CENTRAL EXCISE

1

BASIC CONCEPTS

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

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

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

The assessee submitted that insertion of the explanation to section 2(d) would not change the position established in law that 'aluminium dross and skimming,' were neither processed or manufactured, or were marketable commodities.

Decision of the case:

The High Court observed that effect of the explanation is to get over the judgment of the Apex Court in case of *Commissioner, Central Excise* v. *Indian Aluminium Co. Ltd. 2006 (203) E.L.T. 3 (S.C.)* wherein the Supreme Court held that everything that can be sold was not necessarily marketable.

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

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

2. Does the fabrication, assembly and erection of waste water treatment plant amount to manufacture?

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

Facts of the case:

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

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

Decision of the case:

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

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

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

Decision of the case:

The Apex Court observed that marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The question is not whether there is a hypothetical possibility of a purchase and sale of the commodity, but

whether there is sufficient proof that the product is commercially known. **The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold**. Theory and practice will not go together when one examine the marketability of a product.

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

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

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

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

Facts of the case:

The asseseee was engaged in the manufacture of asphalt batch mix and drum mix/hot mix plant by assembling and installing its parts and components. The Revenue contended that the said plant would be considered to be moveable so as to be dutiable under the Central Excise Act, 1944.

Decision of the case:

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

The Court observed that as per the assessee, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine.

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

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

5. Does the activity of packing of imported compact discs in a jewel box along with inlay card amount to manufacture?

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

Facts of the case:

The appellant imported recorded audio and video discs in boxes of 50 and packed each individual disc in transparent plastic cases known as jewel boxes. An inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole thing was then shrink wrapped and sold in wholesale. The Department contended that the said process amounted to manufacture.

Decision of the case:

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

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

6. Does the process of preparation of tarpaulin made-ups after cutting and stitching the tarpaulin fabric and fixing the eye-lets amount to manufacture?

CCE v. Tarpaulin International 2010 (256) E.L.T. 481 (S.C.)

Facts of the case:

The assessee was engaged in manufacture of 'tarpaulin made-ups'. The 'tarpaulin made-ups' 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 and hence, the Department could not levy excise duty on tarpaulin made-ups.

Decision of the case:

The Apex Court opined that **stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product**. The process did not bring into existence a new and distinct product with total transformation in the original commodity. The original material used i.e., the tarpaulin, was still called tarpaulin made-ups even after undergoing the said process. Hence, it could not be said that the process was a manufacturing process. Therefore, there could be no levy of Central excise duty on the tarpaulin made-ups.

Hence, the Supreme Court, upholding the decision of the Tribunal, held that **conversion of tarpaulin into tarpaulin made-ups would not amount to manufacture**.

2

CLASSIFICATION OF EXCISABLE GOODS

1. Is the product "Scrabble" classifiable under sub-heading 9503.00 or sub-heading 9504.90 of the First Schedule to the Central Excise and Tariff Act, 1985?

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

Facts of the case:

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

Decision of the case:

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

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

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

3

VALUATION OF EXCISABLE GOODS

Section 4(3)(d) of the Central Excise Act, 1944

1. Whether the charges towards pre-delivery inspection and after-sale-service recovered by dealers from buyers of the cars would be included in the assessable value of cars?

Maruti Suzuki India Ltd. v. CCE 2010 (257) E.L.T. 226 (Tri. – LB)

Facts of the case:

The appellants were manufacturers of various types of motor vehicles chargeable to duty on *ad valorem* basis. Department observed that while selling the vehicles to the customers, the dealers added their own margin known as the dealer's margin to the price at which the vehicles were made available to them by the appellants. This dealer's margin contained provision for rendering pre-delivery inspection and three after sale services. Hence, the Department contended that the cost of post delivery inspection and after sale services were to form part of the assessable value of the automobile while discharging the duty liability.

Decision of the case:

The Larger Bench of the Tribunal drew the following propositions:-

(i) Transaction value includes the amount paid by reason of/in connection with sales of goods

The Court noted that the transaction value does not merely include the amount paid to the assessee towards price, but also includes any amount a buyer is liable to pay **by reason of or in connection with the sale of the goods**, including any amount paid on behalf of assessee to the dealer or the person selling the vehicles. **The reason of sale and inter connection thereto are essential elements to contribute for assessable value**.

Measure of levying is expanded and its composition is broad based to bring all that a buyer is liable to pay or incur by reason of sale or in connection on therewith. The transaction value, therefore, is not confined to the amount actually paid and is not restricted to flow back of consideration or part thereof to the assessee directly but even for discharge of sales obligations both in

present and future. Thus, all deferred and future considerations are added to assessable value.

(ii) Definition of transaction value is extensive, at the same time restrictive and exhaustive in relation to the items excluded therefrom

Extensive

The use of expressions like **"includes in addition to"** and **"including but not limited to"** in the definition clause establishes that it is of very wide and extensive in nature.

Restrictive and exhaustive

At the same time, it precisely pinpoints the items which are excluded therefrom, with the prefix as **"but does not include"**. Exclusions being defined no presumption for further exclusions is permissible. Hence, the definition is restrictive and exhaustive in relation to the items excluded therefrom.

(ii) PDI and after sales service charges is a payment on behalf of the assessee to the dealer by the buyer

Both, direct benefit as well as indirect benefit (wholly or partly), flowing from buyer to assessee, resulting from the payment made by the buyer to the dealer in connection with or by reason of the sale transaction will have to be included in the assessable value. Being so, any amount collected by the dealer towards pre-delivery inspection or after sale services from the buyer of the goods under the understanding between the manufacturer and the dealer or forming part of the activity of sales promotion of the goods would be a **payment on behalf of the assessee to the dealer by the buyer**, and hence, it would form part of the assessable value of such goods.

Hence, it was held that **the charges towards pre-delivery inspection and after-sale-service recovered by dealers from buyers of the cars would be included in the assessable value of cars**.

Notes:

1. *As per section 4(3)(d) of the Central Excise act, 1944, transaction value is defined as follows:-*

   Transaction value:-

   - ***means*** *the price actually paid or payable for the goods, when sold, and*
   - ***includes in addition to*** *the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason*

- ***<u>including, but not limited to</u>**, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter;*
- ***<u>but does not include</u>** the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.*

2. *Earlier, in plethora of cases, it had been held that pre-delivery inspection and after-sale-service recovered by dealers from buyers would not be included in the assessable value. The aforesaid judgment of the Larger Bench of the Tribunal takes a contrary view to the earlier judgments.*

4

CENVAT CREDIT

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

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

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

Facts of the case:

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

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

Decision of the case:

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

The High Court laid down the following propositions –

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

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

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

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

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

(a) Expression "means" and "includes"

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

(b) Expression "such as"

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

(iii) Interpretation of the phrase "activities relating to business"

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

(a) The word **'business'** is of wide import and cannot be given a restricted definition to say that business of a manufacturer is to manufacture final products only. In the present case, the business of the appellant would include, apart from manufacture of concentrates, entering into franchise agreements with bottlers, permitting use of brand name, promotion of brand name, etc.

(b) The expression **'relating to'** further widens the scope of the expression 'activities relating to business'.

(c) The expression **'activities'** further widens the scope of the aforesaid expression. Rule making authority has not employed any qualifying words before the word 'activities', like main activities or essential activities etc. It implies that all activities (essential or not) in relation to a business would fall within the ambit of input service. Hence, in the present case all activities having a relation with the manufacturer of the concentrate would fall within the definition of input service.

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

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

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

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

Hence, the Bombay High Court inferred that **the manufacturers of concentrates are eligible to avail credit of the service-tax paid on advertising services, sales promotion, market research etc. availed by them and can utilize such credit towards payment of excise duty on the concentrate.**

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

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

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

Facts of the case:

The assessee was engaged in the manufacture of electricity using naptha as fuel for generation of electricity. The electricity was partly used captively and

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

Decision of the case:

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

(i) Specific part

(ii) Inclusive part

(iii) Place of use

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

(I) SPECIFIC PART

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

Therefore, as per this part, two crucial pre-requisites are as follows:-

(a) All goods "used in or in relation to the manufacture" of final products qualify as "input".

(b) Presupposition that the element of "manufacture" must be present.

The specific part uses the expression "used in or in relation to the manufacture of final product". It implies that the use of input in the manufacturing process, be it direct or indirect and the absence of the input in the final product become irrelevant.

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

(II) INCLUSIVE PART

Input **includes**:

(a) Lubricating oils, greases, cutting oils and coolants;

(b) Accessories;

(c) Paints;

(d) Packing materials;

(e) Input used as fuel;

(f) Input used for generation of steam or electricity.

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

(III) PLACE OF USE

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

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

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

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

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

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

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

(i) Whether the inputs/capital goods have been diverted en-route or the entire quantity with the packing intact has been received and put to the intended use at the recipient factory.

(ii) Whether the impugned goods are hygroscopic in nature or are amenable to transit loss by way of evaporation etc.

(iii) Whether the impugned goods comprise countable number of pieces or packages and whether all such packages and pieces have been received and accounted for at the receiving end.

(iv) Whether the difference in weight in any particular case is on account of weighment on different scales at the despatch and receiving ends and whether the same is within the tolerance limits with reference to the Standards of Weights and Measures Act, 1976.

(v) Whether the recipient assessee has claimed compensation for the shortage of goods either from the supplier or from the transporter or the insurer of the cargo.

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

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

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

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

Decision of the case:

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

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

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

Issue:

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

Decision of the case:

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

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

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

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

6. Can the CENVAT credit of duty paid on inputs and capital goods used in mines be availed?

Madras Cements Ltd. v. CCE 2010 (257) E.L.T. 321 (S.C.)

Decision of the case:

The Apex Court decided the issue with regard to the eligibility of Modvat/Cenvat credit on inputs and capital goods used in mines as follows:-

(i) CENVAT credit on inputs used in mines

The Supreme Court held that the issue as to availability of Modvat/Cenvat credit on inputs (explosives, lubricating oils etc.) was squarely covered by the case of *Vikram Cement v. CCE 2006 (194) E.L.T. 3 (S.C.)*. Therefore, the credit on inputs is allowed.

(ii) CENVAT credit on capital goods used in mines

(a) If the mines are captive mines

If the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee.

(b) If the mines are not captive mines

If the mines are not captive mines but they supply goods to various other cement companies of different assessees, and it is found that the said goods were being used in the lime stone mines outside the factory of the assessee, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee.

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

7. Whether welding electrodes used in repairs/maintenance of plant and machinery can be considered as 'input' as defined under rule 2(g) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) of the CENVAT Credit Rules, 2004]?

Ambuja Cements Eastern Ltd. v. CCE 2010 (256) E.L.T. 690 (Chhattisgarh)

Facts of the case:

Ambuja Cement Ltd., engaged in manufacture of clinker and cement, availed the credit on 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 of production. The Department denied the CENVAT credit on welding electrodes under rule 2(g) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) of the CENVAT Credit Rules, 2004].

Decision of the case:

The High Court observed that the definition of "input" occurring under rule 2(g) of the erstwhile CENVAT Credit Rules, 2002 [now rule 2(k) of the CENVAT Credit Rules, 2004] takes in its ambit all inputs, except the specifically excluded items under erstwhile rule 2(g) [now rule 2(k)], which have been employed in the manufacturing process, whether directly or indirectly and whether contained in the final product or not.

The High Court, relying upon certain earlier decisions, overruled the decision of the Larger Bench of the Tribunal in case of *Jaypee Rewa Cement v. CCE 2003 (159) E.L.T. 553 (Tribunal – LB)*, wherein it was held that welding electrode was not admissible for CENVAT credit. The High Court answered the substantial question of law in favour of the appellant-assessee and held that **welding electrodes used in repairs and maintenance of plant and machinery were inputs as defined under erstwhile rule 2(g) [now rule 2(k)] and thus, entitled for CENVAT credit**.

5

DEMAND, ADJUDICATION AND OFFENCES

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

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

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

Decision of the case:

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

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

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

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

Section 11A(2B)

Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such

duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid.

Explanation 2 to section 11A(2B)

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

Section 11AB

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

Section 11A of the Central Excise Act, 1944

2. Whether non-disclosure of a statutory requirement under law would amount to suppression for invoking the larger period of limitation under section 11A?

CC Ex. & C v. Accrapac (India) Pvt. Ltd. 2010 (257) E.L.T. 84 (Guj.)

Facts of the case:

The respondent-assessee was engaged in manufacture of various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. The respondent procured Extra Natural Alcohol (ENA) from the local market on payment of duty, to which Di-ethyl Phthalate (DEP) is added so as to denature it and render the same unfit for human consumption. The Department alleged that the intermediate product i.e. Di-ethyl Alcohol manufactured as a result of addition of DEP to ENA, was liable to central excise duty.

Issue:

The question which arose before the High Court in the instant case is whether non-disclosure as regards manufacture of Denatured Ethly Alcohol amounts to

suppression of material facts thereby attracting the larger period of limitation under section 11A.

Decision of the case:

The Tribunal noted that denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP) Act. Thus, addition of DEP to ENA to make the same unfit for human consumption was a statutory requirement. Hence, **failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement**. Further, as similarly situated assesses were not paying duty on denatured ethyl alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

The High Court upheld the Tribunal's judgment and pronounced that **non-disclosure of the said fact on the part of the assessee would not amount to suppression so as to call for invocation of the extended period of limitation**.

6

REFUND

Section 11B of the Central Excise Act, 1944

1. Merely because assessee has sustained loss more than the refund claim, is it justifiable to hold that it is not a case of unjust enrichment even though the assessee failed to establish non-inclusion of duty in the cost of production?

CCE v. Gem Properties (P) Ltd. 2010 (257) E.L.T. 222 (Kar.)

Decision of the case:

The High Court answered the question of law in favour of the Revenue. The Court observed that indisputably, the assessee was not liable to pay the duty and was entitled to the refund of the excise duty wrongly paid by it. The claim of the assessee had been rejected on the ground that if the application was allowed, it would amount to unjust enrichment because all the materials sold by the assessee had been inclusive of the duty. Therefore, the burden had been heavy on the assessee to prove that while computing the cost of the material it had not included the duty paid by it.

The Court elucidated that merely because the assessee had sustained the loss in the relevant year, could not be a ground to hold it had not been a case of unjust enrichment. **It was evident from the Chartered Accountant's certificate that the cost of the duty was included while computing the cost of production of the material**. Therefore, on facts of the case, the High Court held that **assessee could not be granted relief since it had failed to establish that the cost of the duty was not included while computing the cost of the products**.

7

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. **Whether the clearances of two firms having common brand name, goods being manufactured in the same factory premises, having common management and accounts etc. can be clubbed for the purposes of SSI exemption?**

   CCE v. Deora Engineering Works 2010 (255) ELT 184 (P & H)

   Facts of the case:

   The respondent-assessee was using the brand name of "Dominant" while clearing the goods manufactured by it. One more manufacturing unit was also engaged in the manufacture and clearance of the same goods under the same brand name of "Dominant" in the same premises. Both the firms had common partners, the brand name was also common and the machines were cleared from both the units under common serial number having common accounts. Department clubbed the clearance of the goods from the both the units for the purposes of SSI exemption because both the units belong to same persons and they had common machinery, staff and office premises etc.

   Decision of the case:

   The High Court held that indisputably, in the instant case, that the partners of both the firms were common and belonged to same family. **They were manufacturing and clearing the goods by the common brand name, manufactured in the same factory premises, having common management and accounts etc.** Therefore, High Court was of the considered view that **the clearance of the common goods under the same brand name manufactured by both the firms had been rightly clubbed**.

8

SETTLEMENT COMMISSION

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

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

Decision of the case:

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

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

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

CUSTOMS

1

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

Section 23 of the Customs Act, 1962

1. **Whether remission of duty is permissible under section 23 of the Customs Act, 1962 when the remission application is filed after the expiry of the warehousing period (including extended warehousing period)?**

   CCE v. Decorative Laminates (I) Pvt. Ltd. 2010 (257) E.L.T. 61 (Kar.)

   Facts of the case:

   The respondent imported resin impregnated paper and plywood for the purpose of manufacture of furniture. The said goods were warehoused from the date of its import. The respondent 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.

   Decision of the case:

   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.

The High Court, overruling the decision of the Tribunal, 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.

2

CLASSIFICATION OF GOODS

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

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

   Decision of the case:

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

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

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

2. **Will the description of the goods as per the documents submitted along with the Shipping Bill be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test? Whether a separate notice is required to be issued for payment of interest which is mandatory and automatically applies for recovery of excess drawback?**

   M/s CPS Textiles P Ltd. v. Joint Secretary 2010 (255) ELT 228 (Mad.)

   Decision of the case:

   The High Court held that the description of the goods as per the documents submitted along with the Shipping Bill would be a relevant criteria for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test. The petitioner could not plead that the exported goods should be classified under different headings contrary to the description

given in the invoice and the Shipping Bill which had been assessed and cleared for export.

Further, the Court, while interpreting section 75A(2) of the Customs Act, 1962, noted that when the claimant is liable to pay the excess amount of drawback, he is liable to pay interest as well. The section provides for payment of interest automatically along with excess drawback. No notice need be issued separately as the payment of interest become automatic, once it is held that excess drawback has to be repaid.

Note - The Headings cited in this case law may not co-relate with the Headings of the present Customs Tariff as this case relates to an earlier point of time.

3

WAREHOUSING

1. Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption?

Paras Fab International v. CCE 2010 (256) E.L.T. 556 (Tri. – LB)

Issue:

Following questions arose before the Larger Bench of the Tribunal for consideration:-

(a) Whether the entire premises of 100% EOU should be treated as a warehouse?

(b) Whether the imported goods warehoused in the premises of 100% EOU are to be held to have been removed from the warehouse if the same is issued for manufacture/production/processing by the 100% EOU?

(c) Whether issue for use by 100% EOU would amount to clearance for home consumption?

(d) Whether non-filing of ex-bond bill of entry before using the goods by the 100% EOU makes the goods as not cleared for home consumption?

Facts of the case:

The appellants were 100% EOU in Alwar. They imported the impugned goods namely HSD oil through Kandla Port and filed 'into Bond Bill of Entry' for warehousing the imported goods. The impugned goods were warehoused in their 100% EOU in Alwar and subsequently used in the factory within the premises of the 100% EOU for manufacture of the finished goods. The Department demanded customs duty on the impugned goods.

The contention of the appellants was that since (i) the entire premises of the 100% EOU had been licensed as a warehouse under the Customs Act; (ii) the impugned goods had been warehoused therein and subsequently utilized for manufacture of finished goods in bond; and (iii) the impugned goods had not been removed from the warehouse, there could not be any question of demanding duty on the same.

Department contended that the entire premises of the 100% EOU could not be treated as a warehouse. The Appellants had executed a common bond B-17 for fulfilling the requirements under the Customs Act, 1962 and the Central Excise Act, 1944. Under the Central Excise Law, the removal of goods for captive consumption would be treated as removal of goods and the assessee were required to pay duty on such removal.

Decision of the case:

The Tribunal observed that as per Customs manual, the premises of EOU are approved as a Customs bonded warehouse under the Warehousing provisions of the Customs Act. It is also stated therein that the manufacturing and other operations are to be carried out under customs bond. The goods are required to be imported into the EOU premises directly and prior to undertaking import, the unit is required to get the premises customs bonded. The imported goods, except capital goods and spares are required to be utilized within a period of one year or within such period as may be extended by the Customs authorities and the importer is required to maintain a proper record and proper account of the import, consumption and utilization of all imported materials and exports made and file periodical returns. The EOUs are licensed to manufacture goods within the bonded premises for the purpose of export.

The Tribunal held that neither the scheme of the Act nor the provisions contained in the Manual require filing of ex-bond bills of entry or payment of duty before taking the imported goods for manufacturing in bond nor there is any provision to treat such goods as deemed to have been removed for the purpose of the Customs Act, 1962.

The Tribunal answered the issues raised as follows:-

(a) The entire premises of a 100% EOU has to be treated as a warehouse if the licence granted under section 58 to the unit is in respect of the entire premises.

(b), (c) and (d) Imported goods warehoused in the premises of a 100% EOU (which is licensed as a Customs bonded warehouse) and used for the purpose of manufacturing in bond as authorized under section 65 of the Customs Act, 1962, cannot be treated to have been removed for home consumption.

4

DEMAND & APPEALS

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

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

Decision of the case:

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

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

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

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

5

REFUND

Section 27 of the Customs Act, 1962

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

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

Decision of the case:

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

Decision of the case:

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

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

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

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

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

***(ii) borne by him**,*

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

Section 27 of the Customs Act, 1962

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

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

Facts of the case:

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

Decision of the case:

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

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

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

**Note: Now TR-6 Challan has been replaced with GAR-7 challan.*

6

PROVISIONS RELATING TO ILLEGAL IMPORT, ILLEGAL EXPORT, CONFISCATION, PENALTY & ALLIED PROVISIONS

Section 125 of the Customs Act, 1962

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

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

Decision of the case:

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

(1) Importation and exportation of prohibited goods and

(2) Importation and exportation of any other goods

(1) Importation and exportation of prohibited goods

In case of importation or exportation of prohibited goods, where the goods were confiscated, the word used is "may". Hence, in case of prohibited goods, there is discretion in the officer either to release the confiscated goods in terms as set out therein or not.

(2) Importation and exportation of any other goods

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

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

Section 111 and 125 of the Customs Act, 1962

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

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

Decision of the case:

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

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

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

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

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

Hence, **in case the imported goods are confiscated, and goods are not redeemed by paying fine, the importer is bound to pay the customs duty.**

Section 111 and section 125 of the Customs Act, 1962

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

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

   Decision of the case:

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

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

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

Section 110 and 124 of the Customs Act, 1962

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

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

   Decision of the case:

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

   The word "or" used in the expression "the owner of the goods or such person" in section 124 has been used conjunctively and not disjunctively. Hence, the notice for confiscation is required to be issued to owner when owner is in possession of goods and goods are seized from his custody. **In case of seizure of goods from the custody of person other than importer, notice**

must also be given to person from whose custody goods were seized. Opportunity must be given to the person in possession of the goods because their confiscation would affect his civil right to possess the goods which were seized from his custody. Thus, **the person from whose custody goods are seized is also entitled to notice and hearing before order of confiscation is passed**.

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

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

   Decision of the case:

   In the instant case, the High Court held that **in a case of confiscation of goods because of their under valuation, Tribunal could not cancel the confiscation order for the want of evidence from the foreign supplier**. The Court considered it be illogical that a person who was a party to undervaluation would give evidence to the Department to prove the case that the invoice raised by him on the respondent was a bogus one and that they had received underhand payment of the differential price. Resultantly, the Court upheld the confiscation order.

7

SETTLEMENT COMMISSION

Section 127B of the Customs act, 1962

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

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

Decision of the case:

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

Section 127M of the Customs Act, 1962

2. Can the order of the Settlement Commission be considered to be a judicial proceeding?

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

Facts of the case:

The Custom House Agent License of the respondents was suspended on the ground that authorised agent of the respondents had committed misconduct by taking active part in the act of smuggling and had thus violated the Custom House Agent Licensing Regulations, 2004. During pendency of the misconduct proceedings, respondents approached Settlement Commission. The Settlement Commission after hearing all the parties held that Revenue had failed to prove that the authorised agent of the respondent Custom House Agent (CHA) had a conscious knowledge of mis-declaration of goods. On the basis of said order of the Settlement Commission, Tribunal decided the case in favour of the respondents and dropped the misconduct proceedings against them. The appellants challenged the Tribunal's order alleging that the order passed by the Settlement Commission was ab-initio, null and void being without jurisdiction.

Decision of the case:

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

Section 127A of the Customs Act, 1962

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

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

Facts of the case:

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

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

Decision of the case:

The High Court noted that the Settlement Commission while considering the aforesaid question of its jurisdiction for taking up the cases relating to drawback had considered the definition of "drawback" as defined in rules

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

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

SERVICE TAX

1

PRELIMINARY LEGAL PROVISIONS

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

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

Decision of the case:

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

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

2

GAMUT AND COVERAGE OF TAXABLE SERVICES

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

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

Decision of the case:

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

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

Section 65(12) of the Finance Act, 1994

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

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

Decision of the case:

The High Court, in the impugned judgment, had upheld the constitutional

validity of service tax levy on hire purchase and lease services after noting that service charge @ 1% was admitted as collected and service tax was levied on service and not on sale or purchase of goods.

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

Section 65(105)(zzzze) of the Finance Act, 1994

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

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

Decision of the case:

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

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

In the instant case, the terms of EULA indicated the dominant intention of parties whereby the developer retained the copyright of each software, be it canned, packaged or customised, and only the right to use with copyright

protection was transferred to the subscribers or the members. The High Court opined that in the transactions taking place between the members of ISODA with its customers, the software is not sold as such, but only the contents of the data stored in the software are sold which would only amount to service and not sale. Further, the High Court was of the view that such transactions could also not be treated as deemed sale under Article 366(29A)(d) of the Constitution of India as that requires a transfer of right to use any goods and in the instant case, the goods as such are not transferred.

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

Section 65(105)(zza) of the Finance Act, 1994

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

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

Facts of the case:

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

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

Decision of the case:

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

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

Section 65(105)(zb) of the Finance Act, 1994

5. Is the assessee liable to pay the service tax on the value of goods/material consumed, during the course of processing of photography or not?

CCE v. Vahoo Colour Lab 2010 (18) S.T.R. 548 (P & H)

Facts of the case:

The respondent-assessee was engaged in rendering service relatable to photography, developing and printing. It availed the benefit of ***Notification No. 12/2003 dated 20-6-2003***. The Revenue claimed that the value of goods/material consumed during the course of processing of photography should not be excluded from value of the service.

Decision of the case:

The High Court noted that evidently, the assessee had already paid the service tax on the value of service, but the claim of the Revenue was that the service tax was also leviable on the cost of material consumed during the

course of processing of photography by the assessee. The Tribunal had erroneously relied on case of ***Deluxe Colour Lab Pvt. Ltd. 2009 (13) S.T.R. 605 (Tribunal)***, wherein it was held that photography service is in the nature of works contract and it involves elements of both, sales and service and the service tax is leviable on the sale portion. The High Court overruled the decision of the Tribunal.

The High Court, following the judgment of ***Bharat Sanchar Nigam Ltd. v. Union of India***, held that indisputably, processing of photography could not be completed without the developing and printing process, to provide the service to the recipient. The photography films, printing papers, chemicals and envelopes were the integral and essential ingredients to complete the process of photography. It implied that the components of sale of photography, developing and printing etc. were clearly distinct and discernible than that of photography service. Therefore, the Court reiterated the view that **as the photography was in the nature of works contract and it involved the elements of both sale and service, therefore, the service tax was not leviable on the sale portion, in the obtaining circumstances of the case**.

6. Will the service provided by way of "advice, consultancy or technical assistance" in the case of turnkey contracts attract service tax and can these turnkey contracts be vivisected?

CCE v. BSBK Pvt. Ltd. 2010 (18) S.T.R. 555 (Tri. – LB)

The Larger Bench of the Tribunal noted that Article 366(29-A)(b) to the Constitution has allowed the vivisection of indivisible contracts in order to find out goods component and value thereof. Therefore, the remnant part of the contract may be attributable to the scope of service tax under the provisions of the Finance Act, 1994.

It inferred that **turnkey contracts can be vivisected and discernible service elements involved therein can be segregated and classifiable as well as valued for levy of service tax under the Finance Act, 1994 provided such services are taxable services** as defined by that Act and depending on the facts and circumstance of each case, services by way of advice, consultancy or technical assistance in the case of turnkey contract shall attract service tax liability.

Section 65(105)(zzm) of the Finance Act, 1994

7. In case where the respondent is authorized by the airport authority to collect entrance fee from visitors to airport, who is liable to pay service tax –respondent or Airport Authority?

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

Facts of the case:

The respondent entered into a licence agreement with Calicut Airport Authority Ltd. 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 Tribunal held that the Airport Authority only was rendering service and therefore, respondent could not be held liable for the same.

The appellant contended that once licence was issued to the respondent, respondent stepped into the shoe of the service provider and he permitted the visitors to enjoy the service on collection of entrance fee. The respondent replied that licence fee paid by respondent to the Airport Authority constituted consideration for the services provided in the Airport and so much so, the Airport Authority was liable to pay service tax on the entire licence fee.

Decision of the case:

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 and the Tribunal's finding to the contrary was untenable. Consequently, it reversed the findings of the Tribunal and allowed the Department's appeal.

Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

1. **Can the option for composition scheme under works contract service be exercised after payment of service tax on a particular works contract?**

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

   Decision of the case:

   The High Court held that on a true and fair construction of rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) 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**.

   The benefit of the composition scheme is available [subject to the exercise of option and the conditions of eligibility for exercise of such option as spelt out in rule 3(3)] only in relation to "works contract service", as defined in rule 2(c) [Rule 2(c) defines "works contract service" as meaning service provided in relation to execution of the works contract referred to in sub-clause (zzzza) of clause 105 of section 65 of the Act].

2. **Whether service tax is payable at the rate prevailing on the date of entry in service or at the rate prevailing at the time of billing and receipt of payment?**

   CCE v. Reliance Industries Ltd. 2010 (19) STR 807 (Guj.)

   Decision of the case:

   The High Court viewed that substantive provisions of the Finance Act, 1994 indicate that **relevant date is the date of entry in service** and not the date of billing.

Rule 4(5) of the Service Tax Rules, 1994

3. Whether the provisions of deemed registration under rule 4(5) of the Service Tax Rules, 1994 are attracted in case of centralized registration?

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

Decision of the case:

The Court observed that every person liable to pay service tax is required under rule 4(1) of the Service Tax Rules, 1994, to apply to the Superintendent of Central Excise for registration in Form ST-1. The deeming provision in rule 4(5) is applicable to registration granted by the Superintendent of Central Excise.

However, the petitioner's application was for centralised registration under rule 4(2). The registration was to be granted by the Commissioner of Central Excise or the Chief Commissioner of Central Excise 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 Commissioner of Central Excise to grant centralised registration under sub-rule (2), 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, registration under sub-rule (2) can only be granted by the Commissioner.

Undoubtedly, registration cannot be indefinitely delayed. Registration has to be granted within reasonable time. However, while in case of grant of registration by the Superintendent of Central Excise, the time stipulation of seven days is mandatory under the Rules and its contravention attracts the consequence of deemed registration, in case of the Commissioner, the same time stipulation extended by circulars is only directory. The circulars prescribe appropriate action against officers who delay registration.