

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

PAPER – 8 : INDIRECT TAXES

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

PART – A

Question 1

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

Answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2

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

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

Answer

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

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

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

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

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

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

Therefore, the Department's claim is not tenable.

Question 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4 + 2 + 2 = 8 Marks)

Answer

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

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

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

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

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

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

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

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

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

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

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

E.C: Rs.100 [Rs.1,100 – Rs.1,000]

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

Notes:

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

Question 4

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

Answer

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

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

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

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

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

Question 5

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

(3 x 2 = 6 Marks)

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

Answer

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

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

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

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

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

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

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

- (c) Where an amount has been collected in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods, the person who is liable to pay such amount as determined under sub-section (3) of section 11D, shall, in addition to the amount, be liable to pay interest at such rate, not below 10% and not exceeding 36% p.a., as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the amount ought to have been paid under this Act, till the date of payment of such amount. Currently the rate is 15% as notified vide Notification No. 68/2003 C.E. dated 12.09.2003.

However, in cases where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount payable is

voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within 45 days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole amount, including the amount already paid.

Where the amount determined under section 11D(3) is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, the interest payable thereon shall be on such reduced or increased amount respectively.

PART - B

Question 6

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

Answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 7

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

Answer

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

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

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

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

Question 8

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

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

Answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART – C

Question 9

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

Answer

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

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

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