SITARAM EDUCATION CENTRE

KS: THE TAX-AGE

RECENT AMENDMENTS TO INDIRECT TAXES
FOR CA FINAL MAY-12 EXAM

RECENT AMENDMENTS TO INDIRECT TAXES

THIS AMENDMENT NOTES COVERS RELEVANT AMENDMENTS MADE BY THE FINANCE ACT, 2011 AND RELEVANT NOTIFICATIONS & CIRCULARS ISSUED BETWEEN 1.5.2011 TO 31.10.2011.

It must be carefully noted that for students appearing in MAY -12 Exam, the amendments made by the Finance Act, 2011 and the amendments made by the notifications, circulars and other legislations up to 31-10-2011 are relevant.

A. CENTRAL EXCISE

(1) MRP VALUATION [SECTION 4A]

Standard Weights and Measures Act, 1976 has been replaced by "Legal Metrology Act, 2009 **w.e.f 1.8.2011 by virtue of amendments made by the Finance Act, 2011.**

Relevant provisions of Legal Metrology Act, 2009 & Legal Metrology (Packaged Commodities) Rules (LMPC), 2011

(1) Packages meant for retail sale are required for declration of Retail sale price.

(2) In the following cases there is no requirement to declare Retail sale price -

i) wholesale packages;
ii) goods meant for export.
iii) packaged commodities meant for industrial consumers
iv) packaged commodities meant for institutional consumers

"Industrial Consumer" means the institutional consumer like transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use for that institution.

"Industrial Consumers" means the industrial consumer who buys packaged commodities directly from the manufacturer for use by that industry.

---

(2) CENVAT CREDIT

a) Rule 3 of CENVAT Credit Rules, 2004

Other duties on which CENVAT credit is allowed –

No	Name of Duty /Tax etc.	Credit of such duty / tax can be utilized only for the payment of -
10.	The service tax leviable u/s. 66A of the Finance Act. [rule 3(1)(ixa)]	w.r.e.f 18.04.2006 the Finance Act, 2011 has amended rule 3 to provide that a manufacturer or producer of final products/ a provider of taxable service shall be allowed to take credit of service tax levied u/s. 66A.

b) Section 5B: Non reversal of CENVAT credit
By virtue of Amendments made by the Finance Act, 2011 - Notification issued under this section shall also be laid before parliament for 30 days when parliament is in session. w.e.f 8.4.2011.

Prior to amendments – Every rules made under this act, every notification issued u/s. 3A, section 4A, Section 5A(1) and section 11C and every order made u/s. 5A(2), other than an order relating to relating of goods of strategic, secret, individual or personal nature, must be laid before parliament for 30 days when parliament is in session. [Section 38(2)]

---

(3) RULE 4(1A) OF CENTRAL EXCISE RULES, 2002

Rule 4 (1A): Inserted w.e.f 1.3.2011 :

Summary: In case of readymade garments and made-up articles of textiles manufactured on job-work basis, liability to pay duty and comply with other provisions (such as registration etc.) is on the merchant manufacturer i.e., the person on whose behalf the goods are manufactured by job-workers.

Rule 4(1A): Notwithstanding anything contained in rule 4 (1), every person who gets the **following goods**, produced or manufactured on his account on job work, shall pay the duty leviable on such goods, at such time and in such manner as is provided under these rules, as if such goods have been manufactured by such person:

~~Provided that such person may authorize the job worker to pay the duty leviable on such goods on his behalf and the job worker so authorized may undertake to discharge all liabilities and comply with all the provisions of these rules:~~ [This option has been withdrawn w.e.f 28.7.2011 vide notification No. 19/2011, hence now the merchant manufacturers shall required to pay excise duty and comply all other provisions of central excise, and they cannot shift their burden to job-worker]

Further, it is to be noted that if the merchant manufacturer already authorized its job-worker to pay the duty before 28.7.2011, he will have to obtain registration and comply with other provisions within a period of 30 days from 28.7.2011.

Goods: falling under chapters 61 or 62 or 63 of the First schedule to the Tariff Act,

i) Articles of apparel and clothing accessories, knitted or crocheted
ii) Articles of apparel and clothing accessories, not knitted or crocheted
iii) Other made up textile articles, sets; worn clothing and worn textile articles; rags.

---

(4) REGISTRATION

a) Person engaged in manufacturing of recorded Smart Cards (tariff sub- heading 8523) exempt from registration of different manufacturing unit, if centralized registration has been opted. [Notification No. 14/2011, w.e.f 3.6.2011]

Every manufacturing unit engaged in the manufacture of recorded smart cards falling under sub-heading 8523 is exempt from registration where manufacturer of such goods has a centralised billing or accounting system in respect of such goods manufactured by different manufacturing units and opts for registering only the premises or office from where such centralised billing or accounting is done.

b) ***Notification No. 13/2011,EX(T) dated 1.3.2011*: Job worker falling under rule 4(1A) shall not required to register himself as the liability to comply the provisions of the Central Excise laws is on the merchant manufacturer.**

Merchant manufacturer i.e, "the person who shall pay the duty or duties of excise leviable on the said goods, under rule 4(1A) and comply with all procedural formalities and discharge all liabilities under the Central Excise Act, 1944 and the rules made there under, in respect of the goods manufactured on behalf of the said other person".

~~Provided that the above exemption shall not apply to the job worker who may be authorised to pay the duty of excise leviable on such final products manufactured by him on behalf of such other person in accordance with the proviso to sub rule (1A) of rule 4.~~ [Refer discussion in point 3 above]

---

(5) RECORDS & RETURN

a) w.e.f 1.20.2011 all the returns or declaration (except unit availing area based exemption in Uttarkhand and Himachal Pradesh) under central Excise are required to file electronically mandatorily.

b) A Large tax payer unit required to file application to ~~chief commissioner~~ Assistant/deputy commissioner for registering a new factory, Input service distributor or first or second stage dealer, after it registered as large tax payer unit. [Notification No. 17/2011, dated 18.7.2011]

Note: it is to be noted that a similar amendment has been made under service tax where application shall be made to Superintendent instead of chief commissioner.

---

(6) Monetary limit of adjudication has been amended vide circular dated 25.10.2011

Central Excise Officer	Power of Adjudication (Amount of duty involved)
Superintendents	Upto ₹1 Lakh in individual show cause notices. However, they would not be eligible to decide cases which involve excisability of a product, classification, eligibility of exemption, valuation and cases involving suppression of facts, fraud etc.
Deputy/ Assistant Commissioners	Upto ₹ 5 lakhs. (except the cases where Superintendents are empowered to adjudicate).
Joint/Additional Commissioners	***Above ₹5 lakhs and up to ₹50 Lakhs***
Commissioners	Without limit

B. COMMON TOPICS UNDER EXCISE & CUSTOMS

(7) RECOVERY OF DUTIES [SEC. 11A OF EXCISE/ SEC. 28 OF CUSTOMS]

For section 11A of the Central Excise Act/ sec. 28 of the Customs Act, the following section shall be substituted – w.e.f 8.4.2011 by the Finance Act, 2011

(1) When there is no fraud, collusion etc -
Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty,—

(a) Can issue show cause notice within 1 year: The Central Excise Officer shall, within 1 from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice; [section 11A(1)(a)]

(b) Voluntary payment of duty and Interest before SCN:

The person chargeable with duty may, before service of notice, pay on the basis of,—
(i) his own ascertainment of such duty; or
(ii) duty ascertained by the Central Excise Officer/(proper officer -in case of customs), the amount of duty along with interest payable thereon u/s. 11AA/28AA. [section 11(1)(b)]

The person who has paid the duty voluntarily shall inform the Central Excise Officer of such payment in writing,

- ➔ NO SCN will be issued if full amount is paid - the CEO on receipt of such information shall not serve any notice in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder. [Section 11A(2)]

- ➔ SCN will be issued if amount paid is short- where the Central Excise Officer is of the opinion that the amount so paid falls short of the amount actually payable, then, he shall proceed to issue the notice as in respect of such amount which falls short of the amount actually payable in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of information. [Section 11A(3)]

In computing the period of 1 year, the period during which there was any stay by an order of the court or Tribunal in respect of payment of such duty shall be excluded. [Section 11A(8)]

(2) When there is fraud, collusion etc.

Where any duty of excise has not been levied or paid or has been shortlevied or short-paid or erroneously refunded, by the reason of—
(a) fraud; or
(b) collusion; or
(c) any wilful mis-statement; or

(d) suppression of facts; or
(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty,

→ Can issue show cause notice within 5 year (Extended period of limitation): the Central Excise Officer shall, within 5 years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon u/s. 11AA and a penalty of 100% of duty specified in the notice. [Section 11A(4)]
Penalty Reduced to 50%: Where, during the course of any audit, investigation or verification, it is found that any duty has not been levied or paid or short-levied or short-paid or erroneously refunded for the reason of fraud; or collusion; or any wilful mis-statement; or suppression of facts; or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, but the details relating to the transactions are available in the specified record, then in such cases,

the Central Excise Officer shall within a period of 5 years from the relevant date, serve a notice on the person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice along with interest under section 11AA and penalty equivalent to 50% of such duty. [section 11A(5)]- this provisions is not there in customs.

→ Voluntary payment of (duty+ Interest + reduced penalty) before issue of SCN

(i) Penalty further reduced to "25% of duty or 1% of such duty per month to be calculated from the month following the month in which such duty was payable- whichever is lower"

Any person chargeable with duty, may, before service of show cause notice on him, pay the duty in full or in part, as may be accepted by him along with the interest payable thereon under section 11AA and penalty equal to 1% of such duty per month to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of 25% of the duty, and inform the Central Excise Officer of such payment in writing. [Section 11A(6)]. However, in customs this penalty is fixed @ 25%

(ii) No SCN will be issued and all proceedings deemed to be concluded if full amount is paid

The Central Excise Officer, on receipt of information about voluntary payment shall not serve any notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded where it is found by the Central Excise Officer that the amount of duty, interest and penalty as per point (i) has been fully paid; [Section 11A(7)]. However, in customs except prosecution proceedings u/s. 135, 135A and 140A all other proceeding deemed to be concluded.

(iii) SCN will be issued within 1 year if amount paid is short – the Central excise officer will proceed in the manner "as it is a case of no fraud" for recovery of such amount if found to be short-paid and the period of 1 shall be computed from the date of receipt of such information. [Section 11A(7)]

In computing the period 5 years, the period during which there was any stay by an order of the court or Tribunal in respect of payment of such duty shall be excluded. [Section 11A(8)]

(3) Where any appellate authority or Tribunal or court concludes that the notice issued by applying extended period of limitation is not sustainable for the reason that the charges of fraud or collusion or any

wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty has not been established against the person to whom the notice was issued, the Central Excise Officer shall determine the duty of excise payable by such person for the period of one year, deeming as if the notice were issued under clause (a) of sub-section (1). [Section 11A(9)]- this provisions is not there in customs.
(4) The Central Excise Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice. [Section 11A(10)]
(5) The Central Excise Officer shall, where it is possible to do so, determine the amount of duty of excise as per above point (4))—

(a) within 6 months from the date of notice in respect of cases where there is no fraud, collusion etc.;

(b) within 1 year from the date of notice in respect of cases where there is fraud, collusion etc. [Section 11A(11)][note -the time limit is not mandatory]

(6) Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer, then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified. [Section 11A(12)]

(7) Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount. [Section 11A(13)]- this provisions is not there in customs.

(8) Where an order determining the duty of excise is passed by the Central Excise Officer under this section, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately. [Section 11A(14)]

(9) The provisions of sub-sections (1) to (14) shall apply, mutatis mutandis, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded [section 11A(15)]- this provisions is not there in customs.

Explanation 1—For the purposes of this section and section 11AC,—

(a) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means,—
(i) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder;

(ii) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed on due date, the date on which such return has been filed;

(iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder;
(iv) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;
(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;

(c) "specified records" means records including computerised records maintained by the person chargeable with the duty in accordance with any law for the time being in force.'.

Explanation 2: For the removal of doubts, it is hereby declared that any non-levy, short-levy, non-payment, short-payment or erroneous refund before 8.4.2011, shall continue to be governed by the old provisions of section 11A.

Relevant date for section 28
Explanation - For the purposes of this section, "relevant date" means,—

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be ;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.'.

Provision with respect to section 28: "Officer" vs. "proper officer"

Sayed Ali [2011] 265 ELT 17 (SC): Section 28 of the Customs Act, 1962 provides for the issue of show-cause notices and assessment by 'proper officer'. As per section 2(34) "proper officer" means only such officer of customs who have been assigned specific function by the CBEC or commissioner.

It was held that, mere conferment of territorial jurisdiction does not construed as "proper office" by itself. There should be assignment of the functions of assessment/reassessment by the CBEC/Commissioner.

Hence, merely because appointing commissioner of customs (Preventive) to be commissioner of customs for Bombay, Thane and Kolaba distict does not give suo motto power to act as a proper officer u/s. 28. There must be specific assignment of function by the CBEC/Commissioner in order to called an "officer" as "Proper officer" for issuing notice u/s. 28. Therefore, all such notice issued u/s. 28 by such commissioner of customs (preventive) was held to be invalid.

Pursuant to the above Judgement,

as a prospective remedial measure, w.e.f 6.7.2011, the CBEC has notified all Customs Preventive officer, revenue Intelligence officers, Central Excise Revenue Intelligence Officer and all Central Excise Officer of Assistant/ Deputy commissioner/ Director rank or above as "Proper Officer" for the purpose of section 17 and section 28 of the Customs Act.

Further, in order to validate Notice issued before 6.7.2011(to nullify the above Judgement), retrospective amendment u/s. 28 has been carried on by inserting sub-section (11) under section 28 by enacting **the Customs (Amendment and Validation) Act, 2011** on 16.9.2011, to provide that all person appointed as Customs officer u/s. 4(1) before 6.7.2011 shall be deemed to be proper officer and shall have power u/s. 17 and 28.

Section 28(11)- newly inserted sub-section read as follows-

"Notwithstanding anything contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of customs u/s. 4(1) before 6.7.2011 shall be deemed to have and always had the power of assessment u/s. 17 and shall be deemed to have been and always had been the proper officers for the purpose of section 28."

---

(8) SECTION 11AA/Sec. 28AA: INTEREST ON DELAYED PAYMENT OF DUTY

For sections 11AA and 11AB of the Central Excise Act/ sec. 28AA and 28AB of the Customs, the following section shall be substituted w.e.f 8.4.2011 by the Finance Act, 2011, namely:—

<u>Section 11AA/Sec. 28AA</u>: (1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made there under, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate of 18% (w.e.f 1.4.11), whether such payment is made voluntarily or after determination of the amount of duty u/s. 11A/28.

(2) Interest shall be paid in terms of section 11A/Sec. 28 after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—
(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 37B/Sec 151A; and

(b) such amount of duty is voluntarily paid in full, within 45 days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment."

---

(9) PENALTY FOR SHORT-LEVY OR NON-LEVY OF DUTY IN CERTAIN CASES [SECTION 11AC]

For section 11AC of the Central Excise Act, the following section shall be substituted by the Finance Act, 2011:— w.e.f 8.4.2011

Section 11AC: (1) where any duty of excise has not been levied or paid or short-levied or short paid or erroneously refunded, by reason of fraud or collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, the person who is liable to pay duty as determined u/s. 11A(10) shall also be liable to pay a penalty.

Quantum of Penalty:

→ Normal penalty: 100% of the duty so determined;

→ Reduced penalty:
(a) Penalty reduced to 50% where specified records of short/not-levied are available:
where details of any transaction available in the specified records, reveal that any duty of excise has not been levied or paid or short-levied or short-paid or erroneously refunded as referred u/s. 11A(5), the person who is liable to pay duty as determined u/s. 11A(10) shall also be liable to pay a penalty equal to 50% of the duty so determined;

(b) Penalty further reduced to 25% if excise duty and interest thereon paid within 30days:

where any duty as determined u/s 11A(10) and the interest payable thereon under section 11AA in respect of transactions referred to in point (a) above is paid within 30 days of the date of communication of order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be 25% of the duty so determined;

(2) The amount of penalty will increase or decrease if the duty amount is subsequently increased or decreased in appeals-
where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer u/.s 11A(10), then, the amount of penalties and interest payable shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined u/s. 11A (10) shall also be liable to pay such amount of penalty or interest so modified.

Explanation.—For the removal of doubts, it is hereby declared that in a case where a notice has been served u/s. 11A (4) and subsequent to issue of such notice, the Central Excise Officer is of the opinion that the transactions in respect of which notice was issued have been recorded in specified records and the case falls under sub-section (5), penalty equal to 50% of the duty shall be leviable.

Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined u/.s 11A (10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

---

(10) SECTION 11E: LIABILITY UNDER ACT TO BE FIRST CHARGE ON THE PROPERTY OR PERSON

(newly inserted w.e.f 8.4.2011 by the Finance Act, 2011]

Notwithstanding anything to the contrary contained in any Central Act or State Act, any amount of duty, penalty, interest, or any other sum payable by an assessee or any other person under this Act or the rules made thereunder shall, save as otherwise provided in section 529A of the Companies Act, 1956, the Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002, be the first charge on the property of the assessee or the person, as the case may be.”.
Note: A similar provision has also been inserted in **Customs u/s. 142A** and in **Service tax u/s. 88** of the Finance Act, 1994.

(11) SECTION 12: POWER TO CENTRAL GOVT. TO APPLY CERTAIN PROVISIONS OF CUSTOMS IN EXCISE

Prior to amendment made by the Finance Act, 2011, section 12 empowers the central Govt. to apply the provisions of Customs relating to the levy and exemption of customs duties, drawback of duty, warehousing, offenses and penalties, confiscation, and procedures relating to offense and appeals in regards to like matters in respect of duties levied u/s. 3 of the Central Excise Act, 1949.

Now after amendment the said power is also extended to duty charged on capacity of production u/s. 3A of the Central Excise Act, 1949, in the following manner-

The provisions of Customs relating to-

(a) offences and penalties – shall apply w.e.f 8.4.2011.

(b) levy and exemption of customs duties, drawback of duty, warehousing, confiscation, and procedures relating to offense and appeals – shall apply w.r.e.f 10.5.2008

---

(12) SECTION 12F: POWER OF SEARCH AND SEIZURE

(Newly inserted w.e.f 8.4.2011 by the Finance Act, 2011]

(1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things.

(2) The provisions of the Code of Criminal Procedure, 1973 relating to search and seizure, shall, so far as may be, apply to search and seizure under this section as they apply to search and seizure under that Code.".

---

(13) SEC. 35R/(Sec.131BA of Customs): APPEAL NOT TO BE FILED IN CERTAIN CASES

[Similar to section 268A of the Income Tax Act, 1961] **Newly inserted**

(1) The Central Board of Excise and Customs may, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of this Chapter.

(2) Where, in pursuance of the orders or instructions or directions, issued under sub-section (1), the Central Excise Officer has not filed an appeal, application, revision or reference against any decision or order passed under the provisions of this Act, it shall not preclude such Central Excise Officer from filing appeal, application, revision or reference in any other case involving the same or similar issues or questions of law.

(3) Notwithstanding the fact that no appeal, application, revision or reference has been filed by the Central Excise Officer pursuant to the orders or instructions or directions issued under sub-section (1), no

person, being a party in appeal, application, revision or reference shall contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

(4) The Appellate Tribunal or court hearing such appeal, application, revision or reference shall have regard to the circumstances under which appeal, application, revision or reference was not filed by the Central Excise Officer in pursuance of the orders or instructions or directions issued under sub-section (1)

(5) Every order or instruction or direction issued by the Central Board of Excise and Customs between 20.10.2010 and 8.4.2011, fixing monetary limits for filing of appeal, application, revision or reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly."

Note: This section has been inserted by the Finance Act, 2011 w.r.e.f 20.10.2010 to nullify the Supreme Court Judgment in case of Bal Pharma Ltd. 2010 ELT 10, wherein it was held that the department cannot challenge a case if a similar case has not be challenge by it earlier.

CBEC Instruction – dated 17.8.2011: *w.e.f 1.9.2011*

(1) Monetary limits for filing appeals by the Department before CESTAT/HC and SC

Sl.No.	Appellate Forum	Monetary limit (based on Amount of duty without Interest and penalty)
1.	CESTAT	Rs.5,00,000/-
2.	HIGH COURTS	Rs.10,00,000/-
3.	SUPREME COURT	Rs.25,00,000/-

(2) **Adverse judgments relating to the following should be contested irrespective of the amount involved:**

a) Where the constitutional validity of the provisions of an Act or Rule is under challenge.

b) Where Notification/ Instruction/ Order or Circular has been held illegal or ultra vires

(3)

Issues	***Clarifications***
Whether duty involved mentioned in the Instruction dated 20.10.2010 refers to duty outstanding to be collected or the total duty demanded for deciding the threshold limit prescribed therein.	In a case where a part of the duty demanded is not disputed and is paid and the outstanding duty under dispute is less than the monetary limit prescribed by the Board, no appeal shall be filed. In other words, monetary limit shall apply on the disputed duty and not on the total duty demanded in a case.
Whether monetary limits would apply to cases of refund.	It is clarified that the monetary limits being prescribed by the Board would apply to cases of refund as well.
Whether applications being filed by the Department before office of Joint Secretary (Revision Application) would also be covered under the stipulation of monetary limits.	The limit specified herein will not be applicable to application filed before the Joint Secretary (Revision Application).

---

(14) ADVANCE RULING

The following person has been notified by Central Govt.

a) Public sector company; (applicable for excise, customs and Service tax)

b) Project Imports by resident (only for customs)

c) ***Resident Public Limited Company*** (only for Customs) [w.e.f 22.9.2011]

"public limited company" shall have the same meaning as is assigned to "public company" in clause (iv) of sub-section (1) of section 3 of the Companies Act , 1956 and shall include a private company that becomes a public company by virtue of section 43A of the said Companies Act, 1956;

"resident" shall have the same meaning as is assigned to it in clause (42) of section 2 of the Income-tax Act, 1961 in so far it applies to a company.

C: CUSTOMS

(15) e-payment of custom duty has become mandatory for importers paying duty of ₹ 1 lakh or more per transaction:-

In order to reduce the transaction cost of the importers and expedite the time taken for customs clearance, the CBEC has made e-payment of duty mandatory for importers paying duty of ₹ 1 lakh or more per transaction. However, the Accredited Importers under the Customs Accredited Client Programme will have to pay duty only through electronically without any monetary limit. w.e.f 1.4.2012.

For your information:
a) e-payment facility was introduced in 2007 as voluntary basis.
b) For this purpose a dedicated payment gateway called "ICEGATE" has been set up by board.
c) the assessee must have e-banking facilities.
d) the importer need not produce any proof of payment for the clearance of goods in case of e-payment.

---

(16) TYPES OF CUSTOMS DUTY

1) Under section 3 of CTA, 1975, for the word "*Standards of Weights and Measures Act,1976" the word "* **Legal Metrology Act, 2009" has been replaced w.e.f 1.8.2011.**

2) *Antidumping duty (Sec. 9A of CTA, 1975): new clause (1A) has been* inserted w.e.f 8.4.2011 by the Finance Act, 2011;-

Section 9A(1A):- Where the Central Govt., on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, be either of the following ways-

a) by altering the description or name or composition of the article subject to such anti-dumping duty
b) by import of such article in an unassembled or disassembled form

c) by changing the country of its origin or export or

d) in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective

it may extend the anti-dumping duty to such article originating in or exported from such country, as the case may be.

---

(17) SECTION 9AA: REFUND OF ANTI-DUMPING DUTY IN CERTAIN CASES

~~Where an importer proves to the satisfaction of Central Government that he has paid any anti-dumping duty, imposed on any article, in excess of actual margin of dumping in relation to such article, he shall be entitled to refund of such excess duty.~~

Where upon determination by an officer authorized in this behalf by the Central Government, an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed u/s. 9A(1) on any article, in excess of the actual margin of dumping in relation to such article, the Central government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty.

However, the importer will not be entitled for refund of provisional anti-dumping duty which is refundable u/s 9A. For this purpose, the Central Government may make rules authorizing the officer of Customs to dispose of such application of refund and the time limit within which such refund will granted.

---

(18) SECTION 27: REFUND OF DUTY

Amended w.e.f 8.4.2011 by the Finance Act 2011 – for sub-section (1) the following sub-section shall be substituted -

(1) Section 27 of the Customs Act, 1962 provides that any person claiming refund of duty or interest paid by him or borne by him can make an application in this regard in prescribed form to the Assistant/Deputy Commissioner of Customs, before the expiry of 1 years, from the date of payment/purchase of such duty or interest.

~~Such as application must be made-~~

- ~~In case of import made by an individual for his personal use or import by Government or by any educational, research or charitable institution or hospital, before the expiry of one year from the relevant date.~~
- ~~In any other, case before the expiry of six months from the date of payment of duty and interest if any paid on such duty.~~

(It is to be noted that if application is made before 8.4.2011 the earlier provisions will be applicable.

However, the aforesaid time limit of 1 Year shall not apply in case the duty or interest has been paid under protest.

Note- For the purpose of this sub-section, "the date of payment of duty or interest" in relation to a person, other than importer shall be construed as "the date of purchase of goods" by such person.
(1B) The period of limitation of 1 year shall be computed as under in certain cases–

i) where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court → the limitation of 1 year shall be computed from the date of such judgment, decree, order or direction.

ii) where goods are exempt from payment of duty by a special order issued u/s. 25(2) → the limitation of 1 year shall be computed from the date of issue of such order.

iii) where any duty is paid provisionally u/s. 18 - the limitation of 1 year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.

(1A) Refund application shall be accompanied by such documentary or other evidence (including the document referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or paid and the incidence of such duty or interest, has not been passed on by him to any other person.

(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Consumer Welfare Fund.

However, in the following cases the refund is granted to applicant instead of credited to Consumer Welfare Fund-

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify and such class of persons have not been passed the incidence of duty to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal , National Tax Tribunal or any Court or in any other provision of this Act or the

regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

---

(19) SECTION 46: BILL OF ENTRY

Amendment u/s. 46(1) - The importer of any goods (other than goods intended for transit or transshipment) shall present ***electronically*** a bill of entry for home consumption or warehousing in the prescribed form to the proper officer. ***However, the commissioner of customs may, where it is not feasible to make an e-filing of bill of entry, allow to present bill of entry in any other manner.***

Note- By virtue of amendments made by the Finance Act, 2011 e- filling of bill of entry shall become mandatory w.e.f 8.4.2011.

---

(20) SECTION 50: ENTRY OF GOODS FOR EXPORTATION

Amendment u/s. 50(1) **-** The exporter of any goods shall make entry thereof by presenting ***electronically*** a shipping bill (in the case of goods to be exported in a vessel or aircraft) or ***electronically*** a bill of export (in the case of goods to be exported by land) to the proper officer in the prescribed form. ***However, the commissioner of customs may, where it is not feasible to make an e-filing of shipping bill/ bill of export, allow to present it in any other manner.***

Note- By virtue of amendments made by the Finance Act, 2011 e- filling of shipping bill/ bill of export for exportation shall become mandatory w.e.f 8.4.2011.

FUNCTIONS INVOLVED IN ASSESSMENT STAGE

~~**Section 17** of the Customs Act, 1962 stipulates that, after Bill of Entry or Shipping Bill has been presented, the proper officer may examine and test the goods. After such examination and testing, the proper officer will assess the duty leviable on such goods.~~

~~**Types of appraisements**: There are two types of appraisement systems given under section 17 -~~

~~**(a) First appraisement system or First check procedure :** This system/procedure is normally resorted to when the declaration made in the Bill of Entry or Shipping Bill is inadequate to correctly determine the tariff nomenclature of the goods. Under this system/procedure, the goods are first examined and the assessment is made on the basis of the documents presented along with the Shipping Bill or Bill of Entry. Under Section 17(3), the proper officer is empowered to call for such additional information or documents as are necessary for a proper assessment of the goods. However, if the documents and information so produced are inadequate, the goods are physically examined. In certain cases the goods are subjected to chemical or other tests and representative samples are drawn from the consignment for test purposes. In such cases the assessment can be finalized only on receipt of the test results. This is also known as **'Control through physical means'.**~~

~~**(b) Second Appraisement system or Second check procedure:** This system/procedure is resorted to when the information and documents furnished by the importer is adequate to determine the correct tariff nomenclature, tariff classification and valuation of goods for the purposes of assessment. Under this system/procedure, the physical examination of the goods or their weighment or testing is only a confirmatory check. Such an examination is carried out after assessment and collection of duty.~~

~~For the purpose of assessing duty, the proper officer may require the importer, exporter or any other person to produce any contract, brokers' note, policy of insurance, catalogue or other document whereby the duty leviable on imported~~

~~goods or export goods may be ascertained and thereafter the importer, exporter or such other person will produce such document and furnish such information. This is also known as **'Control through documents'.**~~
~~**Assessment to be completed within 15 days**: Where any assessment done is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concession of duty availed consequent to any notification therefore under this Act, and the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within **15** days from the date of assessment of the bill of entry or the shipping bill.~~

(21) Section 2(2) – Assessment includes provisional assessment, ***Self- assessment*[1]*,*** re-assessment and any assessment in which the duty assessed is nil.

[1]-definition of Assessment has been amended by the Finance Act, 2011 w.e.f 8.4.2011 to include self-assessment.

---

(22) SECTION 17: ASSESSMENT OF DUTY

The earlier section has been substituted by the Finance Act, 2011 to provide legal backing for self – assessment of import/export duty by the importer/exporter.

(1) An importer entering any imported goods u/s. 46, or an exporter entering any export goods u/s. 50, shall, save as otherwise provided in section 85 (i.,e stores allowed to be warehouse without assessment of duty), self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Re-assessment- Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within 15 days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(6) Where re-assessment has not been done or a speaking order has not been passed on re- assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed. *Consequential amendments has been made by inserting clause (d) to section 157(2) to empowered CBEC to prescribe regulation for specifying the manner of Audit.* **"On-site Post Clearance**

Audit at the Premises of Importers and Exporters Regulations, 2011" has been introduced w.e.f 4.10.2011 for this regards.

Explanation: It is clarified that prior to 8.4.2011 the earlier provisions shall be applicable.

---

(23) SECTION 18: PROVISIONAL ASSESSMENT OF DUTY

~~**(1)** In the following circumstances, the proper officer may direct that the duty leviable on such goods may be assessed provisionally -~~

~~(a) If the importer or exporter is unable to produce any document or furnish any information necessary for assessment of duty on imported goods or export goods, to the satisfaction of proper officer; or~~

~~(b) If the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or~~

~~(c) If the proper officer deems it necessary to make further enquiries for assessment of duty despite the production of all the documents and furnishing of full information by the importer or the exporter;~~

~~**However**, the importer/exporter is required to furnish such security as the proper officer deems fit for the payment of the deficiency between the duty finally assessed and the duty provisionally assessed.~~

w.e.f 8.4.2011, the following sub-section shall be substituted by the Finance Act, 2011-

(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46,—

i) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

ii) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

iii) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

iv) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,

the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed and the duty provisionally assessed.";

(2) When the duty leviable on such goods is assessed finally or ***reassessed by the proper officer*** in accordance with the provisions of this Act, then -

(a) If the goods are cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed ***or re-assessed, as the case may be***. In case the amount so paid falls short or is in excess of duty finally assessed ***or re-assessed, as the case may be***, the importer or the exporter of the goods shall pay the deficiency or is entitled to a refund.

(b) If the goods are warehoused and the duty finally assessed ***or re-assessed, as the case may be***, is in excess of the provisional duty, the customs officer may require the importer to execute a bond binding himself in a sum equal to twice the amount of the excess duty.

(3) The importer or exporter shall be liable to pay **interest,** on any amount payable to the Central Government, consequent to the final assessment order ***or re-assessment order***, at the rate **of ~~13% p.a.~~ 18% p.a** from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) If any refundable amount is not refunded within 3 months from the date of assessment of duty finally or ***re-assessment of duty, as the case may be***, there shall be paid an ***interest*** on such ***un refunded amount*** at rate of 6% p.a. till the date of refund of such amount.

(5) The amount of duty refundable and the interest shall instead of being credited to the Consumer welfare Fund, be paid to the importer or the exporter, if such amount is relatable to –

- the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
- the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- the export duty as specified in section 26;
- drawback of duty payable under sections 74 and 75.

Circular No. 40/2011 – Customs, 9/9/2011: Voluntary payment of custom duty

An importer or exporter can be allowed to pay customs duties voluntarily in the period intervening provisional assessment and final assessment. Whenever any importer or exporter intimates to the proper officer in writing that he desires to pay voluntarily certain amount of duty of customs, at any time before finalization of the provisional assessment, the following points must be noted –

1. Such duty should be paid along with interest on the amount of duty so being paid, at the rate fixed by the Central Government under section 28AA of the Customs Act, 1962, from the first day of the month in which the duty is provisionally assessed till the date of payment thereof;
2. The terms and conditions of the bond and the amount of security of surety furnished at the time of provisional assessment shall remain unchanged; and
3. No refund of duty will be granted till the assessment is finalized.

Benefit: Wherever the importer or exporter pays any amount of duty before finalisation of assessment, he shall not incur interest on the amount of duty so paid.

---

(24) DUTY DRAWBACK

Section 75: One of the conditions to avail duty drawback is Sale proceeds in respect of drawback goods should be received in India within the time allowed under FEMA. Otherwise drawback shall be disallowed.

However, by virtue of amendments made by the Finance Act, 2011, now Central Govt. can allow drawback in certain circumstances even if export remittances are not received within the time allowed under FEMA. [w.e.f 8.4.2011]

Section 76: prohibition of drawback in certain cases

No drawback shall be allowed if the goods exported were imported into India from third countries and exported to Nepal." [Notification No. 13/2011 - Customs (N.T.), New Delhi, the 24/2/2011]

No draw back shall be allowed in rule 3, rule 6 and rule 7 in case the goods falling under heading as below -

0401- milk and cream, not concentrated nor containing added sugar or other sweetening matter

0402- milk and cream, concentrated or containing added sugar or other sweetening matter

0403 - butter milk, curdled milk and cream, Yogurt, kephir and other fermented or Acidified milk and cream, whether or Not concentrated or containing added Sugar or other sweetening matter or Flavoured or containing added fruit, Nuts or cocoa

0404- whey, whether or not concentrated or Containing added sugar or other Sweetening matter; products Consisting of natural milk constituents, Whether or not containing added sugar Or other sweetening matter, not elsewhere specified or included.

0405 - butter and other fats and oils derived From milk; dairy spreads

0406 - cheese and curd

1006: rice

3501- casein, caseinates and other casein derivatives; Casein glues

~~2523: portland cement, aluminous cement, Slag cement, supersulphate cement and Similar hydraulic cements, whether or Not coloured or in the form of clinkers~~

~~5205- cotton yarn (other than sewing thread), Containing 85% or more by weight of cotton, not Put up for retail sale~~

~~5206- cotton yarn (other than sewing thread), Containing less than 85% by weight of cotton, not Put up for retail sale~~

~~5207 - cotton yarn (other than sewing thread) put up for Retail sale~~
[Notification No. 9 / 2011 - Customs (N.T.), New Delhi, the 10th February, 2011]

SEARCH & SEIZURE

(25) Provisional release of goods, documents and things seized pending adjudication [Section 110A]

Any goods, documents or things seized u/s. 110, may, pending the order of the ~~adjudicating officer~~ ***adjudicating authority***, be released, to the owner on taking a bond from him in the proper form with such security and conditions as the ~~Commissioner of Customs~~ ***adjudicating authority*** may require.

Issue of show cause notice before confiscation of goods, etc [Section 124]

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person –

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of ~~a Deputy Commissioner of Customs~~ ***Assistant Commissioner of Customs***, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice or the representation may, at the request of the person concerned be oral.

Note- Before amendments made by the Finance Act, 2011 this SCN can be issued by Deputy comm. or above rank officer and not by Asst. Comm. Now, it can be issued by Asst. Comm. also or above rank of

---

MISCELLANEOUS AMENDMENTS

(26) SECTION 3: CLASSES OF OFFICERS OF CUSTOMS.

(a) Chief Commissioners of Customs;
(b) Commissioners of Customs;
(c) Commissioners of Customs (Appeals);
(cc) Joint Commissioners of Customs;
(d) Deputy Commissioners of Customs;
(e) Assistant Commissioners of Customs or ~~Deputy Commissioner of Customs~~[1]
(f) such other class of officers of customs as may be appointed for the purposes of this Act.

[1](Finance Act,2011 has omitted the word w.e.f 8.4.2011)

---

(27) SECTION 150: PROCEDURE FOR SALE OF GOODS AND APPLICATION OF SALE PROCEEDS

Where any goods not being confiscated goods are to be sold under any provisions of this Act, the sale proceeds shall be paid to the owner of the goods after making payment in the following order-

(a) selling expenses

(b) freight and other charges payable in respect of goods sold.

(c) duty on the goods sold,

(d) charges in respect of the goods sold due to the person having the custody of the goods,

(e) any amount due from the owner of the goods to the Central Government under the provisions of this Act or any other law relating to customs,

Provided that where it is not possible to pay the balance of sale proceeds, if any, to the owner of the goods within a period of 6 months from the date of sale of such goods or such further period as the Commissioner of Customs may allow, such balance of sale proceeds shall be paid to the Central Government.[inserted w.e.f 8.4.2011 by the Finance Act, 2011]

---

(28) SECTION 151A: INSTRUCTIONS TO OFFICERS OF CUSTOMS

The Board may, if it considers it necessary or expedient so to do for the purpose of (1) uniformity in the classification of goods or (2) with respect to the levy of duty thereon, ***or (3) for the implementation of any other provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods*** issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued -

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.

---

(29) ADJUDICATING POWER UNDER CUSTOMS [CIRCULAR NO. 24/2011-CUSTOM DATED 31/52011]

(1) Adjudicating of cases where showcause notice issued u/s. 28

Adjudicating officer	Nature of cases	Amount of duty involved
Assistant/deputy commissioner	all cases	upto 5 lakhs.
Additional/Joint commissioner	all cases	upto 50 lakhs
Customs commissioner	all cases	without limit

(2) Adjudicating of cases under Rule 16 of custom, Central excise and service tax drawback rules, 1995

Adjudicating officer	Nature of cases	Amount of drawback
Assistant/deputy commissioner of Customs	Simple demand of erroneously paid drawback	without any limit.
	cases involving collusion, willful	

	misstatement or suppression of facts etc.	upto 5 lakhs.
Additional/Joint commissioner	cases involving collusion, willful misstatement or suppression of facts etc.	without any limit

---

(3) Adjudicating of Export promotion schemes i.e., DEPB/ Advance Authorisation/DFIA/ Reward scheme etc.

Adjudicating officer	Duty incentive amount
Assistant/deputy commissioner	upto 5 lakhs.
Additional/Joint commissioner	upto 50 lakhs
Customs commissioner	without limit

(30) ON-SITE POST CLEARANCE AUDIT AT THE PREMISES OF IMPORTERS AND EXPORTERS REGULATIONS, 2011(JUST READ)

(1) They shall come into force w.e.f 4.10.2011.

(2) Definitions.- In these regulations, unless the context otherwise requires,-

(a) 'audit' means examination of bills of entry, shipping bills, invoices, packing lists, import licences, books of account, and other records of transaction relating to imported and export goods, and may include inspection of goods at the premises, if available and where necessary, drawl of samples;

(b) 'books of account' includes ledgers, day-books, cash books, account-books and other accounts whether kept in the written or printed form and data stored on a floppy, disc, tape or any other form in electro-magnetic data storage device;

(c) 'premises' includes the place at which imported or export goods and connected books of account, records of transaction and other documents are ordinarily kept by an importer or exporter, as the case may be, and his registered office or the premises indicated in his Importer Exporter Code (IEC) issued by the Ministry of Commerce and Industry and the places wherever the imported or export goods, as the case may be, are ordinarily kept;

(d) words and expressions used and not defined herein but defined in the Customs Act, 1962 shall have the same meaning respectively, assigned to them in the said Act.

3. Importers and exporters to make available relevant documents.-

(1) The importer or exporter, as the case may be, shall make available in a timely manner the books of account, records of transaction and other relevant documents maintained by him for a period of five years from the date of import or export, as the case may be, relating to imported or export goods, as the case may be, as required by the proper officer.

(2) The importer or exporter, as the case may be, shall provide true and correct information to the proper officer.

(3) The importer or exporter, as the case may be, shall render assistance to the proper officer in the discharge of his official duty and shall in no case refuse or obstruct the proper officer in discharge of official duty.

4. Manner of conducting audit.-
(1) The proper officer shall give not less than fifteen days advance notice to the importer or exporter, as the case may be, to conduct audit.

(2) The proper officer shall, where considered necessary,

(i) obtain from the importer or exporter, as the case may be, prior information relating to imported or export goods, as the case may be, before conducting audit;

(ii) visit the premises to gather relevant information relating to imported or export goods, as the case may be.

(3) The proper officer shall conduct the audit in the premises of the importer or exporter, as the case may be.

(4) The proper officer shall inform the importer or exporter, as the case may be, of the objections, if any, before preparing the draft audit report to provide him an opportunity to offer clarifications with supporting documents.

(5) Where the importer or exporter as the case may be, is in agreement with the audit findings, in part or in full, he may make voluntary payments of duty due, if any, and the proper officer shall record the same in the audit report.

(6) The proper officer may, where necessary, inspect the imported or export goods, where such goods are available during the course of audit.

(7) The proper officer may take samples of imported or export goods in the presence of the importer or exporter as the case may be and copy of relevant documents to verify the correctness of assessment of duty.

5. Penalty.- Any importer or exporter, who contravenes any provision of these regulations or abets such contravention or fails to comply with any provision of these regulations with which it was his duty to comply, shall be liable to a penalty which may extend to fifty thousand rupees.

RECENT JUDICIAL PRONOUNCEMENTS

[Most of the Case Laws are already given in the study material. Students must put equal stress on those case Laws especially case Laws of 2010 and 2011 given in the study material. These are the additional case studies to be studies]

A: CENTRAL EXCISE

Basic concepts (Manufacture/ Movable/Marketable)

(1) GTC Industries Ltd. 2011: A roll of aluminum foil was cut as a shell for cigarettes and packed with fixed number of cigarettes to protect cigarettes from moisture. The department argues that since the nature, form and purpose of foil were changed, therefore the process of cutting and embossing aluminum foil amounted to manufacture.

The Bombay High Court ruled that-

(a) Cutting of foil in size is a process and not every process is amount to manufacture, only the process which produces distinct and identifiable commodity and renders marketable value can be called manufacture.

(b) It was held that cutting and embossing did not transform aluminum foil into distinct and identifiable product. It did not change the nature and substance of foil. The said process did not render any marketable value, only made it usable for packing.

Hence, such process does not amount to manufacture.

(2) Usha Rectifier Corpn. (I) Ltd. (S.C.): The appellant manufactured certain testing equipments to test their final products and stated the same in their balance sheet and also in the Director's reports. Later on, the assessee claimed that testing equipment were assembled in the factory for research and development purposes and since the research was unsuccessful the same were dismantled. Hence, it would not amount to manufacture. Further, the assessee also stated that the project was undertaken to avoid importing of such equipment with a view to save foreign exchange.

It was held that when assessee had themselves made admission regarding the development of testing equipments in their own Balance Sheet and directors report, it could not make contrary claims later on. Further when the assessee stated that such equipments were developed to avoid importing of such equipments with a view to save foreign exchange it was confirmed that such equipments were saleable and marketable. Hence, excise duty is chargeable on such equipments.

(3) Saraswati Sugar Mills [2011] (SC):
Iron and Steel Structures used to support the plant cannot be regarded as components of the plant because it is not an integral part of plant it merely gives support to the plant. Therefore, iron and steel supports structures are not 'components' and are not capital goods. Hence, liable to excise duty and no exemption under Notification No. 67/95 shall be available.

Note: Notification No. 67/95: Provides exemption to pay excise duty on capital goods (as defined in rule 2(a) of the CENVAT Credit rules, 2004) manufactured in a factory and used in the factory of production from excise duty.

(4) Dabur India Ltd. [2011] (H.P): Samples of finished products retained in the factory pending investigation of complaints (known as Control samples) are not liable to duty, because, they cannot be said to have been removed from the factory within the meaning of Rule 5 of the Central Excise Rules, 2002.

(5) Nicholas Piramal India Ltd. 2010 (S.C.): Product with the shelf life of 2 to 3 days was marketable and hence, excisable. [Refer Page No. 15 of current study mat or Nov-11 case law sheets]

(6) Medley Pharmaceuticals Ltd. 2011 (S.C.): Physician samples were excisable goods and were liable to excise duty. [Refer Page No. 15 current study mat or Nov-11 case law sheets]

Classification

(7) Sundstrand Forms P. Ltd. [2011] (SC): Carbonless paper is a chemically treated paper used for producing impression of the writing or manuscript of the original paper on the other paper sheet. It is classified under Tariff Heading 48.16 as 'self-copying paper, other copying or transfer papers' and not under the Heading 48.20 "Registers and other stationary items" or under 49.01 "Printer Matter" .

(8) Gurukripa Resins Pvt. Ltd. [2011] (SC)

The final product (Turpentine Oil) was manufactured without the aid of power. However, the processing one of raw material (water) used in or in relation to manufacture of Turpentine Oil was carried on with the aid of power. Manufactured of Turpentine Oil without the aid of power was subject to NIL rate of duty and manufactured with the aid of power was subject to 16% rate of duty.

Held that the processing of raw material (water) with the aid of electric motors was so integrally connected to the ultimate manufacture of 'Turpentine Oil' that without such activity the turpentine oil cannot be manufactured, therefore, final product are also considered as manufactured with the aid of power and hence, liable to 16% duty.

(9) Kitply Industries Ltd. [2011] (SC): Laminated panels of particle and medium density fiber boards, being "laminated" in nature, are classifiable under Heading 4408.90, since the heading 4408.90 covers "plywood, veneered panels and similar laminated wood", it means that all kinds of laminated wood, whether plywood or others, are covered.

Heading 4406 covers "Particle Board and similar board of wood" and Heading 4408.90 covers laminated boards of plywood or other similar nature. In this case it was laminated panels. Further, as per Rule 3 (c) also we consider heading of the last numerical order.

Valuation

(10) Electronics & Controls Power Systems Pvt. Ltd. [2011] (SC): Assessee, a manufacturer of UPS system, supplied bought-out batteries as an optional item along with UPS system. Held that, since battery is an essential and integral part of UPS system, therefore, the value of bought-out batteries is includible in value of UPS system.

(11) Royal Enfield [2011] (SC): Packing of motor cycle for removing it from the factory to the depot is to avoid scratch and breakage to motor cycles, which is necessary for putting the motor cycles in saleable condition. Therefore, such packing charges should be includable in the assessable value whether charged separately or not.

CENVAT Credit

(12) Andhra Paper Mill Ltd. [2011] (AP): The chlorine gas was received in cylinders by paying charges for entire cylinder and used for manufacture of paper. After use, a small portion thereof was left in cylinder which was returned to supplier. The assessee availed full CENVAT credit, whereas the department is of the view that since a portion of chlorine was not used in the factory therefore, CENVAT credit shall not be allowed with respect to such portion.

It was held that**,** the unutilized portion of the chlorine gas was actually a processing loss and it not possible consume the entire gas in the cylinder. Therefore, CENVAT credit shall be allowed fully as the duty was paid on entire amount of gas.

(13)Tata Advanced Materials Ltd. [2011]: When capital goods on which CENVAT credit was availed for excise duty paid on it and later on destroyed of which the assessee received insurance claim including excise duty, then there is no question of reversal of CENVAT credit.

It was held that merely because the Insurance Company had paid the assessee the value of goods including the excise duty, it would not render the availment of the CENVAT credit wrong or irregular. It was not a case of double benefit as contended by the Department. Hence, in absence of any specific provisions there is no right of department to seek reversal of credit.

(14) Ecof Industries Pvt. Ltd. 2011: The head office (registered as ISD) distributed CENVAT credit on service tax paid for service used in its Cutack Branch to its Malur branch. The department argued that since the service tax was paid in respect of services obtained by Cuttack unit, the credit of the said service tax paid could not be utilized by Malur unit.

The Karnataka High Court Considering rules 2(k), 2(l), 2(m), 3(1) and 7 of the CENVAT Credit Rules, 2004, opined that there is no such prohibition prescribed under law. Hence, the argument of department is not sustainable.

(15) Prime Health Care Products 2011: The assessee manufactures toothpaste and purchase toothbrush from market and pack it along with toothpaste and sold it as combo offer. The assessee claimed CENVAT credit on excise duty paid on toothbrush. The Department denied the claim of the assessee on the ground that the tooth brush is not an input for the manufacture of the tooth paste and also the cost of tooth brush was not added in the M.R.P. of the combo pack.

The Gujarat High Court observed that the process of packing and re-packing tooth-brush and tooth paste in a unit container would fall within the ambit of "manufacture" as per section 2(f)(iii) of the Central Excise Act, 1944. There was no dispute about the fact that on tooth brush, excise duty had been paid. The tooth brush was put in the packet along with the tooth paste and no extra amount was recovered from the consumer on the tooth brush.

Further, as per rule 2(k) of CENVAT Credit Rules, 2004 "input" also included accessories of the final products cleared along with final product, the value of which is included in the value of the final product.

In the given case, since no extra amount was recovered from the customer on the tooth brush, it implies that the value of the tooth brush was included in the value of tooth paste i.e, final product. Hence, the contention of the department is not in accordance with the law.

(16) Sterling Gelatin 2011 (Guj.): From a manufacturing process a by-product is emerged which is exempted from excise duty. However, the main product is dutiable. The department is of the view that since input was used commonly for exempted goods and dutiable goods, therefore Rule 6 shall be applicable.

It was held that, the manufacturer did not intend to manufacture the by-product and as such no quantity of input was specifically used for the manufacture of such by product. Further, by paying excise duty on main product, the duty paid on input was automatically recovered. Hence, Rule ^ not applicable in the given case even if by product is exempted. The department cannot ask the manufacturer to pay 5% of the value of exempted goods by applying Rule 6.

(17) Ind-Swift Laboratories Ltd. 2011 (S.C.):- Interest under rule 14 is charged happening of any of the three specified circumstances –CENVAT credit (i) wrongly taken or (ii) utilized wrongly or (iii) erroneously refunded. Therefore, the earlier judgement of P&H high court that interest cannot be charged in case of wrong availment of credit has been set aside by the Apex court.

SSI Exemption

(18) Convertech Equipment Pvt. Ltd. [2011] (SC): When trade mark is **assigned** with all rights to the assessee by a foreign company, the assessee becomes the owner of such Trade Mark in India. Hence SSI exemption cannot be withdrawn.

(19) Minimax Industries [2011] (Del.): Initially, all the three brothers were doing the family business together; however, later on two brothers started separate business in partnership in the same line using same name i.e. "Minimax". The third brother continues the sole proprietary concern using the same name "Minimax". It was held that, the name "Minimax" belongs to both entitles. Therefore, no one use the brand name of other. Hence, SSI exemption shall be available.

B: COMMON TOPICS UNDER EXCISE & CUSTOMS

[Show Cause Notice, Penalty, Appeals & Revisions, Refund]

(20) Hans Steel Rolling Mill 2011 (265) E.L.T. 321 (S.C.)
The Honble Supreme Court stated that compounded levy scheme is a separate scheme from the normal scheme for collection of excise duty on goods manufactured. Rules under compounded levy scheme provide for the method, time and manner of payment of duty, interest and penalty and as such a comprehensive code by itself. The general provisions of the Act are therefore excluded in case of Compounded Levy scheme.

The Court further stated that applying one scheme of tax administration to a different scheme is inappropriate and would disturb smooth functioning of such unique scheme. Hence, it held that the time-limit under section 11A of the Central Excise Act, 1944 is not applicable to recovery of dues under compounded levy scheme.

(21) Techno Rubber Industries Pvt. Ltd. 2011: The assessee cleared goods by paying higher excise duty by mistake which the buyer refused to pay in the month of March. The customer raised a debit note in his name in the month of June of the same year.

The assessee claimed refund on the basis of debit note raised by the buyer in his name in the month of June to demonstrate that his customer had not paid the excess duty to him. The Department contented that since the debit note was issued in the month of June and not March, it could not be the basis for refund.

The Karnataka High Court pronounced that once it is evident that the Department has received excess duty, they must refund it to the person who has paid the excess duty.

In the given case, when the buyer had refused to pay excess duty claimed and had raised a debit note, it is clear that the assessee had not received that excess duty which he had paid to the Department. Therefore, the Department is bound to refund excess duty to the assessee.

(22) Grasim Industries Ltd. [2011] (SC): In case of erroneous refund, the department has the power u/s. 11A to issue show cause notice and recovery of it. There is no question of filing any appeal for recovery by the department. Hence, the argument of the assessee is not legally valid

(23) Prudential Spinners Ltd. [2011] (SC): Penalty u/s. 11AC is Fixed cannot be reduced.

Where it is established that short/non- payment of duty was due to fraud etc. then penalty u/s. 11AC is levied at the prescribed quantum and there is no option for lesser penalty even if , there is delay in payment of duty by merely one or two days; and the duty has been paid before the issue of SCN.

(24) Sukfdeo Singh [2011] (All.): Application for condonation of delay in filing appeal before Commissioner (Appeals) can be ORAL also.

Where written application for condonation of delay in filing appeal is not filed with the appeal, the Commissioner (Appeals) should give opportunity to the appellant to move such application. It cannot outright reject the appeal.

(25) RDC Concrete (India) p. Ltd. [2011] 270 (SC):
The same arguments and evidences that were put in the application of Rectification of Mistake were already put forth in appeal proceedings and the same were rejected earlier by the CESTAT. Now, while rectifying mistake apparent record the CESTAT considered the earlier argument and evidence which was rejected earlier by it and passed a reverse conclusion as provided earlier.

The Apex Court clarify that it is a well established law that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning. Hence, re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record.

In the given case, the Apex Court ruled that arguments not accepted earlier during disposal of appeal cannot be accepted while hearing rectification of mistake application. Hence, by doing so the CESTAT had reconsidered its legal view as it concluded differently by accepting the arguments which it had rejected earlier, which is out of purview of the power of CESTAT u/s. 35C(2). It cannot re-appreciate the evidence and reconsider its legal view taken earlier.

(26) Gujchem Distillers 2011: The Bombay high court held that CESTAT cannot dispose appeal on a totally new ground which was not raised before adjudicating authority. In such a case it should remand the matter back to the adjudicating authority.

(27) Miscellaneous

(1) The writ petition/ appeal can only be filed by the aggrieved party. [UPSRTC [2011] (SC)]

(2) The benefit of Exemption of import duty cannot be given to the smuggled goods. [M. Ambalal & Co. 2010 (SC) [For detail refer Nov 11 case law sheets or current study mat]

(3) Offences under Central Excise & Customs are non-cognizable (i.e. the Department cannot arrest without warrant) and bailable [Om Prakash [2011] (SC)]

(4) Concession given under Project import cannot be denied when imported goods are lost in sea before reaching the project site. [Lanco Kondapalli Power Pvt. Ltd. [2011] (SC)]

(5) Chartered Accountant's certificate alone is not sufficient evidence to rule out the unjust enrichment [BPL Ltd. 2010 (Mad.)] [For detail refer Nov 11 case law sheets or current study mat]

C: CUSTOMS

BASIC CONCEPTS

(28) Tirupati Udyog Ltd. 2011: Customs duty can be levied only on goods imported into or exported beyond the territorial waters of India. Since both the SEZ unit and the DTA unit are located within the territorial waters of India. Hence, clearance of goods from DTA to SEZ shall not be considered as export and hence not liable to export duty.

SEZ Act also does not contain any provision for levy and collection of export duty for goods supplied by a DTA unit to a unit in a Special Economic Zone for its authorised operations. In the absence of specific provisions in the SEZ Act export duty cannot be levied on the DTA supplier by implication.

VALUATION

(29) Living Media India Ltd. [2011] (SC): The assessee imported pre-recorded Audio CDs in India from its holding company and it was liable to pay royalty on the sale of imported recorded CD. Held, that since royalty is paid as a condition of sale therefore it must included in the assessable value.

(30) Aggarwal Industries Ltd. [2011] (SC): The assessee imported goods as per the contract price and does not paid anything extra and the contract price is genuine. It was held merely because the price of the goods rises on the date of contract the transaction value could not be rejected

(31) Siddachalam Exports Pvt. Ltd. [2011] (SC): The exporter over valued the price of the exported goods in order to claim higher drawback. It was held that, the department must first applied Rule 3 of Customs Export Valuation Rules, 2007 and not Rule 6.

SEARCH & SEIZURE

(32) Textoplast Industries (2011): The adjudicating authority can imposed penalty u/s. 112 of the Customs Act on the partners as well as on the partnership firm. In the given case the Bombay high court applied the ruling of Apex court in the case of Standard Chartered Bank where in it was held that section 140 which gives power for criminal proceedings on the company/firm as well as on director, Manger, partner or other responsible officer , is also applicable for adjudication proceedings.

Contrary ruling: - Mohammed Farookh Mohammed Ghani 2010 (Guj.): Since partner and partnership firms are not separate entity like company and shareholders, therefore, imposing of penalty on firm is also amounts to levy of penalty on partner. Therefore, there is no question of penalizing the partners separately for the same contravention.

(33) S.J Fabrics Pvt. Ltd. 2011 (Cal.): It was held that although there is no time limit for issuance of order u/s. 110 but the goods cannot indefinitely be detained without any order u/s. 110. Therefore, it should ordinarily be issued immediately after interception and detention of the goods.

By analyzing section 110 the court opined that when any goods are seized under this section and for this notice u/s. 124 is not issued within 6 months (or further extended to 6 months by commissioner) of the seizure of the goods, the goods must be returned to the assessee.

(34) Manish Lalit Kumar Bavishi 2011 (Bom.): Held that custom officer is bound to give copies of seized document to the assessee, when the assessee asks for. By applying the section 110(4) the Honorable High court held that it is upon the choice of the assessee to ask or not to ask for copies of the seized document but this choice is not for revenue officer. If the assessee asks for copies of the seized documents they are bound to give it.

(35) O.T Enasu 2011 (ker.): The High Court opined that the essential requirement to levy penalty u/s. 112(a)(ii) is **"duty sought to be evaded".** There is difference between the term "Seeking to evade" and "sough to be evade". "seeking to evade" refers a mental thinking to evade duty but there is no such attempt is taken for evasion of duty, whereas "sough to evade" refers a conscious attempt to evade duty. It was held that, penalty cannot be levied in case of "seeking to evade" rather penalty can only be levied in case of "duty sought to be evade".

D: SERVICE TAX

(36) SIM cards are not goods rather they are part of telecommunication service. Hence, liable to service tax under "Telecommunication service". This judgement of High court has been reconfirmed by the Apex Court in the case of **Idea Mobile Communications Ltd. (2011)**

(37) <u>Lincolin Helios (India) Ltd. 2011 (Kar.)</u>: In the given case, the assessee charged on customer for the services rendered as well as the value of the manufactured products and pay excise duty on whole value but did not pay service tax on the basis of a argument that there could not be levy of tax under two parliamentary legistations.

It was held that, Excise duty and service tax are not mutually exclusive, there is no question of double taxation as excise duty is charged on manufacture where as service tax is charged on providing service. Therefore, the assessee must pay service tax on the value of services.

(38) <u>APITCO Ltd. [2011] 23 STR J94 (SC)</u>: where grant-in-aid is received from Govt. and such grant-in-aid is utilized wholly for implementation of Govt. scheme for the benefit of public and no extra amount is received from Govt., it was held that such grant-in-aid is not a consideration for any service. Hence, not taxable.

(39) <u>Cochin International Airport Ltd. 2011</u>: Amount received by a airport for (a) Royalty for ground handling services (including passenger handling, ramp handling, cargo flight handling, etc.); (b) Garbage clearance is not taxable.

(40) <u>Metro Cash and Carry [2011] 23 STR 124 (Kar.)</u>: Royalty paid by assessee, to foreign company for use of brand name 'Metro' is taxable as 'import of service' under section 66A under 'Franchise Service'.

(41) Can appeal be filed to High Court for deciding the question relating to the taxability of service tax? The High Court has no jurisdiction in this case and the appeal lies to the Apex Court under section 35L of the Central Excise Act, 1944, which alone has exclusive jurisdiction to decide the said question.
