CENTRAL EXCISE

1

BASIC CONCEPTS

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

1. Whether the metal scrap or waste generated during the repair of his worn out machineries/parts of cement manufacturing plant by a cement manufacturer amounts to manufacture?

   Grasim Industries Ltd. v. UOI 2011 (273) E.L.T. 10 (S.C.)

   Facts of the case: The assessee was the manufacturer of the white cement. He repaired his worn out machineries/parts of the cement manufacturing plant at its workshop such as damaged roller, shafts and coupling with the help of welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams, etc. In this process of repair, M.S. scrap and Iron scrap were generated. The assessee cleared this metal scrap and waste without paying any excise duty. The Department issued a show cause notice demanding duty on the said waste contending that the process of generation of scrap and waste amounted to the manufacture in terms of section 2(f) of the Central Excise Act.

   Decision of the case: The Apex Court observed that manufacture in terms of section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient.

   However, in the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, (the end product). The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. Therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process.

   Hence, it held that the generation of metal scrap or waste during the repair of the worn out machineries/parts of cement manufacturing plant does not amount to manufacture.

2. Does a product with short shelf-life satisfy the test of marketability?

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (260) E.L.T. 338 (S.C.)

Facts of the case: In the instant case, the product had a shelf-life of 2 to 3 days. The appellant contended that since the product did not have shelf-life, it did not satisfy the test of marketability.

Decision of the case: The Supreme Court ruled that short shelf-life could not be equated with no shelf-life and would not *ipso facto* mean that it could not be marketed. A shelf-life of 2 to 3 days was sufficiently long enough for a product to be commercially marketed. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it was shown that the product had absolutely no shelf-life or the shelf-life of the product was such that it was not capable of being brought or sold during that shelf-life.

Hence, product with the shelf life of 2 to 3 days was marketable and hence, excisable.

3. Are the physician samples excisable goods in view of the fact that they are statutorily prohibited from being sold?

Medley Pharmaceuticals Ltd. v. CCE & C., Daman 2011 (263) E.L.T. 641 (S.C.)

The question which arose for consideration was whether physician samples of patent and proprietary medicines intended for distribution to medical practitioner as free samples, satisfied the test of marketability. The appellant contended that since the sale of the physician samples was prohibited under the Drugs and Cosmetics Act, 1940 and the rules made thereunder, the same could not be considered to be marketable.

Supreme Court observed that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Physician sample was capable of being sold in open market.

Moreover, the Drugs and Cosmetics Act, 1940 (Drugs Act) and the Central Excise Act, 1944 operated in different fields. The restrictions imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss. Prohibition on sale of physician samples under the Drugs Act did not have any bearing or effect on levy of excise duty.

Therefore, the Court inferred that the physician samples were excisable goods and were liable to excise duty.

Note: This case was affirmed in case of Medley Pharmaceuticals Ltd. v. Commissioner - 2011 (269) E.L.T. A20 (S.C.).

4. Whether assembling of the testing equipments for testing the final product in the factory amounts to manufacture?

Usha Rectifier Corpn. (I) Ltd. v. CCEx., New Delhi 2011 (263) E.L.T. 655 (S.C.)

Facts of the case: The appellant was a manufacturer of electronic transformers, semi-conductor devices and other electrical and electronics equipments. During the course of such manufacture, the appellant also manufactured machinery in the nature of testing equipments to test their final products.

The appellant had stated in their balance sheet that the addition to the plant and machinery included testing equipments. The said position was further substantiated in the Director's report wherein it was mentioned that during the year, the company developed a large number of testing equipments on its own.

However, the assessee contended that such items were assembled in the factory for purely research and development purposes, but research being unsuccessful, same were dismantled. Hence, it would not amount to manufacture.

The appellant further submitted that the said project was undertaken only to avoid importing of such equipment from the developed countries with a view to save foreign exchange.

Decision of the case: The Supreme Court observed that once the appellant had themselves made admission regarding the development of testing equipments in their own Balance Sheet, which was further substantiated in the Director's report, it could not make contrary submissions later on. Moreover, assessee's stand that testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange, confirmed that such equipments were saleable and marketable. Hence, the Apex Court held that duty was payable on such testing equipments.

5. Does the process of cutting and embossing aluminum foil for packing the cigarettes amount to manufacture?

CCE v. GTC Industries Ltd. 2011 (266) E.L.T. 160 (Bom.)

Facts of the case: A roll of aluminum foil was cut horizontally to make separate pieces of the foil and word 'PULL' was embossed on it. Thereafter fixed number cigarettes were wrapped in it. Aluminum foil, being a resistant to moisture, was used as a protector for the cigarettes and to keep them dry.

Revenue submitted that the process of cutting and embossing aluminum foil amounted to manufacture. Since the aluminum foil was used as a shell for cigarettes to protect them from moisture; the nature, form and purpose of foil were changed.

Decision of the case: The High Court pronounced that cutting and embossing did not transform aluminum foil into distinct and identifiable commodity. 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. There were no records to suggest that cut to shape/embossed aluminum foils used for packing cigarettes were distinct marketable commodity. Hence, process did not amount to manufacture as per section 2(f) of Central Excise Act, 1944. Only the process which produces distinct and identifiable commodity with marketable value can be called manufacture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2

CLASSIFICATION OF EXCISABLE GOODS

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

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

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

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

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

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

3

VALUATION OF EXCISABLE GOODS

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

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

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

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

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

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

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

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

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

Extensive

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

Restrictive and exhaustive

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

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

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

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

Notes:

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

   Transaction value:-

   - means the price actually paid or payable for the goods, when sold, and
   - ***includes in addition to*** *the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time,*
   - ***including, but not limited to****, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter;*
   - ***but does not include*** *the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.*

2. *It may be noted that CBEC, in view of the aforesaid judgment has clarified vide Circular No. 936/26/2010-CX. dated 27-10-2010 that pre-delivery Inspection charges and after-sale service charges collected by the dealers are to be included in the assessable value under section 4 of the Central Excise Act, 1944.*

4

CENVAT CREDIT

1. **The assessee claimed the CENVAT credit on the duty paid on capital goods which were later destroyed by fire. The Insurance Company reimbursed the amount inclusive of excise duty. Is the CENVAT credit availed by the assessee required to be reversed?**

   CCE v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.)

   Facts of the case: The assessee purchased some capital goods and paid the excise duty on it. Since, said capital goods were used in the manufacture of excisable goods, he claimed the CENVAT credit of the excise duty paid on it. However, after three years the said capital goods (which were insured) were destroyed by fire. The Insurance Company reimbursed the amount to the assessee, which included the excise duty, which the assessee had paid on the capital goods. Excise Department demanded the reversal of the CENVAT credit by the assessee on the ground that the assessee had availed a double benefit.

   Decision of the case: The High Court noted that the as per CENVAT Credit Rules, 2004, CENVAT credit taken irregularly stands cancelled and CENVAT credit utilised irregularly has to be paid for.

   In the instant case, the Insurance Company, in terms of the policy, had compensated the assessee. The High Court observed that merely because the Insurance Company had paid the assessee the value of goods including the excise duty paid, 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.

   The High Court therefore answered the substantial question of law in favour of the assessee and against the Revenue.

2. **Head office distributed the CENVAT credit of the service tax paid on the services received to its various units. Can the CENVAT credit be denied to a particular unit on the ground that input services were obtained by another unit belonging to the same manufacturer?**

   CCE v. Ecof Industries Pvt. Ltd. 2011 (271) E.L.T. 58 (Kar.)

   Facts of the case: The assessee was engaged in manufacturer of excisable goods in Malur. Its head office, located in Chennai, was registered as 'Input Service Distributor'.

The head office had paid service tax for services received by the head office and its units from various service providers. Thereafter, it had distributed the credit of service tax to its various units including the unit at Malur. The assessee availed and utilized the said credit for payment of central excise duty on their final products.

Revenue contended 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.

Decision of the case: Considering rules 2(k), 2(l), 2(m), 3(1) and 7 of the CENVAT Credit Rules, 2004, the High Court elucidated that availment of credit of the service tax paid on the input service at a particular unit by another unit is not prohibited under law. However, the head office is expected to register itself as an input service distributor and thereafter, is entitled to distribute the credit of such input services in the manner prescribed under law. The High Court therefore held that Malur unit had rightly availed the CENVAT credit of the service tax paid by its head office.

3. In case of combo-pack of bought out tooth brush sold alongwith tooth paste manufactured by assessee; is tooth brush eligible as input under the CENVAT Credit Rules, 2004?

CCus. v. Prime Health Care Products 2011 (272) E.L.T. 54 (Guj.)

Facts of the case: The assessee was engaged in the manufacture of tooth paste. It was sold as a combo pack of tooth paste and a bought out tooth brush. The assessee availed CENVAT credit of central excise duty paid on the tooth brush. Revenue contended that the tooth brush was not an input for the manufacture of the tooth paste and the cost of tooth brush was not added in the M.R.P. of the combo pack and hence, the assessee had availed CENVAT credit of duty paid on tooth brush in contravention of the provisions of the CENVAT Credit Rules, 2004.

Decision of the case: The High Court noted that the process of packing and re-packing the input, that was, toothbrush 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].

Further, the word "input" was defined in rule 2(k) of the CENVAT Credit Rules, 2004 which also included accessories of the final products cleared along with final product. There was no dispute about the fact that on toothbrush, excise duty had been paid. The toothbrush was put in the packet along with the tooth paste and *no extra amount was recovered from the consumer on the toothbrush**.

Considering the definition given in the rules of "input" and the provisions contained in rule 3, the High Court upheld the Tribunal's decision that the credit was admissible in the case of the assessee.

Note: *The definition of inputs under rule 2(k) has been substituted vide Notification No. 3/2011-C.E. (N.T.) dated 1-3-2011.*

The erstwhile definition, inter alia, stipulated that input includes accessories of the final products cleared along with the final product. As per the new definition, input still includes accessories of the final products cleared along with the final product. However, it has also added the condition that the value of such accessory should be included in the value of the final product.

In the aforesaid judgment, since no extra amount was recovered from the customer on the toothbrush, it implies that the value of the toothbrush was included in the value of the final product i.e. toothpaste. Hence, the judgment holds good as per the provisions of the new definition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5

DEMAND, ADJUDICATION AND OFFENCES

1. Whether time-limit under section 11A of the Central Excise Act, 1944 is applicable to recovery of dues under compounded levy scheme?

   Hans Steel Rolling Mill v. CCEx., Chandigarh 2011 (265) E.L.T. 321 (S.C.)

   The Apex Court elucidated 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 stipulate method, time and manner of payment of duty, interest and penalty. Since the compounded levy scheme is comprehensive scheme in itself, general provisions of the Central Excise Act and rules are excluded from this scheme.

   The Supreme Court affirmed that importing 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.

Section 11A of the Central Excise Act, 1944

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

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

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

   Issue: The question which arose before the High Court in the instant case is whether non-disclosure as regards manufacture of Denatured Ethly Alcohol amounts to suppression of material facts thereby attracting the larger period of limitation under section 11A.

   Decision of the case: The Tribunal noted that denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP)

Act. Thus, addition of DEP to ENA to make the same unfit for human consumption was a statutory requirement. Hence, failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement. Further, as similarly situated assesses were not paying duty on denatured ethyl alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

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

6

REFUND

Section 11BB of the Central Excise Act, 1944

1. **What is the date of commencement of the period for the purpose of computing interest on delayed refunds under section 11BB- the date of receipt of application for refund or date on which the order of refund is made?**

   Ranbaxy Laboratories Ltd. v. UOI 2011 (273) E.L.T. 3 (SC)

   Decision of the case: The Apex Court observed that interest under section 11BB becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of section 11BB that can be arrived at is that interest under the said section becomes payable on the expiry of a period of three months from the date of receipt of the application under section 11B(1).

   The Apex Court further noted that Explanation appearing below the proviso to section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner/Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under section 11B(2). It is apparent that the explanation does not bearing or connection with the date from which interest under section 11BB becomes payable and does not postpone the said date.

   In the light of the aforesaid discussion, the Supreme Court elucidated that section 11BB of the Central Excise Act, 1944 comes into play only after an order for refund has been made under section 11B. However, the liability of the revenue to pay interest under section 11BB commences from the date of expiry of three months from the date of receipt of application for refund under section 11B(1) and not on the expiry of the said period from the date on which order of refund is made.

   Note: Section 11BB provides as under:

   If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-

section (1) of that section, there shall be paid to that applicant interest at such rate, not below five percent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :

Where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty. [Proviso]

Explanation - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal National Tax Tribunal or any court against an order of the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.

2. Can the excess duty paid by the seller be refunded on the basis of the debit note issued by the buyer?

CCE v. Techno Rubber Industries Pvt Ltd. 2011 (272) E.L.T. 191 (Kar.)

Facts of the case: The assessee cleared the goods paying higher rate of excise duty in the month of March, although the rate of duty on the said goods had been reduced in the budget of the same financial year. However, the buyer refused to pay the higher duty which the assessee had paid by mistake. The customer raised a debit note in his name in the month of June of the same year. The assessee applied for the refund of excess excise duty paid. Revenue rejected his claim on the ground that incidence of the duty had been passed by him to the buyer.

While claiming refund, the assessee relied on the 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 adjudicating authority argued that since the debit note was issued in the month of June and not March, it could not be the basis for refund.

Decision of the case: The High Court elucidated that once it is admitted that the Department has received excess duty, they are bound to refund it to the person who has paid the excess duty. If the buyer of the goods has paid that excess duty, he would have been entitled to the said refund.

In the instant case, when the buyer had refused to pay excess duty claimed and had raised a debit note, the only inference to be drawn was that the assessee had not received that excess duty which he had paid to the Department. Consequently, Department was bound to refund to the assessee the excess duty calculated. Hence, the substantial question of law raised was answered in favour of the assessee and against the revenue.

Section 11B of the Central Excise Act, 1944

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

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

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

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

7

APPEALS

1. **Can re-appreciation of evidence by CESTAT be considered to be rectification of mistake apparent on record under section 35C(2) of the Central Excise Act, 1944?**

   CCE v. RDC Concrete (India) Pvt. Ltd. 2011 (270) E.L.T. 625 (S.C.)

   Decision of the case: In the instant case, the arguments not accepted at an earlier point of time were accepted by the CESTAT while hearing the application for rectification of mistake and it arrived at a conclusion different from earlier one.

   The Apex Court elucidated that re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. It is a well settled 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.

   The Supreme Court observed that arguments not accepted earlier during disposal of appeal cannot be accepted while hearing rectification of mistake application. Submissions made before Tribunal while arguing rectification of mistake application had also been advanced before Tribunal when appeal heard at earlier stage. The Apex Court held that CESTAT had reconsidered its legal view as it concluded differently by accepting the arguments which it had rejected earlier.

   Hence, the Court opined that CESTAT exceeded its powers under section 35C(2) of the Act. In pursuance of a rectification application, it cannot re-appreciate the evidence and reconsider its legal view taken earlier.

   Note: Section 35C(2) reads as under:-

   The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal.

2. **Is the CESTAT order disposing appeal on a totally new ground sustainable?**

   CCE v. Gujchem Distillers 2011 (270) E.L.T. 338 (Bom.)

   The High Court elucidated that in the instant case, the CESTAT had disposed of the appeal on a ground which was not urged by the respondents before the adjudicating authority. Thereby the CESTAT had disposed of the appeal on a totally new ground which was not laid before the adjudicating authority and which would entail a finding on facts.

The High Court explained that had the CESTAT not been satisfied with the approach of the adjudicating authority, it should have remanded the matter back to the adjudicating authority. However, it could not have assumed to itself the jurisdiction to decide the appeal on a ground which had not been urged before the lower authorities.

8

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

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

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

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

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

9

SETTLEMENT COMMISSION

Section 32E(1) of the Central Excise Act, 1944

1. Whether a consolidated return filed by the assessee after obtaining registration, but for the period prior to obtaining registration, could be treated as a return under clause (a) of first proviso to section 32E(1)?

   Icon Industries v. UOI 2011 (273) E.L.T. 487 (Del.)

   Facts of the case: The petitioner got its units registered after few days of the search conducted in its units. Thereafter, it filed consolidated return with the Department for the period prior to search. After that, it filed a settlement application in respect of the proceedings issued by the Commissioner.

   The Settlement Commission opined that the units were registered only after the search was conducted and prior to that there was no registration and no returns as mandated by clause (a) of first proviso to section 32E(1) of the Central Excise Act, 1944 were filed. Consequently, the Commission rejected the settlement application on the ground that the application did not conform to the parameters as stipulated under section 32E(1) of the Act.

   Decision of the case: The High Court noted that certain riders have been provided in section 32E(1) for entertaining applications for settlement. Clause (a) of first proviso clearly lays down that unless the applicant has filed returns, showing production, clearance and Central Excise duty paid in the prescribed manner, no such application shall be entertained.

   The Court referred the case of *M/s. Emerson Electric Company India Pvt. Ltd.* wherein it was held that although section 32E(1) does not refer to rule 12 of the Central Excise Rules, 2002 under which ER-1/ER-3 returns are prescribed, since the said returns contain details of excisable goods manufactured, cleared and duty paid in the prescribed manner, the said return can be deemed to be the 'return' referred to in section 32E(1). Hence, the concept of return has to be understood in context of rule 12 of the Central Excise Rules, 2002. However, in case of consolidated returns filed in the instant case, the applicant would not be able to indicate 'duty paid' in the prescribed manner (or even in any manner) and question would continue to agitate about the details of production and clearance to be filled in such belated returns.

Considering the above discussion, it rejected the submission of the petitioner that filing of consolidated return covering all the past periods would serve the purpose. Hence, it held that the order passed by the Settlement Commission was absolutely justifiable.

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

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

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

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

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

CUSTOMS

1
BASIC CONCEPTS

1. **Are the clearance of goods from DTA to Special Economic Zone chargeable to export duty under the SEZ Act, 2005 or the Customs Act, 1962?**

   Tirupati Udyog Ltd. v. UOI 2011 (272) E.L.T. 209 (A.P.)

   Decision of the case: The High Court, while deciding the aforesaid question of law, made the following observations:-

   - A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words he cannot be taxed at all.
   - SEZ Act 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 a charging provision in the SEZ Act providing for the levy of customs duty on such goods, export duty cannot be levied on the DTA supplier by implication.
   - With regard to the Customs Act, 1962, a conjoint reading of section 12(1) with sections 2(18), 2(23) and 2(27) of the Customs Act, 1962 makes it clear that 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, Section 12(1) of the Customs Act 1962 (which is the charging section for levy of customs duty) is not attracted for supplies made by a DTA unit to a unit located within the Special Economic Zone.

   The High Court thus inferred that the clearance of goods from DTA to Special Economic Zone is not liable to export duty either under the SEZ Act, 2005 or under the Customs Act, 1962.

   Notes:

   1. *Chapter X-A of the Customs Act, 1962, inserted by Finance Act 2002, contained special provisions relating to Special Economic Zones. However, with effect from 11-5-2007, Chapter X-A, in its entirety, was repealed by Finance Act, 2007. Consequently, Chapter X-A of the Customs Act is considered as a law which never existed for the purposes of actions initiated after its repeal.*
   2. *Karnataka High Court in case of CCE v. Biocon Ltd. 2011 (267) E.L.T. 28 has also taken a similar view as elucidated in the aforesaid judgment.*

2

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

Section 23 of the Customs Act, 1962

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

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

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

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

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

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

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

3

CLASSIFICATION OF GOODS

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

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

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

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

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

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

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

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

   Decision of the case: The High Court held that the description of the goods as per the documents submitted along with the Shipping Bill would be a relevant criteria for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test. The petitioner could not plead that the exported goods should be classified under different headings contrary to the description given in the invoice and the Shipping Bill which had been assessed and cleared for export.

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

4

WAREHOUSING

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

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

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

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

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

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

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

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

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

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

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

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

The Tribunal answered the issues raised as follows:-

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

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

5

DEMAND & APPEALS

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

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

   Decision of the case:

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

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

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

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

6

REFUND

1. **Whether Chartered Accountant's certificate alone is sufficient evidence to rule out the unjust enrichment under customs?**

   CCus., Chennai v. BPL Ltd. 2010 (259) E.L.T. 526 (Mad.)

   Decision of the case: The High Court noted that section 27 of the Customs Act mandates on the importer to produce such documents or other evidence, while seeking refund, to establish that the amount of duty in relation to which such refund is claimed, has not been passed on by him to any other person.

   However, in the given case, the respondent had not produced any document other than the certificate issued by the Chartered Accountant to substantiate its refund claim. The certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain facts. It would not automatically entitle a person to refund in the absence of any other evidence. Hence, the respondent could not be granted refund merely on the basis of the said certificate.

   Thus, the High Court, overruling the Tribunal's decision, answered the question of law in favour of revenue.

Section 27 of the Customs Act, 1962

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

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

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

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

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

Section 27 of the Customs Act, 1962

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

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

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

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

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

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

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

7

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

1. Whether the benefit of exemption meant for imported goods can also be given to the smuggled goods?

   CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)

   Decision of the case: The question which arose before the Apex Court for consideration was whether goods that were smuggled into the country could be considered as 'imported goods' for the purpose of granting the benefit of the exemption notification.

   The Apex Court held that the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962.

   The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling on the economy. Hence, it held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

2. Can the goods be detained indefinitely without any formal order under section 110 of the Customs Act, 1962?

   S.J. Fabrics Pvt. Ltd. v. UOI 2011 (268) E.L.T. 475 (Cal.)

   Decision of the case: The High Court held that there is no time limit for issuance of an order under section 110 and/or the proviso thereof. However, such notice should ordinarily be issued immediately upon interception and detention of the goods. The goods cannot indefinitely be detained without any order under section 110.

   The High Court observed that section 110(2) provides that when any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession, the goods were seized. The proviso to Section 110(2), however, empowers the Commissioner of Customs to extend the aforesaid period of six months by a further period of not exceeding six months on sufficient cause being shown.

Note: Although, it has already been established in number of cases that detention and seizure are not same under the customs provisions, in the aforesaid judgment, the two terms seem to have been used inter-changeably. The said fact may be borne in mind while going through the aforesaid decision.

3. Is it mandatory for the Revenue officers to make available the copies of the seized documents to the person from whose custody such documents were seized?

Manish Lalit Kumar Bavishi v. Addl. DIR. General, DRI 2011 (272) E.L.T. 42 (Bom.)

Facts of the case: The assessee sought copies of the documents seized from his office premises under panchanama and print outs drawn from the Laptop during his attendance in DRI. However, Revenue officers replied that the documents would be provided to him on completion of the investigation.

Decision of the case: The High Court held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document/seeking extract and not the officer.

If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. The denial by the Revenue to make the documents available was clearly an act without jurisdiction.

The High Court directed the Revenue to make available the copies of the documents asked for by the assessee which was seized during the course of the seizure action.

4. Under what circumstances can the penalty be imposed in terms of section 112(a)(ii) of the Customs Act, 1962?

O.T. Enasu v. UOI 2011 (272) E.L.T. 51 (Ker.)

The High Court noted that under sub-clause (ii) of clause (a) of section 112, the liability to penalty is determined on the basis of duty sought to be evaded. Therefore, the jurisdictional fact to impose a penalty in terms of section 112(a)(ii) includes the essential ingredient that "duty was sought to be evaded". Being a penal provision, it requires to be strictly construed. "Evade" means, to escape, slip away, to escape or avoid artfully, to shirk, to baffle, elude. The concept of evading involves a conscious exercise by the person who evades. Therefore, the process of "seeking to evade" essentially involves a mental element and the concept of the status "sought to be evaded" is arrived at only by a conscious attempt to evade.

In view of the above discussion, the High Court inferred that unless it is established that a person has, by his omissions or commissions, led to a situation where duty is sought to be evaded, there cannot be an imposition of penalty in terms of section 112(a)(ii) of the Act.

5. Can separate penalty under section 112 of the Customs Act be imposed on the partners when the same has already been imposed on partnership firm?

Textoplast Industries v. Additional Commissioner of Customs 2011 (272) E.L.T. 513 (Bom.)

Decision of the case: The High Court noted that Explanation to section 140 of the Customs Act, 1962 brings within purview of "Company", a firm or an association of individuals, and "Director" in relation to firm, includes its partner. The High Court observed that in case of Apex Court judgment of *Standard Chartered Bank v. Directorate of Enforcement*, there emerged the principle that the deeming fiction is not confined to a criminal prosecution but will also extend to an adjudication proceeding as well. Hence, the High Court, in the instant case, held that the deeming fiction in section 140(2) making Director, Manager, Secretary or other officer of company liable to penalty, would not be confined to criminal prosecution but extends to adjudication proceeding as well.

The High Court explained that had it been otherwise, it would have led to strange situation where, for criminal prosecution, partner as well as person in charge responsible for conduct of business of partnership firm would be liable whereas for adjudication purposes, a narrower construction had to be adopted. There was no reason to exclude penalty on partnership firm, particularly when it was consistent with overall scheme and object of the Act.

In view of the above discussion, the High Court held that for the purpose of imposing penalty, the adjudicating authority under Customs Act, 1962 might, in an appropriate case, impose a penalty both upon a partnership firm as well as on its partners.

Note: The Gujarat High Court, in case of CCE & C, Surat-II v. Mohammed Farookh Mohammed Ghani 2010 (259) E.L.T. 179, has held that separate penalty under section 112 could not be imposed on the partners in addition to the penalty on the partnership firm. However, the Gujarat High Court, while deciding the said case, has not considered the principle enunciated by the Supreme Court in the Standard Chartered Bank case. In the circumstances, it appears that separate penalty under section 112 can be imposed on the partners in addition to the penalty on the partnership firm.

Section 125 of the Customs Act, 1962

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

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

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

(1) Importation and exportation of prohibited goods and

(2) Importation and exportation of any other goods

(1) Importation and exportation of prohibited goods

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

(2) Importation and exportation of any other goods

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

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

Section 111 and 125 of the Customs Act, 1962

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

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

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

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

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

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

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

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

Section 111 and section 125 of the Customs Act, 1962

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

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

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

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

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

Section 110 and 124 of the Customs Act, 1962

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

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

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

The word "or" used in the expression "the owner of the goods or such person" in section 124 has been used conjunctively and not disjunctively. Hence, the notice for confiscation is required to be issued to owner when owner is in possession of goods and goods are seized from his custody. In case of seizure of goods from the custody of person other than importer, notice must also be given to person from whose custody goods were seized. Opportunity must be given to the person in possession of the goods because their confiscation would affect his civil right to possess the goods which were seized from his custody. Thus, the person from whose custody goods are seized is also entitled to notice and hearing before order of confiscation is passed.

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

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

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

8

SETTLEMENT COMMISSION

Section 127B of the Customs act, 1962

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

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

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

Section 127M of the Customs Act, 1962

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

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

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

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

Section 127A of the Customs Act, 1962

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

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

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

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

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

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

SERVICE TAX

1

PRELIMINARY LEGAL PROVISIONS

1. **Is the service tax and excise liability mutually exclusive?**

   Commissioner of Service Tax v. Lincoln Helios (India) Ltd. 2011 (23) S.T.R. 112 (Kar.)

   Facts of the case: The assessee undertook not only manufacture and sale of its products, but also erected and commissioned the finished products. The customer was charged for the services rendered as well as the value of the manufactured products. The assessee had paid the excise duty on whole value including that for services, but did not pay the service tax on the value of services on the ground that there could not be levy of tax under two parliamentary legislations.

   Decision of the case: The High Court held that the excise duty is levied on the aspect of manufacture and service tax is levied on the aspect of services rendered. Hence, it would not amount to payment of tax twice and the assessee would be liable to pay service tax on the value of services.

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

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

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

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

Note: Supreme Court, in case of Idea Mobile Communications Ltd. v. CCE 2011 (23) S.T.R. 433, has affirmed the aforesaid decision. .

2

GAMUT AND COVERAGE OF TAXABLE SERVICES

Security agency services

1. **Whether a concern not having profit motive can be regarded as a security agency under section 65(94) of the Finance Act, 1994?**

   Punjab Ex-Servicemen Corporation v. UOI 2012 (25) S.T.R. 122 (P & H)

   Facts of the case: The assessee was a statutory corporation under the provisions of the Punjab Ex-Servicemen Corporation Act, 1978 (PESCO Act). Its activities were of deploying Ex-servicemen by way of providing security agency service. After the security agency service became taxable, the appellant applied for registration under the Act and was issued the registration certificate. However, inspite of registration, the appellant neither paid service tax nor filed return.

   The Revenue issued notice to the assessee requiring it to file the return contending that even if the appellant did not have profit motive and was not 'commercial concern', it was liable to pay service tax.

   Decision of the case: Considering the charging provision under section 68 and definition of value of taxable service under section 67, the High Court observed that there was no requirement that the service provider should provide service for profit motive.

   The Court further noted that use of the word business in the definition of security agency is not enough to hold that service provider must have profit motive. The word business does not necessarily imply requirement of profit motive. The expression is used in a taxing statute in the sense of occupation or profession which occupies time, attention and labour normally with the object of making of profit as against support or pleasure.

   Hence, the assessee was held liable to service tax in the given case.

   Note: As per section 65(94) of the Finance Act, 1994:-

   *"Security agency" means any person engaged in the **business** of rendering services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any*

fact or activity, whether of a personal nature or otherwise, including the services of providing security personnel.

Renting of immovable property services

2. In case where rooms have been rented out by Municipality, can it pass the burden of service tax to the service receivers i.e. tenants?

Kishore K.S. v. Cherthala Municipality 2011 (24) S.T.R. 538 (Ker.)

Facts of the case: The petitioners entered into agreements with the respondent-Municipality and had taken rooms on rent from it. They were called upon to pay service tax.

The primary contentions of the petitioners were as follows:-

(a) Under the agreement, there was no provision for payment of service tax. Therefore, the demand for payment of service tax was illegal. Further, service tax was payable by the Municipality and there was no authority with which the Municipality could pass it on to the petitioners.

(b) Since they were small tenants, the Municipality must be treated as units of the State within the meaning of Article 289 of the Constitution of India and, therefore, levy of service tax on the property or on the income of the Municipality was unsustainable.

The Revenue contended that service tax was an indirect tax. Though primarily the person liable to pay the tax was Municipality, there was nothing in the law which prevented passing of the liability to the tenants.

Decision of the case: The High Court rejected the contentions of the assessee and opined as under:-

(a) As regards the contention that there was no mention of the service tax liability in the contract, the Court held that this is a statutory right of the service provider/Municipality by virtue of the provisions under law to pass it on to the tenants. It is another matter that they may decide not to pass it on fully or partly. It is not open to the petitioners to challenge the validity of the demand for service tax, in view of the fact that service tax is an indirect tax and the law provides that it can be passed on to the beneficiary. Hence, the service tax can be passed on by the service provider i.e. Municipality.

(b) The word “State” in Article 289 does not embrace within its scope the Municipalities. Hence, when service tax is levied on the Municipality there is no violation of Article 289. Moreover, Municipality has not raised the contention that there was a violation of Article 289.

Hence, it was held that Municipality can pass on the burden of service tax to the tenants.

Pandal or shamiana services

3. Can marriage be regarded as a social function for the purpose of levying service tax under pandal or shamiana contractor services?

   All India Tent Dealers Welfare Organization v. UOI 2011 (24) S.T.R. 385 (Del.)

   Facts of the case: The assessee pleaded that erection of pandal/ shamiana for Hindu marriage is fundamentally a sacrosanct and sacred religious function and can never be treated as a social function to invite service tax. Thus, Explanation to section 65(77a)* is unconstitutional and hence should be quashed.

   Decision of the case: The High Court noted that apparently, Hindu marriage is not treated or regarded a social function per se. Only when a "pandal or shamiana" is used for marriage, it earns the status of "social function" because the service component is involved. Since the statute itself postulates that marriage is to be regarded as a social function, full effect has to be given to the same. Besides, the pre-requisite is the use of "pandal or shamiana". Hence, the High Court elucidated that when a "pandal or shamiana" is used for marriage, it would be regarded as "social function" and would be liable to service tax.

   **Note: Explanation to section 65(77a) was inserted by the Finance Act, 2007. Section 65(77a) reads as under:-*

   "Pandal or shamiana" means a place specially prepared or arranged for organising an official, social or business function.

   Explanation: For the purposes of this clause, "social function" includes marriage.

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

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

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

   - Agreement itself termed the assessee as a consignment agent.
   - Price was mutually decided by the principal and the agent (assessee). Had the assessee been merely a commission agent, price determination would not have been within his domain.

- Since assessee had been given the authority and power to appoint dealers, stockists and distributors, it implied that it was not merely a commission agent.
- Mere procurement of purchase orders was not involved, but stored goods were also cleared and forwarded to stockists and dealers by the assessee.

Section 65(12) of the Finance Act, 1994

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

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

   Decision of the case:

   The High Court, in the impugned judgment, had upheld the constitutional validity of service tax levy on hire purchase and lease services after noting that service charge @ 1% was admitted as collected and service tax was levied on service and not on sale or purchase of goods.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Facts of the case: The respondent entered into a licence agreement with Calicut Airport Authority Ltd. where under he got the right to collect entrance fee from visitors to the Airport. Since respondent was authorized to collect entrance fee which was for services provided to the customers in the Airport, the Department issued notice demanding service tax from the respondent. The Tribunal held that the Airport Authority only was rendering service and therefore, respondent could not be held liable for the same.

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

Decision of the case: The High Court elucidated that **even though respondent was not providing the service in the Airport which was done by the Airport Authority, once the licence was given by the Airport Authority to the respondent to permit entry and allow enjoyment of the services provided there to the customers, respondent in fact became the service provider**, though he was only acting as an agent under the licence agreement with the Airport Authority. Therefore, the Court opined that respondent being the service provider was liable to pay the service tax and the Tribunal's finding to the contrary was untenable. Consequently, it reversed the findings of the Tribunal and allowed the Department's appeal.

3

SERVICE TAX PROCEDURES

1. **Can appeal be filed to High Court for deciding the question relating to the taxability of service tax?**

   CCEx. & ST v. Volvo India Ltd. 2011 (24) S.T.R. 25 (Kar.)

   Decision of the case : The High Court held that the question as to whether the assessee is liable to pay service tax falls squarely within the exception carved cut in section 35G of the Central Excise Act, 1944, *'an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment'*, and the High Court has no jurisdiction to adjudicate the said issue. 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.

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

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

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

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

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