory penalty under Section 11AC to 25% if he makes payment within 30 days from the date of communication of Tribunal's appellate order.

Note : The Board has issued a Circular - No. 898/18/2009-CX., dated 15-9-2009 F.No. 4/2/2009-CX.1 (Refer section 11AC of your notes), which is contrary to the judgement. The Board has taken a view that the option of 25% penalty would be available only if the deposit is made within 30 days of communication of the Adjudication Order and not from the order of Commissioner (A).

6. CCE v BIOPAC INDIA CORPORATION LTD. 2010 (258) ELT 56 (Guj.)

Capital goods were fully destroyed in fire after being used for many years. It cannot be said that the Capital Goods are not used in manufacture of final product. Hence, the assessee is not required to reverse credit availed.

Note : Students should remove that if Capital Goods are removed as scrap then in terms of Rule 3(5A), Excise duty has to be paid on the transaction value and the Rate of Duty prevailing on that date.

7. Commissioner v. Elex Knitting Machinery Co. 2010 (258) E.L.T. A48 (P & H)

Sole proprietor of the appellant firm was also a partner in a Partnership Firm. The partnership firm owned a brand. The appellant sole proprietorship firm affixed the brand on the goods removed by it while claiming exemption under notification 08/03 as SSI unit. The Department denied the benefit of SSI Notification 08/2003 on the ground that the goods were bearing the Brand Name at the time of clearance.

¹ [2010 (254) [E.L.T.](#) 277 (Guj.)

The Tribunal dismissed the adjudication order and ruled in favour of the assessee. The High Court implicitly affirmed the order of the Tribunal. The benefit of SSI exemption under Notification No. 08/03, was admissible on the ground that sole proprietor of appellant firm, by virtue of being partner in firm owning brand name, also became co-owner of brand name in question and hence, could not be said to have used brand name of another person while manufacturing and clearing goods in individual capacity.

8. Commissioner v MEW Electricals Pvt. Ltd. 2010 (258) E.L.T. A21 (Guj.)

The High Court implicitly affirmed the order of the Tribunal.

As per Rule 16(2) of Central Excise Rules, where processing has resulted in remaking / remanufacture, then if rate of duty on date of second removal was lower than rate of duty at the time of first clearance of goods, assessee cannot be called upon to pay higher duty. The CENVAT taken at the time of receipt of goods in the factory was fully allowable and cannot be denied on the pretext that the rate of duty on date of second removal was lower than rate of duty at the time of first clearance of goods.

9. CCE v CHHABRA TUBE PRODUCTS (P) LTD. 2010 (252) E.L.T. 63 (H.P.)

An appeal against the order of the CESTAT involving Rate of Duty can be made only and directly to Supreme Court. The issue involved in this case was whether, the phrase “determination of a rate of duty” would include applicability of an exemption notification, whereby an appeal against the order of the CESTAT would lie before the High Court or the Supreme Court.

On appeal the High Court ruled that the phrase “determination of a rate of duty” has been deemed to include the question whether any goods are covered or not covered by a particular notification issued by Central Government granting total or partial exemption from duty. Hence remedy against orders of the CESTAT involving such matters would lie before the Supreme Court.

10. CCE v TARPAULIN INTERNATIONAL 2010 (256) ELT 481 (SC)

The assessee was engaged in manufacture of ‘tarpaulin made-ups’. The ‘tarpaulin made-ups’² was the tarpaulin cloth prepared by making solution of wax, aluminum stearate and pigments which were mixed. The solution was heated in a vessel and was transferred to a tank. Grey cotton canvas fabric was then dipped into this solution and passed through two rollers, whereafter the canvas was dried by exposure to atmosphere. Thereafter, the tarpaulin made-ups were prepared by cutting the cloth into various sizes and stitched and eye-lets were fitted. Department viewed that the “tarpaulin made-ups” prepared by means of cutting, stitching and fixing of eye-lets amounted to manufacture and, hence, they were exigible to duty. However, the assessee stated that the process of mere cutting, stitching and putting eyelets did not amount to manufacture.

On appeal the Supreme Court ruled that:

The process of stitching and fixing eyelets would not amount to manufacturing process, since tarpaulin after stitching and eyeleting continues to be only cotton fabrics. The purpose of fixing eyelets is not to change the fabrics, even though there is value addition. As the process does not bring into existence a new and distinct product with total transformation in the original commodity. The original material used i.e., the tarpaulin, is still called tarpaulin made-ups even after undergoing the said process.

² The ‘tarpaulin made-ups’ are made from tarpaulin cloth by cutting the cloth into various sizes and stitched and eye-lets are fitted.

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

The Assessee is engaged in the activity of manufacturer of foot wear. For the manufacture of foot wear, various raw materials are purchased by the assessee from the market and/or from their respective manufacturers such as fabrics, rubbers, chemicals, solvents etc. During the process of manufacturing of foot wear various chemicals/rubbers/solvents etc., are mixed together and a thin layer of such mixed materials is sandwiched in between two sheets of textile fabric, in running length. The product is later cut and stitched according to the assessee's requirements and in-process materials are used as shoe-uppers in the foot wear. Such fabrics are also at times sent to job workers for stitching purposes only and the fabric sandwiched with the mixed materials are inputs of the intermediate stage during the course of manufacture of footwear. Vulcanisation³ of the foot wear takes place only after completing the entire process and then it would be a finished product as a footwear, made available in the market and acquires commercial identity and turns out to be a commercially known product.

The Collector of Central Excise noticed that during the manufacture of foot wear the assessee manufactures an excisable product called double textured fabric which is further used as upper material in the manufacture of foot wear and this double textured fabric is nothing but rubberized, water proof fabric with a thin layer of rubber sandwiched between two sheets of cotton fabric in running length. As a result of that process a double textured fabric emerges as a distinct product with specific properties and character other than that of original fabric used as input which is known in commercial trade parlance as double textured fabric which is used in considerable quantities for making rain-coats, holdalls, hand bags etc. The Collector therefore, came to the conclusion that this double textured fabrics are marketable products fulfilling the requirement of the definition of excisable goods as per Section 2(d) attracting the levy of central excise duty under the Act.

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

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

Note : This judgement assumed much significance due to the fact that Finance Act 2008 has inserted an explanation to Section 2(d), whereby goods sold for a consideration would be deemed marketable. This deemed marketability as well now has to undergo the test of **commercial capability of being sold**, as ruled by the Court. In other words goods which on sale may fetch some consideration but if they are commercially not capable of being sold in that form cannot be considered deemed marketable.

³ Process of treating rubber or rubberlike materials with sulphur at great heat to improve elasticity and strength or to harden them.

12. CCE v Solid & Correct Engg. Work 2010 (252) ELT 481 (SC)

M/s. Solid & Correct Engineering Works, M/s. Solid Steel Plant Manufacturers and M/s. Solmec Earthmovers Equipment are partnership concerns engaged in the manufacture of parts and components for road and civil construction machinery and equipments like Asphalt Drum/Hot Mix Plants and Asphalt Paver Machine etc. M/s. Solidmec Equipments Ltd. (hereinafter referred to as 'Solidmec' for short) the fifth unit with which we are concerned in the present appeals is a marketing company engaged in the manufacture of Asphalt Drum/Hot Mix Plants **at the sites** provided by the purchasers of such plants. Solidmec advertises its product and undertakes contracts for supplying, erection, commissioning and after sale services relating thereto.

An inspection of the factories of **Solid & Correct Engg. Work** by a team of officers from Central Excise, led to the issue of a notice to Solidmec, accusing the four manufacturing units of having wrongly declared and classified parts and components being manufactured by them as complete plants/systems, even when they were merely parts and components and not machines or plants functional by themselves.

The show cause notice alleged that Solidmec was engaged in the manufacturing of Asphalt Batch Mix, Drum Mix/Hot Mix Plant by assembling and installing the parts and components manufactured by the manufacturing units of the group. According to the notice the process of assembly of the parts and components at the site provided by the purchasers of such plants was tantamount to manufacture of such plants as a distinct product with a new name, quality, usage and character emerged out of the said process. Resultantly the end-product; namely, Asphalt Drum/Hot Mix Plants became exigible to duty.

The Supreme Court on appeal ruled that an attachment where the necessary intent of making the same permanent is absent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently, like a building or a tree. The Court observed that, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine.

Hence setting up of an Asphalt Drum Mix Plant at customer site by using duty paid components tantamount to manufacture of movable property and subject Excise duty.

13. Commissioner v Bemcee Ltd. 2010 (256) ELT A16 (SC)

The Supreme Court ruled that the process of slitting/shearing of steel coils does not amount to manufacture as the description as flat rolled products continue to be the same even after the process of slitting even though tariff sub-heading changed. Since the identity of the product remained unchanged even with change of classification, activity causing such a change does not amount to manufacture.

14. CCE v SONY MUSIC ENTERTAINMENT (I) PVT. LTD 2010 (249) ELT 341 (Bom)

The assessee imported recorded audio and video discs packed in boxes of 50. After receipt of the material in its factory, it packed each individual disc in transparent plastic cases known as jewel boxes, an inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole was then shrink wrapped. The assessee thereupon sold such packed compact discs in wholesale.

The Department took a view that the processes undertaken by the assessee in regard to the compact discs amounted to manufacture as the packed compact discs were not marketable without being packed in the jewel box & they would otherwise be subject to damage and that the insertion of the inlay card was also essential because without it the customer would not be aware of the identity of the compact disc or the nature of its contents. The Department also cited the provisions of Note 6 to Section XVI of the tariff that conversion of an unfinished or incomplete product into a complete finished product amounts to manufacture.

On appeal the Bombay High Court ruled that what assessee received was compact discs containing data reproducible as music or visual images or both. What it sold was nothing other than such discs, even though packed in a box and containing details of the contents of each disc. It is therefore not possible to say that an article that is new and different from the commodity that the assessee imported has emerged as a result of the treatment that was imparted to the imported article at the assessee's hands. It continued to be a compact disc.

The activity of packing imported Compact discs in a jewel box along with inlay card would not amount to manufacture under Section 2(f) of the Central Excise Act, 1944

15. PREM KHALSA IRON STEEL ROLLING MILLS v CCE 2010 (253) ELT 516 (P & H)

The assessee is manufacturing a hot re-rolling mill of non-alloys steel. The assessee had availed the benefit of SSI exemption and paid duty accordingly. It was observed that the value of the goods cleared by the assessee during the preceding financial year was more than permissible limit of Rs. 400 lacs. In calculating this 400 lacs limit the Department included clearance of goods made under Section 3A (compounded levy scheme). Clearances covered under Section 3A is clearance for Home consumption & also it is not covered in exclusion list. Hence its clearance value to be included while determining the aggregate value of the goods cleared from the factory under SSI exemption. Accordingly the clearances had crossed the limit of 400 lacs in the preceding financial year the assessee was not entitled to the benefit of Notification 08/03. It therefore issued show cause notice demanding Central Excise duty on goods cleared under SSI exemption.

Assessee contended that in order to avail the benefit of SSI exemption, only three types of values are to be taken into consideration:

- (i) Value under Section 4 of the Central Excise Act;
- (ii) Value under Section 4A of the Central Excise Act;
- (iii) Tariff value as fixed under Section 3(2) of the Act.

and goods cleared under Section 3-A do not fall under these categories.

Further under Section 4, 4A and 3(2), only assessable value of the goods is determined. In case, goods are cleared under Section 3A of the Act, unlike payment of duty on clearances on every consignment, lump-sum amount is paid on the basis of capacity determined on the basis of machines. Hence clearances covered under the Compounded Levy Scheme i.e. Section 3A are not to be included while determining the aggregate value of the goods cleared from the factory under SSI exemption.

On appeal the Court ruled that from a perusal of SSI exemption notification, it is quite evident that the benefit of exemption is available only to a unit whose clearances for home consumption did not exceed Rs. 400 lacs during the preceding financial year. In the notification itself, it has been provided that while calculating the limit of Rs. 400 lacs, specified clearances shall not be included. The goods cleared on payment of duty under Section 3A of the Excise Act are not covered in exclusion list.

For arguments sake, if the contention of the assessee is accepted, a unit, clearing goods, running into crores, shall also be entitled to the benefit of notification if the clearances are made under Section 3A of the Act. The intention of exemption notification is to provide benefit to Small Scale Units and not to every unit. Even the language of the notification is clear and there is nothing to suggest that clearances made under Section 3A of the Act are not to be counted while calculating the aggregate value of the clearances.

Hence, in the absence of specific provision clearances made under Section 3-A of the Act cannot be excluded.

16. CCE v RAJASTHAN SPINNING & WEAVING MILLS LTD. 2010 (255) ELT 481 (SC)

The assessee is engaged in the manufacture of yarn. They availed CENVAT credit on “capital goods” in respect of steel plates and M.S. channels used by them for erection of chimney for the diesel generating set. A SCN was issued for recovery of CENVAT, on the basis that the “capital goods” in the present context cover only the diesel generating set and its components, spares and accessories and not steel plates or M.S. channels used in chimney, the subject items were not “capital goods”. Therefore, CENVAT credit had been wrongly availed of by the assessee.

The submissions of the assessee were that the items in question being components of chimney which in turn was an accessory of the diesel generating set. It was also asserted that chimney was a vital part of the generating set for discharge of gases arising out of burnt fuel, mandatory under the Pollution Control laws.

On appeal the Supreme court observed that Steel plates and M.S. channels used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for the said purpose has to be treated as an accessory of diesel generating set.

Applying the “user test” the Steel Plates and M.S. channels, used in the fabrication of chimney would fall within the ambit of “capital goods”. Hence the assessee was entitled to avail of cenvat credit in respect of steel plates and M.S. channels.

17. CCE v Hawkins Cookers Ltd. 2010 (253) ELT A140 (Bom)

The assessee is engaged in the manufacture of pressure cookers which were cleared by them on payment of duty to their various depots and C & F agents. They were also clearing empty master cartons, (EMP), BOPP tapes, Cello tapes separately to the Depots and C & F agents and on which Cenvat credit was availed. SCN was issued stating that since the EMP and other packaging materials were cleared separately and were not used within the factory of production but at the premises of the Depots & C & F agents, the same cannot be considered as being used in or in relation to manufacture of final product and therefore Credit thereon is not eligible.

The assessee was of the opinion that the entire packing material should be considered as has been used in or in relation to the manufacture of the final product. Therefore they as well should be entitled to CENVAT.

The High Court ruled that since the depot had been defined as a place of removal, the EMP removed along with goods from factory but used for packing at depot had to be considered as have been used in or in relation to the manufacture of final products and credit of duty paid on such master cartons could not have been denied.

It is also held that once cost of additional packing had been considered to be inclusive in the assessable value, there was no reason why such packing should not be considered being used in or in relation to the manufacture of final products, when definition of inputs include packing material as well. Hence the additional packing material as well would be entitled to CENVAT.

18. AMBUJA CEMENTS EASTERN LTD. v CCE 2010 (256) ELT 690 (Chhattisgarh)

Assessee is engaged in manufacture of clinker and cement. During the relevant period welding electrodes used in manufacture of parts and components of the capital goods and also in repairs and maintenance of the capital goods within the factory.

Department served the SCN for wrong availment of Cenvat credit on welding electrode.

The appeals preferred by the assessee before the Commissioner (Appeals) were also dismissed on merits by holding that welding electrodes used for repair and maintenance are not eligible for Cenvat credit. However, the credit availed on welding electrodes used in manufacture of capital goods was allowed.

Against the order of Commissioner (A) assessee contended that that the welding electrodes used in repairs/maintenance of the plant and machinery can be considered as input as defined under Rule 2(g) of the Cenvat Credit Rules, 2004, as in the instant case, the welding electrodes have been used for repair/maintenance of the capital goods, which are, in turn, used in the manufacture of final products i.e. clinker and cement. The assessee has availed Cenvat credit on the welding electrodes used in relation to manufacture of final products.

Issue: Whether welding electrodes used in repairs/maintenance of plant and machinery can be considered as 'Input' as defined under Rule 2(k) of Cenvat Credit Rules, 2004?

On appeal the High Court pointed out that Rule 2(k) of the CCR which defines Input uses the expression "in or in relation to the manufacture of goods". This expression should normally encompass entire process carried on by the manufacturer, of converting raw materials into finished goods. Where any particular process, or activity, is so integrally connected with the ultimate production of the goods, but for that process, manufacturing, or processing of the goods would be commercially inexpedient, goods required in that process would, fall within expression "in the manufacturing of goods". Considering this argument Court ruled that welding electrodes used in repairs and maintenance of plant and machinery are inputs and thus, entitled for Cenvat credit.

Note : This decision is against the recently issued CBEC circular No. 267/11/2010-CX, dated 8-7-2010. If asked Students should refer to both the things without drawing any conclusion.

19. TATA ENGINEERING & LOCOMOTIVE CO. LTD. v CCE 2010 (256) ELT 56 (Bom)

The Assessee is engaged in the manufacture of motor vehicles. In the process of manufacture of motor vehicles, the assessee uses large number of components. The manufacturing process inter-alia involves that before any raw materials which are used for manufacture of motor vehicle are subjected to destructive test. These parts are subjected to stresses and strains in order to test their tensile strength and other qualities up to a point where the stress on them is greater than they have withstood and they break or get so distorted that they cannot be put to use. After testing the remnants of these parts are cleared as scrap on payment of duty appropriate to scrap. The assessee had taken Cenvat credit of the duty paid on these inputs, on the ground that such testing was essential for manufacture and without such testing, the quality requirement of the finished products, could not be ensured.

The Department's contention was that the conversion of the parts which were tested into scrap did not take place during the course of manufacture and therefore Cenvat credit is not available.

On appeal the Bombay High Court ruled that if inputs are used in or in relation to the manufacture of finished goods CENVAT is available even though it is not present in finished goods.

The Court pointed out that the importance of the quality control in the age of global competition. No manufacturer could afford to push its product in the national or international market without achieving certain level of quality in the product. The quality control has become integral part of the manufacturing process, which is required to be undertaken either before the commencement of actual production or subsequent thereto depending upon the nature of the product.

Laboratory test or quality check is always in relation to the manufacture of finished goods. It is immaterial whether or not the input is physically present in the final finished product as such. Hence Cenvat Credit is available.

20. WRIGLEY INDIA PVT. LTD. v CCE 2010 (255) ELT 201 (P & H)

The assessee is engaged in the manufacture of chewing gum/bubble gum and was availing the benefit of Cenvat credit, in respect of inputs used in or in relation to the manufacture of bubble gum, including packing material. "Boomer-tattoos" are used in packing material, for packing the manufactured bubble gum. The assessee availed credit on the goods known as Boomer tattoo. Department denied credit, in regard to "Boomer-tattoos", on the ground that these are not inputs used in or in relation to the manufacture of their final product i.e. chewing gum/bubble gum.

On appeal the High Court observed that the case chewing gum/bubble gums manufactured by the assessee are directly or primarily packed into the printed aluminum foils without "Tattoos". The Court pointed out that putting a "Boomer-tattoo" in the package material of the bubble gum is an additional step in aid used for promotional material and is not termed as a packing material as such, especially when it is depicted on the packing that "free tattoo inside". The primary function of putting the "Tattoo" in the wrapped bubble gum is to promote the trade and to attract the children, rather than to be used for the purpose of packing "Tattoo".

There is no direct or indirect use of the "Tattoo" in or in relation to the manufacture of the product, rather it is separately known as "Tattoo" in the market, has a separate identity, specific purpose of promotion of the product and for the purpose of advertisement. Hence, it is not a packing material and cannot be considered as inputs within the meaning and definition of 'input' as contemplated under the relevant Rule.

Therefore, the "Boomer-tattoo" is not a primary packing material and therefore not eligible for CENVAT.

21. CCE v BHUSHAN STEELS AND STRIPS LTD. 2010 (257) ELT 5 (SC)

The assessee was engaged in the manufacture of flat-rolled products (cold-rolled) of non-alloy steel out of the duty-paid HR/CR strips in coil form. The input coils (HR/CR) so received by the assessee were of greater width generally ranging between 1040 and 1600 mm. But the assessee could cold roll in their factory coils up to width of 1275 mm. The input coils of greater width had therefore to be slit into smaller width by the job-workers employed by the assessee so that the same could be fed into machines for cold rolling & the side slits were being obtained as a result of specific slitting instructions keeping in view their intended use. Waste and scrap of non-alloy steel *inter alia*, including side slitting/cutting of HR and CR is generated in process(i.e. off-cuts of HR coils) . Such goods were declared by the assessee as waste and scrap and as not usable as such, because of breakage, cutting up, wear and other reasons. The assessee had sought to classify off-cuts of HR coils as "waste and scrap" under Tariff Entry 72.04 and cleared the same at payment of duty at a lower rate by declaring them as re-melting scrap not usable as such.

Department on enquiry found that the goods being assessed to duty by the assessee as waste and scrap included products such as side slitting or HR coil, CR coil, end cuttings of HR coils and CR coils and roughly-shaped CR sheets which were not in the form of re-melting scrap and could be used as such for other purposes. Therefore SCN was issued demanding differential duty on all the side trimmings with a width of 10 mm, proposing their classification as flat-rolled products under Heading 72.08, 72.09 and 72.11.

On appeal the Supreme Court took the following view :

The off-cuts (side trimmings) were neither classifiable under Heading 72.04 as “waste and scrap” nor did it accept the contention raised by the Revenue that the disputed items were liable to fall under Headings 72.08, 72.09 and 72.11. It would be classifiable under Heading 72.16 – “Angles, shapes and sections of iron or non-alloy steel”.

HSN Explanatory Notes in Chapter 72 provide that “waste and scrap” is generally used for the recovery of metal by re-melting or for the manufacture of chemicals.

If the goods can be reused without first being melted, are excluded from the purview of Heading 72.04. They would also not fall under Tariff Entries 72.08, 72.09 and 72.11 as the offcuts are of different shapes and sizes and would not fall under these tariff items.

The side slittings, end cuttings and others will be classifiable under Heading 72.16 of the Schedule to the Tariff Act being offcuts of different shapes and sizes.

22. CCE v International Auto Ltd 2010 (250) ELT 3 (SC)

Assessee supplied auto parts to their customers manufacturers of motor vehicles, who determined the prices of auto parts having regard to the cost of raw material, manufacturing cost, profit margin, etc. and placed orders with the assessee. Since price difference arose between the price on the date of removal and the enhanced price at which the goods stood ultimately sold. Assessee paid differential duty pertaining to the price rise.

Department issued a show-cause notice proposing to levy interest on the differential duty, paid by the assessee, under Section 11AB of the Central Excise Act, 1944. Assessee contended that in the present case was not a case of short-levy or non-levy of the goods removed by the assessee calling for recovery under Section 11A of the Act, hence, this was not a case for charging of interest under Section 11AB of the Act.

The Apex Court pointed out that that the assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty. The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amounts.

The Court ruled that it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came under section 11A(2B) of and attracted levy of interest under Section 11AB.

23. WOOD POLYMER LIMITED v UOI 2010 (257) ELT 503 (Guj)

Assessee was manufacturing paper based laminate sheets. The classification proposed by the assessee was approved by the Department from time to time. The assessee paid the duty voluntarily by way of self assessment adopting the classification approved and cleared the goods.

Another company M/s. Viral Laminates Pvt. Ltd. manufacturing same goods, had filed an Appeal before Commissioner (A) and the said authority has passed an order holding that the said product would be classifiable under a Heading which was different from what the assessee had classified.

Based on that decision rendered in the case of *M/s. Viral Lamintes Pvt. Ltd.*, the Assessee preferred refund applications. Department contended that all the refund applications were filed are time barred & the order passed in the case of *M/s. Viral Laminates Pvt. Ltd.*, is not a final order and the revenue had preferred Appeal before the CESTAT. Department also contended that merely because in the case of one party, the Commissioner (appeals) has taken the particular view, the assessee was not entitled to gets the benefit of that order unless the assessee get an order in its favour.

On appeal the High Court ruled as that for the purpose of claiming refund the assessee cannot rely upon the order passed by the Commissioner (Appeals) when the facts are totally different. It is an admitted position that the assessee had paid the excise duty voluntarily and cleared the goods at the relevant time. The assessee had never applied for revision of classification. Once the classification is finalized and duty is paid accordingly, unless and until such classification is challenged and/or disturbed, it is not possible for the assessee to make refund claim based on some order passed by the Appellate authority in other case.

24. AMCHONG TEA ESTATE v UOI 2010 (257) ELT 3 (SC)

Supreme Court ruled that in terms of section 35(1), Commissioner(A) has no power to condone delay beyond period of 30 days from date of expiry of 60 days prescribed for filing statutory appeal. The language used makes the position clear that the Legislature intended to entertain the appeal by condoning the delay only upto the 30 days.

25. Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (251) ELT 162 (Del)

Settlement Commission is not empowered to grant the benefit of reduced penalty of 25% under section 11AC where application for settlement is made.

The order of settlement is distinct from the adjudication order. The scheme of Settlement and that of adjudication is contained in two separate chapters of the Central Excise Act. Once the assessee has adopted the course of settlement, he has to be governed by the provisions settlement. Therefore, the benefit of reduced penalty, which could have been availed when the matter of determination of duty was before a Central Excise Officer would not be attracted to the cases of a settlement.

26. AUSTRALIAN FOODS LTD. v CCE 2010 (254) ELT 392 (Mad)

As per section 32E assessee may approach the Settlement Commission, before adjudication to settle the case, disclosing his duty liability which has not been disclosed by him before the Central Excise Officer. But, it nowhere provides that the assessee could approach the Settlement Commission, regarding a disputed question, particularly regarding a disputed question of fact and law as to the applicability of whether Section 4 or Section 4A of the Central Excise Act.

Applicability of whether Section 4 or Section 4A is out of the jurisdiction of the Settlement Commission, since it has not been vested with the power to decide such a question of direct assessment. Therefore any order of Settlement Commission on question of law that too in relation to adjudication is bad in law.

27. CC v SUDARSHAN CARGO PVT. LTD. 2010 (258) ELT 197 (Bom)

Imported goods were cleared for home consumption after assessment of Bill of Entry and upon payment of duty. Subsequently the Custom authorities carried out re-assessment imposing higher duty, penalty, interest and confiscation. It also passed Redemption order upon payment of Redemption Fine.

On appeal the Bombay High Court ruled that under Section 125 a power is conferred on the Customs Authorities to order confiscation of the goods with discretion to release the goods on payment of redemption fine where import of goods became prohibited on account of breach of the provisions of the Act, rules or notification.

The concept of redemption fine arises in the event goods are available and are to be redeemed. Redemption order can only be passed if the goods are available, for redemption. The question of redemption fine on goods would not arise if there are no goods available for confiscation. Once goods are cleared for home consumption upon assessment they cannot be redeemed nor fine can be imposed.

Note : Students should also keep in mind the judgment of the Supreme Court in *Weston Components Ltd. v CC*⁴. The Supreme Court there noted that the goods were released on the application by the appellant and appellant executed a bond. The court then observed that in these circumstances, if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine. The contention therefore, of the appellants there that the redemption cannot be imposed because the goods were not available for custody of the respondent authorities was rejected.

Here unlike the case of Sudarshan Cargo the goods were released on Bond.

28. ZUARI CEMENT LTD. 2009 (239) ELT 495 (AAR)

Advance Ruling is defined in Section 23A(b) of the Central Excise Act to mean “the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity proposed to be undertaken, by the applicant.” Activity is defined in of the same section to mean “production or manufacture of goods”.

This implies that an application for advance ruling would be eligible, if the activity of production/manufacture of goods for which a ruling is sought, has to be a “proposed” activity and not an ongoing one.

In the present application, the activity of manufacture of cement in respect of which the question of law regarding availability of credit of central excise duty on the so called inputs/capital goods has been sought appeared to be for an activity which is already being undertaken by the applicant in its existing factory. In the above situation, creation of additional capacity for manufacture of cement by expanding the plant cannot be considered to be a “proposed” activity qualifying for pronouncement of a ruling. Production of the same goods, namely cement, in the expanded plant is only a repetition or continuation of the past activity. Therefore the application was rejected.

⁴ 2000 (115) E.L.T. 278 (S.C.)

29. Vishwa Traders Pvt Ltd. v UOI 2009 (241) E.L.T. 164 (Guj)

Assessee filed an application with the Settlement Commission. However, as the applicant was not willing to accept the duty liability settled by the Commission, the Commission sent the case back to the adjudicating authority. It directed the adjudicating officer to dispose the case in accordance with the provisions of the Act as if no application had been made to Settlement Commission. When case came up before Revenue for adjudication, it decided that since as per section 32-M, any order made by the Settlement Commission was conclusive; the figure of duty liability fixed by the Settlement Commission had attained finality. Hence, assessee was required to make payment of the said amount along with penalty and interest. On this proposal of the Department, the assessee filed an appeal before the High Court. The High Court ruled as under:

Sec 32L provides that if Settlement Commission sends back the case back to the CEO because of non-cooperation by assessee, then the adjudicating officer shall dispose off the case as if no settlement application has been made. If there is no application before Settlement Commission, there can be no question of any final order of adjudication. Consequently, the order passed by the Settlement Commission cannot be considered to be the final order of adjudication. Revenue shall continue the adjudication proceedings from the stage at which the proceedings before Settlement Commission commenced.

30. Raj Kumar Shivhare v Asst Director of Enforcement 2010 (253) E.L.T. 3 (S.C.)

In the case of Raj Kumar Shivhare – SC 2010 assessee filed an appeal with Tribunal alongwith a request for waiver of pre-deposit. Tribunal rejected the waiver request and asked appellant to make pre-deposit failing which its appeal will be dismissed. The assessee preferred an appeal before the High Court against the interim order (interlocutory oRder) rejecting the stay application. On appeal the Supreme Court ruled that :

Any person aggrieved by ANY decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

Right of appeal conferred on aggrieved person from any (every) order of Appellate Tribunal and restricted meaning not to be given. Any order or decision of Appellate Tribunal means ALL decisions or orders of Appellate Tribunal.

In a case where right of appeal is limited only from a final order or judgment and not from interlocutory order, the Statue creating such rights makes it clear. It had not been done so in the case before us. Thus, even interlocutory order is appealable.

31. UOI v. Mahamaya Overseas Ltd. - 2010 (256) E.L.T. A88 (S.C.)

The assessee importer opened Letter of Credit (LC) for import of superior kerosene oil on 25-11-2003. The Government issued a notification restricting import of subject goods dt 25-11-2003 but was published on 27.11.2003. The assessee contended that notification imposing restriction published on 27-11-2003 and hence, not applicable to their case, since it already opened irrevocable LC on 25-11-2003.

The Court observed that the EXIM Policy permitted free import of goods shipped before restriction placed on import of specified goods. The Court ruled that the importer cannot be made to suffer if restriction imposed subsequently when irrevocable letter of credit already made. Further, it is not necessary for shipment to be made before date of imposition of restriction but shipment can be made within original validity period of irrevocable LC.

32. INDIAN REFRIGERATION INDUSTRIES v CCE 2010 (255) ELT 491 (SC)

In cases where assessment have been made pending approval of classification list filed by the assessee, such assessments made till approval of classification list cannot be treated as provisional. Such assessments would be treated as final.

33. CCE v GUJRAT AMBUJA CEMENT LTD. 2010 (256) ELT 356 (HP)

Components of Diesel Generating Power Plant (DGPP) installed in a factory entitled for CENVAT credit even when DGPPs are exempted from payment of duty. DGPP is capital goods. If duty is paid on the components used in its manufacture, CENVAT credit for such duty cannot be denied even if the DGPP is exempted from Excise Duty.

34. CCE v BHARAT HEAVY ELECTRICALS LTD. 2010 (257) ELT 369 (Kar)

Subsequent to the removal of goods by the assessee, there came about price escalation due to increase in input labour and other costs which was determined by All India Industrial Price Indices and by Reserve Bank of India communicated by All India Electrical Manufacturers Association. The assessee accordingly deposited differential duty paid and issued supplementary invoices for the same. As differential duty had already been deposited, Department issued SCN for interest and penalty for delayed payment.

On appeal the High Court distinguished the Supreme Court judgement of SKF Ltd., and observed that differential duty was already paid for relevant period. There was no short payment under section 11A(2B). Held goods cleared initially at normal price, there was no price escalation clause embedded in such sale. If such price escalation had not taken place, assessee could not foresee subsequent escalation. Therefore as the escalation was not known at the time of removal, interest is not payable. Section 11AB for interest not applicable.

35. GRASIM INDUSTRIES LTD. v UOI 2010 (256) E.L.T. 553 (Del.)

The assessee manufactures man-made fabrics as well as polyester/ viscose blended yarn. For the purposes of manufacturing, it employs duty paid inputs as well as other inputs. The duty paid inputs include polyester staple and viscose staple fibre as well as other packing materials and consumables. The products manufactured by the petitioner are cleared for exports.

The assessee had claimed rebate in respect of central excise duty paid on raw materials as well as in respect of central excise duty paid on the final products under the provisions of Rule 18. The claim in respect of the rebate qua final products has been allowed by the authorities below. However, the rebate in respect of duty paid on raw materials has been disallowed.

On appeal the High Court observed that a plain reading of the aforesaid Rule indicates that the Central Government has power to grant rebate and that too by notification in respect of duty paid on excisable goods which are exported 'or' on duty paid on materials used in the manufacture or processing of such goods.

In pursuance of the said Rule 18, the Central Government issued notification No. 21/2004-C.E. (N.T.) for rebate on inputs and notification No. 19/2004-C.E. for rebate on finished excisable goods. The plea of the petitioner throughout has been that the Central Government having issued both the notifications and the petitioner having complied with the conditions stipulated in the notifications, it was entitled to the grant of rebate under both the notifications.

The Court ruled that the grant of rebate of duty paid could be availed either on the duty paid on excisable goods or on the duty paid on the materials used in the manufacture or processing of such goods and not both. The notifications are only machinery provisions implementing the principles laid down in Rule 18. Thus, even where a case falls for grant of rebate under both the notifications, the same cannot be granted because the rule itself prescribes that the grant of rebate shall be made on duty paid on excisable goods “or” on duty paid on materials used in the manufacturing or processing of such goods.

36. KINGSLEY INDUSTRIES LTD. v Sup of CE 2010 (255) E.L.T. 510 (Cal.)

Held CBEC Circular specifying that exports to Nepal should be treated as central excise clearance for home consumption. Hence exports held entitled to benefit of exemption under Central Excise Notification 08/2003.

37. QUALIMAX ELECTRONICS PVT. LTD. v UOI 2010 (257) E.L.T. 42 (Del.)

Adjudication order dated 24-12-2009 but received after 8-1-2010. Application for settlement filed on 8.1.2010. Application rejected by the commission on the ground that case already adjudicated and is not pending.

The High court ruled that adjudication order signals end of case pending before adjudicating authority and it closes window of opportunity of settlement. Receipt of order-in-original not relevant for settlement of case. Date of adjudication to be the date when such order goes out of control of adjudicating authority by signing and sending it to assessee. Date of dispatch from office of adjudicating authority relevant. Impugned order-in-original left office of adjudicating authority on 31-12-2009 and adjudication became effective and complete on such date. As the pre-condition of case pending adjudication on date of settlement application not satisfied, rejection of application by Settlement Commission justified.

There is the danger that to prevent an assessee from seeking a settlement of his case, the adjudicating authority may quickly pass the adjudication order the moment he gets an inkling that the assessee is about to approach the Settlement Commission. There is also the danger that the adjudicating authority may back date an order. Adjudicating authorities are not supposed to behave in this manner and are presumed to function within the boundaries of law but, these things can happen. Still the date of adjudication to be the date on which the adjudicating authority loses opportunity to tear off, destroy or alter the adjudication order. In other words, when the order goes out of his control. And, that happens when the order is signed and the one-way process of sending it to the assessee is put in motion.

38. KARNATAKA SOAPS & DETERGENTS LTD. v CCE 2010 (258) E.L.T. 62 (Kar.)

The assessee adopted lower value for inter-unit transfer and higher price for independent buyers which was noticed by audit party of Department. Verification of records revealed adoption of same value based on cost construction method for several years while higher value adopted for other buyers. There was an increase in the cost of production but the same not brought to notice of Department. Suppression and wilful mis-statement was proved and accepted by the assessee.

Credit availed based on supplementary invoice in respect of differential duty paid on inter-unit stock transfer of goods. As it was an admitted case of suppression / wilful mis-statement, credit of differential duty not allowable vide Rule 7 of CCR.

Held bar on availment of credit in case of suppression by supplier applicable when **sale involved**. Hence in this case as there is an inter-unit transfer, credit for differential duty would be admissible.

39. CCE v HARISH SILK MILLS 2010 (255) E.L.T. 393 (Guj.)

If duty amount is paid before issuance of show cause notice, the penalty is reduced to 25% of duty amount. The SCN should carry an option and mention specifically the amount and option to pay reduced penalty. If option is not given to respondent assessee, such option should be given to assessee and period of 30 days would commence from the date of giving such option by amending the SCN or communication.

40. GLOBAL STAMPING & WELDING AUTOMOTIVE P. LTD. v CBEC 2010 (256) E.L.T. 3 (Mad.)

Inputs were removed as such by debiting duty applicable as on final products @ 8%. However, the inputs were received with the duty of 10% to 14%. The assessee paid the differential duty immediately as pointed out.

This was considered as misuse of CENVAT and hence Department invoked deterrence provisions Rule 12AA of the CCR under Notification No. 32/2006-C.E. (N.T.) to restrict use of Cenvat credit and to pay duty consignment-wise. Assessee's submission that error due to computer generated invoices keeping current rate of duty and that benefit not availed "knowingly"

On appeal against the order of the Department, High Court ruled that penal consequences applicable where violation attributable to knowledge as to wrong claim with intention to secure certain advantages which otherwise law does not permit. Unless Revenue establishes that assessee acted knowingly with mala fide intention, penal provisions not imposable. Unless and until the Revenue is able to show that the assessee knowingly made use of the computer generated invoices with a view to gain unmerited advantage, a mere violation thus does not expose an assessee otherwise to the restrictions contemplated in the said Rule and notification.

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

PP is a proprietary firm engaged *inter alia* in the business of manufacture and trade of toys, games and puzzles of various kinds. The goods are manufactured by the assessee either under their own brand name of "United Toys" or under different brand names. One of the items manufactured by the assessee is "Scrabble" which is a registered brand name owned by M/s. JWSS.

The dispute involved was whether the manufactured item was classifiable under Chapter 95 CHAPTER 95 TOYS, GAMES AND SPORTS REQUISITES; PARTS AND ACCESSORIES THEREOF, heading 9503.00 – as *Other toys*; reduced-size models and similar recreational models, working or not; puzzles of all kinds carrying NIL rate of duty or under Heading 9504 – as *Articles for funfair*, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment – 9504.90 Others (residuary category) carrying 16% rate of duty.

According to the assessee, "Scrabble" is a puzzle or in the alternative it is an educational toy falling under sub-heading 9503.00 of the CETA.

The Department was of the opinion that "Scrabble" was not a puzzle, it was not a toy but a game and, therefore, it could not be classified under sub-heading 9503.00; that, all games which contain boards and pieces were classifiable under sub-heading 9504.90 and since "Scrabble" has board(s) and pieces it was classifiable under sub-heading 9504.90 of the CETA, attracting duty @ 16%. Accordingly show cause notices were served on the assessee for short payment of duty.

On appeal the SC ruled that

There are two subject-matters, namely, Toys on one hand and Articles meant for funfair, table or parlour games on the other hand.

The difference between a “game” and a “puzzle” is brought out by three distinct features, viz., outcome, clue-chance and skill. In a puzzle outcome is pre-determined and fixed. It is not so in “Scrabble”. For example, in crossword, outcome is pre-determined or fixed. In a crossword puzzle, there is a grid of squares and blanks into which words crossing vertically or horizontally are written according to clues. Similarly, a jigsaw puzzle is a contrivance for testing ingenuity. In jigsaw puzzle there is a set of varied, irregularly shaped pieces, which when properly assembled form a map or picture. These are examples to demonstrate that in a puzzle the outcome is fixed or pre-determined which is not there in “Scrabble”. A person solving a puzzle, unlike games, does not aim at winning by scoring more points but aims at arriving at the solution by finding the correct answer or by putting it together properly, and winning or losing can only come by way of time taken in solving the puzzle.

The other important difference is that in a “Scrabble” there are no clues whereas in crossword puzzle, as stated above, words are written according to clues.

One more distinguishing feature to be kept in mind is, in “Scrabble” there is an element of chance and skill. The player in “.Scrabble” gets lettered tiles to create words by chance. “Scrabble” is defined as a board game in which players use lettered tiles to create words in crossword fashion. These tiles are initially kept in a pouch from which every player picks up the tiles. This is pure matter of chance. Further, apart from the element of chance there is also an element of skill involved in “Scrabble”. Each lettered tile has an assigned value and the player has to create words. He tries to create words which attain maximum value; tries to gain maximum value from the lettered tiles which come by chance to him. This is where skill comes in. Each player uses his skill to achieve the highest value. In other words, if a player has command over language, he can coin or create words with highest maximum value. Thus, these two elements of chance and skill are the key elements of a “Scrabble”. In “Scrabble” no clues are given as in the case of crossword or jigsaw puzzles. In “Scrabble”, outcome is not fixed or pre-determined as in the case of puzzle. The essential characteristic of crossword to lay down clues and having a solution is absent from “Scrabble”. It involves a lot of luck. One of the crucial ingredients is that one does not know what tiles are on the 56

opponent’s rack or which one would be drawn next. So, aided by artful strategy there is a good chance of beating someone with a better vocabulary. Hence, it is seen that luck lacks in a puzzle unlike in the game of “Scrabble” as an essential constituent.

Further, in a game there is a trial of skill or chance between two or more contesting parties according to some rule(s) by which one may succeed or fail. It is a contest for success, for a trial of chance or skill. These are the various dictionary meanings of the word “game”. Applying the dictionary meaning, we are of the view that “Scrabble” is a board game. It is not a puzzle. In the circumstances, it falls under Heading 95.04 and not under sub-heading 9503.00 of the CETA.

As regards the alternative argument, of “educational toy” one finds that “educational toys” remain even today tools of amusement. They remain an object for a child to play with. One needs to apply the predominant test in such cases. As stated earlier, the two main elements of “Scrabble” are - chance and skill. These elements are absent in a toy. Hence even a “Junior Scrabble” is not an educational toy. It is a game. It remains a board game and in the context of the placement of the entries in Chapter 95. Applying these tests, we are of the view that even a “Junior Scrabble” will not fall in the category of “educational toys”.

42. SANGHI POLYESTERS LTD. v Sup of CE 2010 (251) E.L.T. 504 (A.P.)

The assessee deposited duty by cheque for the months of January by 5 February. However, the cheque was bounced and resulted in non-payment. The non-payment was eventually made good by payment upon utilizing the account current.

The Department almost after 3 years initiated recovery proceedings under section 11, asking the assessee to pay duty which was paid by utilizing the account current earlier alongwith interest under Rule 8 for the defaulted period. The Department was of the view that Rule 8 provided that if default in payment of duty continues beyond 30 days, the defaulter is not entitled to avail Cenvat credit during the period of default. However, while the default continued beyond 30 days, the duty was paid only after 15 days by utilizing account current and that therefore the consignment wise clearance ought to have been made during the defaulted period. In terms of section 11 the Department also ordered detention of excisable goods.

On appeal the High Court ruled that

A plain reading of Sections 11 and 11(A) would reveal that the provisions of Section 11 are attracted where duty and any other sums are payable to the Central Government and the officer empowered in this behalf is entitled to recover such duty through one of the prescribed modes. However, Section 11(A) is attracted where the duty was either not levied or not paid or short levied or short paid or erroneously refunded.

The facts of this case show that the dispute pertains to the entitlement of the assessee to avail Cenvat credit during the period when duty was due and payable by it and was defaulted. It is not a case where the Department is seeking to recover the duty, payment of which was defaulted by the petitioner. This dispute is thus clearly comprehended by Rule 14 of the Cenvat Credit Rules.

Since the dispute between the parties is governed by the special rules, which specifically applied Section 11(A) for effecting recoveries, consequently it is incumbent upon the Department to issue a show cause notice to the petitioner calling upon it to pay the duty in respect of which Cenvat credit was availed. The procedure followed by the Department to invoke section 11 is not in accordance with the scheme of the law.

SERVICE TAX

1. CCE v AMITDEEP MOTORS 2010 (17) STR 514 (All)

Assessee is authorized dealer of M/s. Maruti Udyog Ltd. and is also registered as Authorized Service Station under service tax. Inter alia it was also arranging for documents from customers for principal and maintaining liaison with customers for delivery of vehicles and arranging documents for dispatch of vehicles. It received commission from M/s. Maruti Udyog Ltd. for sourcing orders for them to the Govt. Agencies and also for receiving the vehicles from them and delivering the same to the Govt. Agencies. The above service was sought to be taxed by the department and according to him it falls under the category of "Clearing and Forwarding Agent" services.

The Court ruled that the assessee is engaged in the business of selling cars. The assessee is authorized dealers of Maruti vehicle. The main work of the assessee is to sell the cars and if, in that connection the assessee has done something, it cannot be said that the assessee is "C & f Agent" within the aforesaid provisions. Hence the Commission received cannot be taxed under the category of "Clearing and Forwarding Agent".

2. CCE v. P. C. Paulose 2010 (19) STR 487 (Ker.)

The assessee entered into a licence agreement with AAI where under he got the right to collect entrance fee from visitors to the Airport. Since respondent was authorized to collect entrance fee which was for services provided to the customers in the Airport, the Department issued notice demanding service tax from the respondent.

The High Court elucidated that even though respondent was not providing the service in the Airport which was done by the Airport Authority, once the licence was given by the Airport Authority to the respondent to permit entry and allow enjoyment of the services provided there to the customers, respondent in fact became the service provider, though he was only acting as an agent under the licence agreement with the Airport Authority. Therefore, the Court opined that respondent being the service provider was liable to pay the service tax.

3. Nagarjuna Construction Company Ltd v. GOI 2010 (19) STR 321 (A.P.)

The High Court held that on a true and fair construction of rule 3(3) of the Works Contract (Composition Scheme) Rules, 2007, unambiguously, it was clear that where in respect of a works contract service tax had been paid, no option to pay service tax under the composition scheme could be exercised. The entitlement to avail the benefits of the composition scheme is only after an option is exercised under rule 3(3) of the said rules and this provision specifically enjoins a disqualification for exercise of such option where service tax has been paid in respect of a works contract. In other words, **where service tax has been paid in respect of a works contract, the eligibility to exercise an option to avail the benefits of the composition scheme is excluded.**

4. Karamchand Thapar & Bros. (Coal Sales) Ltd. v. UOI 2010 (20) STR 3 (Cal.)

The Court observed that every person liable to pay service tax is required, to apply to the Superintendent for registration. The deeming provision of grant of Registration within 7 days is applicable to registration granted by the Superintendent only.

In this case the application was for centralised registration. The registration was to be granted by the C/CC in whose jurisdiction the premises of the petitioner company, from where centralised billing/accounting was done, was located. There being no time stipulation on the Com to grant centralised registration, the provision of deemed registration is not attracted in case of grant of registration by the Commissioner.

Further, even if the applications for centralized registrations have been submitted to the Superintendent of Central Excise, centralized registration can only be granted by the Commissioner.

CUSTOMS

1. CC v PRABHU DAYAL PREM CHAND 2010 (253) ELT 353 (SC)

Subsequently, on the basis of the information received from the London Metal Exchange, (for short, “the LME”) to the effect that the price of the said metals in the LME as on the date of import was more than the price declared by the assessee.

Even though there is a reference to contemporaneous import in the order passed by the Department no material regarding such import has been placed before us or made available by the Department at any point of time. Therefore, assessment made purely on the basis of the information received from the London Metal Exchange, (LME) to the effect that the price of the said metals in the LME as on the date of import was more than the price declared by the assessee, without any corroborative evidence of imports at or near that price is not permissible under law. Hence Transaction value declared by assessee is acceptable.

2. Pernod Ricard India (P) Ltd. v CC 2010 (256) E.L.T. 161 (S.C.)

Where valuation of imported goods is being done as per Rule 6 – Transaction Value of Similar Goods, of the Customs Valuation Rules, the transaction value of similar goods can be taken, subject to adjustment to take account of the difference attributable to commercial level or to the quantity or both and such adjustments should be made on the basis of ‘demonstrated evidence’.

The Tribunal had granted the adjustment (i.e. discount / deduction) of 20% from the value of similar goods on the ground that the imports made by the assessee were higher in quantity than the comparable imports of the similar goods.

The Supreme Court on appeal ruled that the Tribunal decision’s was incorrect. The grant of discount, in case of larger imports, is a normal commercial practice. However, there was no demonstrated evidence to allow such 20% discount. In absence of any demonstrated evidence, the adjustment was invalid.

3. Lan Eseda Industries Ltd. v CC 2010 (258) ELT 3 (SC)

When the price declared by the importer is not the true transactions value on account of big difference in the prices at which similar computers are imported from others and declared value of the computers imported from M/s. TCAL, the said prices can be rejected

The assessee imported computers from M/s. TCAL, Hong Kong. The Department found that the said computers had actually been manufactured by M/s. Tulip, Netherlands and TCAL, Hong Kong was merely a distributor of the Netherlands company. The Department also found that the assessee had himself importer similar computers from other companies at a far higher price. Based on this, the Department rejected transaction value contending that the transaction value was lower with a view to evade customs duty.

On appeal the Supreme Court ruled that when the price declared by the importer is not the true transactions value on account of big difference in the prices at which similar computers are imported from others and declared value of the computers imported from M/s. TCAL, the said prices can be rejected. Accordingly, the value of computers imported from M/s. TCAL shall be the value of contemporaneous imports i.e., the price at which the like computers were imported by the assessee from other parties.

4. Atherton Engineering Co. Pvt. Ltd. v UOI 2010 (256) ELT 358 (Cal)

Assessee imported artemia cyst (brine shrimp eggs). It classified it as 'prawn feed' under the heading 2309 which includes products used as animal feed. However, the Department contended that this product was classifiable under the heading 0511.99 which refers to other products in the category of non edible animal products. In reply, the importer pleaded that these imported cysts contained little organisms/embryos which later became larva that prawns feed on. Therefore, according to them, the nature and character of this product was not changed by nurturing or incubation.

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

The Court opined that if the embryo within the egg was incubated in controlled temperature and under hydration, a larva was born. This larva did not assume the character of any different product. Its nature and characteristics were same as the product or organism which was within the egg. Hence, the Court held that the said product should be classified as feeding materials for prawns under the heading 2309. These embryos might not be proper prawn feed at the time of importation but could become so, after incubation.

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

High Court held that if an order was passed by CESTAT based on consent⁵ and the matter was remanded at the instance of Revenue, then Revenue could not pursue an appeal against such order in a higher forum. In the instant case, the Tribunal had remanded the matter in order to re-compute the duty payable by the assessee on the basis of representation of Revenue. Thereafter, the Revenue filed an appeal against the said order. Such appeal filed by the Revenue is not tenable.

6. UOI v Essar Steel Ltd. - 2010 (255) ELT A115 (SC)

Hence, no Export duty is payable goods which are cleared from DTA unit to the SEZ.

There is no provision in the SEZ Act for levy of export duty on supplies made by a DTA unit to the SEZ. In case goods are cleared from DTA to SEZ, then said goods are deemed to be exported under SEZ Act., but such deemed export only for allowing export benefit to the seller and not for levy of export duty under Section 12 of Customs Act.

As per sec 12 of customs Act, 1962 liability of customs duty arises only in case where goods are exported from India. As there is no activity of taking goods out of India, no Export duty is payable goods which are cleared from DTA unit to the SEZ.

7. CCE v DECORATIVE LAMINATES (I) PVT. LTD. 2010 (257) ELT 61 (Kar)

The assessee imported resin impregnated paper and plywood for the purpose of manufacture of furniture. The said goods were warehoused from the date of its import. It sought an extension of the warehousing period which was granted by the authorities. However, even after the expiry of the said date, it did not remove the goods from the warehouse. Subsequently, the assessee applied for remission of duty under section 23 of the Customs Act, 1962 on the ground that the said goods had become unfit for use on account of non-availability of orders for clearance.

⁵ A consent order is a judicial decree expressing a voluntary agreement between parties to a suit, especially an agreement by a defendant to cease activities alleged by the Government to be illegal in return for an end to the charges.

The High Court, while interpreting section 23, stipulated that section 23 states that only when the imported goods have been lost or destroyed at any time before clearance for home consumption, the application for remission of duty can be considered. Further, even before an order for clearance of goods for home consumption is made, relinquishing of title to the goods can be made; in such event also, an importer would not be liable to pay duty.

Therefore, the expression “at any time before clearance for home consumption” would mean the time period as per the initial order during which the goods are warehoused or before the expiry of the extended date for clearance and not any period after the lapse of the aforesaid periods. The said expression cannot extend to a period after the lapse of the extended period merely because the licence holder has not cleared the goods within the stipulated time.

Moreover, since in the given case, the goods continued to be in the warehouse, even after the expiry of the warehousing period, it would be a case of goods improperly removed from the warehouse as per section 72(1)(b) read with section 71.

Held that the circumstances made out under section 23 were not applicable to the present case since the destruction of the goods or loss of the goods had not occurred before the clearance for home consumption within the meaning of that section. When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not attract section 23 of the Act.

8. L.M.L. LTD v CC 2010 (258) ELT 321 (SC)

The appellant had imported goods being CD-ROM containing drawings and designs of engineering goods and documents of title of the drawings and designs representing the right to use information and technology. The Bill of Entry was filed for clearance of the goods at Nil rate of duty by claiming classification of the goods under the Customs Tariff Heading

4906.00 – *“Plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; hand-written texts; photographic reproductions on sensitized paper and carbon copies of the foregoing”* and CETA Heading 4901.90, read with the benefit of Nil rate of duty under Notification No. 17/2001.

The Adjudicating Officer, however, decided the case against the appellant holding that the imported goods are covered under CETA Heading 8524.90 and thus not eligible for the exemption.

On appeal the Supreme Court ruled that:

Chapter 49 deals with printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans. Heading 49.06 covers within its fold plans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand; handwritten texts; photographic reproductions on sensitized paper and carbon copies of the foregoing. The only caveat imposed by Heading 49.06 is that the said plans or drawings have to be originals drawn by hand. The qualification that the plans and drawings has to be originals drawn by hand has to be construed strictly and cannot be given a liberal and wide meaning. There is no dispute that the drawings and designs of the engineering goods in issue are not originals drawn by hand but are images of drawings and designs which have been loaded or recorded on a CD ROM. Further, there is no question of considering the said images in the CD ROM as photographic reproductions on sensitized paper or carbon copies of photographic reproductions. Thus, images of drawing and designs of engineering goods recorded in the CD ROM will not fall within the domain of Heading of 49.06.

Also it would not fall under 49.11 – *“Other printed matter, including printed pictures and photographs”*

Now the question which arises for consideration in this case is whether the disc in question, with designs and drawings of the engineering goods could be said to be information technology software, as was submitted by the counsel for the appellant. The Court pointed out that software is the set of instructions that allows physical hardware to function and perform computations in a particular manner, be it a word processor, web browser or the computer's operating system. These expressions are in contrast with the concept of hardware which are the physical components of a computer system, and data, which is information that performs no computation and gives no enabling instructions to computer hardware but is ready for processing by the computer software.

There can be no doubt that images on the CD-ROM being engineering drawings and designs do not provide instructions for the computer hardware to perform. At best, the said drawings and designs can be said to be are by-products and outputs of the computer software, which generate the designs and drawings. Therefore, such engineering drawings or designs data in a CD cannot be placed in the category of the term "software". It is therefore held that the engineering drawings and designs contained in a CD ROM will not be covered Heading 85.24 of the Tariff.

We are therefore of the view that CD-ROM containing images of drawings and designs of engineering goods are not classifiable under the Tariff Heading 49.06 or under Heading 49.11. as other printed matter. The alternative plea of the appellant for classifying the same under Sub-Heading 8524.39 or 8524.90 of the Tariff is also not acceptable. The Appellant is therefore not entitled for the benefit of Nil rate of duty under Notification No. 17/2001, dated 1-3-2001.

In passing the above judgement the Apex Court considered the HSN notes and observed that HSN are safe guide to resolve dispute on tariff classification is internationally accepted nomenclature emerging from Harmonised System of Nomenclature (HSN). HSN Explanatory Notes are dependable guide for interpretation of Customs Tariff.

CD-ROM is covered by Chapter – 85, but the drawing is not in the nature of software, hence the goods under consideration would be liable to duty and would not be eligible to exemption notification.

9. DUNLOP INDIA LIMITED v CC 2010 (258) ELT 328 (Cal)

In order to import certain goods prior licensing was required. Accordingly additional licence was arranged by agent of seller-exporter, charging an amount of Rs. 12,25,000 from the importer (Dunlop India). The issue involved is whether such amount paid as service charge of licence premium should be added to the transaction value.

On appeal the High court ruled that

On a bare reading of the Rule 10 it appears that applying the principle of attribution, transaction value could be identified in the instant case by adding the amount of Rs. 12.25 lakh as paid as service charge of the license premium for the sole reason that until and unless the importer, was successful to secure/procure any additional license to import the said machine, it was not possible for the seller, to bring the said machine from Russia. Hence, for the purpose of importing the machine from Russia by purchase, the payments of Rs. 12.25 lakh has a direct nexus on importation as without additional license, importer-appellant was not able to purchase the said imported goods. As such, such payment is includable in the price of imported goods. The said price is otherwise coming as other payments in terms of Rule 10(1)(e) in the angle that for the purpose of satisfaction to import the goods, the seller was obliged to identify whether the purchaser had any additional license for importation or not, which practically has nexus to transaction of such sale, irrespective of the fact that the transaction value in the high sea was shown otherwise.

10. SRI MEENAKSHI APPARELS PVT. LTD. v CC (258) E.L.T. 481 (Kar.)

The assessee contended before the Court that Notification No. 17/2002-Cus. (N.T.) appoints Director of Revenue Intelligence as Commissioner of Customs and authorises him to investigate. The notification does not confer power on him to adjudicate dispute and that Rules 16/16A of Customs, Central Excise Duties and Service tax Drawback Rules confer such power only on AC/DC. Hence the Director of Revenue Intelligence cannot adjudicate matters relating to Duty Drawback.

On appeal the High Court ruled that Section 5(2) of Customs Act provides that an officer of Customs may discharge duties and exercise powers of officers subordinate to him. Higher officer can perform functions and duties of subordinate officer. Once notification issued in pursuance of Section 4(1), person so appointed has all powers conferred under Section 5(2). It is not possible to accept the contention that the Director of Revenue Intelligence had no jurisdiction to adjudicate the dispute regarding duty drawback. A person appointed under Section 4(1), by virtue of Section 5(2), has the jurisdiction to exercise the power of a subordinate or a lower authority and therefore, the power exercised by the Director of Revenue Intelligence is as stipulated under the Act and therefore, he cannot be found fault with and therefore, he has the jurisdiction to adjudicate.

Further, in this case if the assessee proposes to seek remedy against the adjudication order of the Commissioner, it would lie to the CESTAT and not the Central Government. Revision application to the Central Government in relation to Duty Drawback matter can be made only against the order of the Commissioner (A).

11. AASU PLASTICS PVT. LTD. v UOI 2010 (258) E.L.T. 54 (Guj.)

Goods imported at Bombay Port where they were inspected superficially by the Customs Department. The goods were released upon payment of Customs duty from Customs and were brought to the assessee's factory. Thereafter, Excise officers visiting assessee factory, inspected the goods and found that the goods were mis-declared. Accordingly the goods were seized and SCN was issued on the ground of mis-declaration in the Bill of Entry.

On appeal the High Court ruled that CBEC Circular No. 88/98-Cus., empowers officer in-charge of sending and receiving unit to watch movement of goods, whereby, Excise Department is vested with powers of Customs as well. Notice issued to assessee on the basis of detailed examination done at factory where material supposed to be used, was not without jurisdiction. Hence confiscation directed under section 111 by the Central Excise Officer, in accordance with the law.

12. CC v AKASH TRADING CO. 2010 (253) E.L.T. 734 (Ker.)

The Government imposed Provisional Anti Dumping Duty pending investigation. As no extension was granted the Provisional Order lapsed after expiry of 6 months, pending completion of investigation. Subsequently when investigation was completed after 3 months, from the date of lapse of Provisional Order, Government issued definite (Final) Order for imposition of ADD. However the final order notification was made applicable retrospectively from the date of imposition of Provisional ADD.

The assessee made imports after expiry of notification providing for provisional levy. The assessee was of the contention that retrospective levy under final notification for ADD issued under Section 9A(5) of the Act is possible only for the period when the provisional notification providing for anti-dumping duty was in force. In other words, according to respondents, once the provisional notification, expired, levy from the date of introduction of provisional duty under the said notification could not have been provided. Therefore the imports made should not attract ADD.

On appeal the High court ruled that:

The Anti-dumping Rules expressly confers authority on the Government to introduce anti-dumping duty with effect from the date of imposition of provisional levy.

It is clear from the provisions that pending enquiry and orders, section 9A(2) authorises imposition of anti-dumping duty provisionally. Second proviso to Rule 13 of ADD rules states that provisional order shall remain in force only for a period not exceeding six months from the date of the order, and extension of the same can be made upto nine months. However, there is no provision in the Act or Rules making it mandatory for the Central Government to issue final orders on liability for anti-dumping duty before expiry of the provisional order issued under Section 9A(2) of the Act. In fact there is no time bar for issuing final order determining anti-dumping duty.

However Rule 20(2)(a) gives authority to the Government to levy anti-dumping duty with effect from the date of imposition of provisional duty. Once an order under Section 9A(2) is issued imposing duty provisionally then the question of retrospectivity does not arise and only Rule 20(2)(a) applies which authorises the Government to levy anti-dumping duty from the date of introduction of provisional duty which is the case here.

In this case, there is no retrospective levy because retrospective levy can be only for period prior to the issue of notification providing for provisional anti-dumping duty. Once an order under Section 9A(2) is issued imposing duty provisionally then the question of retrospectivity does not arise and only Rule 20(2)(a) applies which authorises the Government to levy anti-dumping duty from the date of introduction of provisional duty which is the case here.

13. Comm v Naresh Lokumal Serai 2010 (256) ELT A19 (SC)

If the assessee acted *bona fide* by submitting detailed packing list giving complete description of all items imported by him and the absence of declaration of value in the BDF could not be the ground for the imposition of penalty or confiscation of goods when there is no statutory obligation on the passenger to declare such a value. Passenger is not required to disclose value of such baggage also. There is a marked difference between mis-declaration and non-declaration of value of the goods. For non-declaration of value neither confiscation nor penalty is imposable under section 111(m).

Allowance for Baggage in case of Transfer of residence is permissible even if goods are offending and liable to confiscation. The exemption of transfer of residence cannot be denied. It was observed that there were new goods which were not in possession of the passenger during his stay abroad. Such goods were not entitled to benefit of transfer of residence under Baggage rules. In facts of case, benefit of Transfer of Residence was denied on goods shipped from USA, whereas the transfer of residence was from Dubai, irrespective of fact that bill of lading was in name of the passenger. Passenger found guilty of misdeclaration and goods held liable to confiscation.

Valuation Rules are applicable to valuation of baggage as there is no separate method prescribed for that purpose and in most of baggage cases, the transaction value may be irrelevant as most items may be used and imported much after their purchase. Therefore, the best judgment method of valuation may be the most appropriate.

The adoption of selling price of locally produced goods based on the report of appraiser was unacceptable as the appraiser was not an expert and there was a statutory prohibition on accepting price of locally produced goods. Further, internet prices are unacceptable for the purpose of valuation. Similarly, 'Price Tags' could not be accepted for valuation purposes as they refer to retail prices in the country of export and not to price for export to India.

14. OPTIGRAB INTERNATIONAL v GOI 2010 (253) E.L.T. 722 (Mad.)

In the present case, three show cause notices were issued which were answerable to three different Adjudicating Authorities before three different Commissionerates and as such the cases covered in the three show cause notices are only three different cases. Therefore, they cannot be treated as one single case and as a matter of fact it cannot be clubbed.

Single common application filed in respect of case covered by three show cause notices issued by three different Commissionerates. Application for settlement held as not maintainable in impugned order as additional amount of duty accepted less than Rs. 3 lakhs when cases treated separate. Each and every application to have a notice and additional duty liability admitted more than Rs. 3 lakhs for every application.

Expression “case” in Section 127A(b) of Customs Act not referring to multiple proceedings before different authorities. Three SCNs to be considered as three different cases and cannot be clubbed or treated as one. Amount involved in each SCN being less than Rs. 3 lakhs, additional duty liability not exceeds Rs. 3 lakhs. Ingredients in Section 127B ibid not satisfied and application for settlement not maintainable. Hence the application for clubbing of three show cause notices is untenable.

15. CCE v N.I. SYSTEMS (INDIA) P. LTD. 2010 (256) ELT 173 (SC)

Assessee imports various products from its Holding Company and supplies the same to its customers in India. The products were computer based instrumentation products. The importer claimed the items to be computers and/or parts of computer & grouped the items in accordance with similar/identical functions broadly under CTA heading 8471, 8473 and other headings falling under Chapter 84. The importer contended that they use real-time operating systems (software) and not the standard operating systems such as Microsoft Windows. Broadly, the importer categorized the imported items as follows:

- (i) PXI Controllers.
- (ii) Input/Output Modules (also known as Modem or Control/Adaptor Units).
- (iii) Signal Converters.
- (iv) Chassis and its parts.

On verification of the technical data (including the catalogue and the webcast of the importer), Department observed that the subject goods were not structurally designed to function as a computer. The embedded controllers may perform all functions of a CPU but the controllers in itself are not CPUs. The subject goods stood manufactured for a special purpose and that purpose was either measurement or control for industrial use & not as ADP Machines. Applying the test of common parlance still then the subject goods are measuring/controlling instruments. In the circumstances, the department has broadly classified embedded Controllers, Programmable Automation Controllers (“PACs”), Data Acquisition Boards, Digital Input-Output Boards, PXI Chassis etc. under Chapter 90 - as against the classification sought by the importer under heading 8471.

PXI controller, I.O. modules and signal converters are all varieties of ADP Machines. They all run on operating systems like linux, windows etc.

An ADP Machine requires various types of interface boards/units which are required to be installed in it and connected to sensors so that temperature, voltage and pressure can be received by the interface boards/units and converted into digital signals and then sent to ADPM processing.

As the PXI controller satisfies the requirement of free programmability, storing and processing of programmes, performance and arithmetical computation and execution of programmes, the PXI controller qualifies as ADP Machine in terms of Chapter Note 5(A) to Chapter 84 of Customs Tariff.

On appeal the Supreme Court ruled the following:

A. PACs/Programmable Process Controllers imported by the assessee herein are suitable for use principally with Industrial Process Control Equipment like sensors, thermostats etc. which measures temperature, process etc. Therefore, they are correctly classifiable as a part of the said machine, instrument or apparatus. The principle function of controllers is to execute control algorithm for real time monitoring and for controlling devices, processes or systems. As such, a PAC/PPC is a part of an industrial process control equipment/system and accordingly such controllers are classifiable as a part of instrument or apparatus under chapter 90

B. I.O. Modules and Chassis

The primary function of I.O. Modules (Boards) is to function as a part of measuring and control System. It is for this reason that such Modules are required to be classified as parts and accessories of regulating and measuring System. For this purpose, it is necessary to examine each of the imported items apart from Controllers in order to see whether the hardware coupled with the pre-installed software gives it a definite identity and function. From the catalogue and technological write-ups we find that each and every I.O. Module imported by the assessee is configured with a sensor at one end.

Therefore the imported goods were rightly classified by the Department under Chapter 90.

16. CC v BIOMED HITECH INDUSTRIES LTD. 2010 (256) E.L.T. 511 (Mad.)

The issue involved was the appealability of order passed by Chief Commissioner as adjudicating authority. Tribunal held appeal to Tribunal not maintainable against order passed by such officer.

The High court on appeal against the aforesaid order observed that Chief Commissioner of Customs empowered to exercise powers of Commissioner of Customs who is his immediate subordinate officer. Section 5(2) of Customs Act, 1962 providing for exercise by customs officer, powers of another subordinate customs officer and discharge duties of such subordinate officer. Expression used being singular in said provision, immediately superior officer can exercise powers and discharge duties conferred on officer immediately subordinate to him. Chief Commissioner of Customs empowered to exercise powers of Commissioner of Customs who is his immediate subordinate officer in the hierarchy.

Section 129A of Customs Act, 1962 specifically providing for appeal against order passed by Chief Commissioner of Customs while exercising power of Commissioner (Adjudication). Mere signing of adjudication order by Chief Commissioner cannot make order as passed by him in his own capacity. Chief Commissioner stepped into shoes of Commissioner of Customs and exercised his powers as adjudicating authority. Therefore appeal maintainable before CESTAT against such order of the Chief Commissioner.

17. SRAVANI IMPEX P. LTD. v ADDL. DIR. GENERAL 2010 (252) E.L.T. 19 (A.P.)

Held foreign currencies, remitted in contravention of Section 11 into the account of the petitioner, should be confiscated in terms of Section 111(d) read with Section 120 of the Customs Act, 1962. As goods include currency, negotiable instruments and any kind of movable property, the amounts remitted into the petitioner's account are "imported goods" within the said meaning. In as much as the petitioner had illegally brought foreign currency into their account, in the guise of sale proceeds, they have contravened the provisions of Section 11 of the Customs

Act. Since the amounts remitted, though not relatable, were routed in the guise of sale proceeds with the sole purpose of getting DEPB benefits in a fraudulent manner, they were illegally imported into India. As foreign exchange has been remitted into India, in the guise of sale proceeds, the prohibition envisaged under Section 111(d) is attracted and, consequently, such illegal foreign exchange remittances into the petitioner's account is liable to be confiscated under Section 111(d) of the Customs Act 61

18. SRAVANI IMPEX P. LTD. v ADDL. DIR. GENERAL 2010 (252) E.L.T. 19 (A.P.)

Held A false entry made in the shipping bill, empowers Customs officers to confiscate the goods. The liability of fraudulently exported goods to confiscation arises, under Section 113, as soon as the goods are attempted to be exported which, necessarily, precedes its actual export. There is no provision in the Customs Act to suggest that this accrued liability is wiped out or is extinguished with the exportation of the goods. It may be that, after the goods are exported, the liability for confiscation may not be enforceable by physical confiscation of the goods. Personal penalty under Section 114 is attracted as soon as the goods incur liability to confiscation under Section 113 and such liability arises when the goods are attempted to be exported contrary to any "prohibition". The liability of personal penalty provided in Section 114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Section 113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement.

The mere fact that the DGFT is empowered to confiscate the goods or impose penalty would not, denude Customs officers of the powers of confiscation under Section 113(i) of the Customs Act or to demand, under Section 28 of the Customs Act, repayment of the Customs duty benefits extended earlier to the petitioner on the erroneous premise that the fraudulently over-invoiced goods represented the true value of exports made by them.

19. Shabir Ahmed Abdul Rehman v UOI 2009 (235) ELT 402 (Bom)

The petitioner on his arrival from Muscat was apprehended at the Airport as he was carrying 41 gold bars valued at Rs. 18,88,337/- (international market value)/Rs. 23,16,500/- (local market value) concealed in a pouch,. The said gold bars were seized from the petitioner on the reasonable belief that they are liable to be confiscated.

Thereafter, on completion of investigation, a show cause notice was issued to the petitioner and by an order it was ordered that the seized gold bars are liable to be confiscated and penalty of Rs. 3,00,000/- was also imposed.

Being aggrieved by the aforesaid order, the petitioner filed an appeal before the Commissioner of Customs (Appeals) who directed reshipment of the gold in question subject to payment of reshipment fine of Rs. 6,00,000/-. The Commissioner (A) reduced the personal penalty from Rs. 3,00,000/- to Rs. 1,00,000/-.

The petitioner filed revision application before the Government of India. In the revisionary order it was held that the petitioner is entitled to redeem the confiscated gold subject to payment of duty and also fine and penalty imposed by Commissioner (A). As the gold was already disposed off, the Commissioner was directed to return the sale proceeds subject to payment of duty, fine and penalty. Challenging the aforesaid order, the present petition is filed. The revenue has accepted the decision of the revisional authority.

The petitioner had informed the customs authorities that the petitioner is filing an appeal against the adjudication order and the confiscated gold should not be disposed of. As per CBDT circular the customs authorities ought not to have disposed of the confiscated gold during the pendency of the appeal. It was submitted that the petitioner is entitled to the market value of the confiscated goods together with interest thereon at the rate fixed by this Court from the date of auction till payment.

The Court ruled that no doubt that the customs authorities had informed the petitioner that the confiscated gold has already been handed over for disposal. Handing over the confiscated gold immediately after serving the order of confiscation itself was improper. In any event after receiving letter from the petitioner, the customs authorities ought to have stopped the auction sale of the confiscated gold. However, the gold was sold during the pendency of the appeal filed by the petitioner before Commissioner (A). The finding recorded by the revisional authority and accepted by the revenue is that the action of the customs authorities in selling the gold during the pendency of the appeal is against the existing departmental instructions and is not in good taste.

Since the petitioner is seeking redemption of the confiscated gold, he cannot escape payment of fine and penalty. In fact, counsel for the petitioner offered to pay fine and penalty. As regards payment of duty is concerned, in our opinion, duty would be payable only if the gold was actually allowed to be redeemed. In the present case, what is being given is the sale proceeds and not the gold as such. In such a case, the question of paying duty in respect of the sale proceeds would not arise. The customs authorities are liable to return the entire sale proceeds without deducting therefrom the duty but subject to deduction of fine of Rs. 6,00,000/- and penalty of Rs. 1,00,000/- imposed by the Commissioner (A) with interest.

20. Commissioner of Customs v. Filco Trade Centre (P) Ltd. 2009 (239) E.L.T. 19 (Guj.)

On a search conducted in the premises of the assessee, different varieties of ball bearings of foreign make were recovered. As per Revenue, the said goods were not imported under valid import documents. Hence, it seized the goods. Thereafter, confiscation of seized goods was ordered under section 111(d) of the Customs Act, 1962, redemption fine was fixed and penalties were levied.

The High Court observed that undoubtedly, goods, import of which is prohibited, either by the provisions of the Act or any other law in force, can be confiscated and consequential actions initiated under the provisions of the Act. However, in the present case, as noted by the Tribunal, there was no restriction on the goods in question and hence, it could not be stated that respondent assessee had committed any act of illegal import of prohibited goods.

The Court ruled that a negative burden could not be cast on respondent assessee that although ball bearings were neither prohibited goods nor restricted goods, the respondent-assessee should show that import was permissible.

21. ISPAT ALLOYS LTD. v UOI 2010 (249) E.L.T. 504 (Bom.)

Notification No. 208/88-Cus., dated 29th June 1988 specifically stated that the notification would be valid up to and inclusive of 31st March 1989. However, the Government withdrew the notification w.e.f. 1.3.1989. When the assessee had placed the order the exemption notification was in force however, pre-mature withdrawal resulted in denial of exemption when the goods landed at the Customs Port. On appeal by the assessee the High Court ruled that exemption notification can be withdrawn in public interest and in such an event, principle of promissory estoppel would not apply to action of withdrawal. Keeping in view the public interest of providing adequate incentive/protection to the domestic manufacturers, notifications were withdrawn/superseded w.e.f. 1-3-1989. Protection of domestic industry is certainly in public interest and extent of protection is a matter of public policy.