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CA - FINAL
MAY-2013

IDT CASE LAWS COMPILATION {EXCISE , SERVICE TAX, CUSTOMS}

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- THIS BOOKLET CONTAINS 72 CASE LAWS COMPILED FOR STUDENTS BENEFIT WITH A VIEW OF LAST POINT REVISION (FREE OF COST).
- ANALYSIS OF 72 CASE LAWS :-
  - OLD CASES OF PREVIOUS ATTEMPTS = 45. OF THAT 13 ARE ALREADY ASKED IN EXAM; 32 OLD CASES STILL NOT ASKED IN EXAM
  - NEW CASES INTRODUCED FOR MAY-13 ATTEMPT = 27. OF THAT 1 ALREADY ASKED IN EXAM; 26 NEW CASES EFFECTIVELY INTRODUCED FOR MAY-13 ATTEMPT
- ANY FURTHER SUGGESTIONS & RECOMMENDATIONS FOR IMPROVEMENT ARE WELCOMED.

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SR NO	ISSUE	FACTS & DECISION OF CASE	CASE NAME
		CENTRAL EXCISE	
1)	**Does the process of removal of foreign materials from iron ore for concentration of such ore amount to manufacture?**	**FACTS:** *The Steel Authority of India Ltd. (SAIL) was mining iron ore from mines. The Department said SAIL was mining iron ore from mines and subjecting the same to crushing, grinding, screening and washing with an aim to concentrate the ores.* *The Department contended that in the case of the Respondents their mining activity was done by fully mechanized system; that they were mining iron ores from mines and then ores were subjected to process of crushing, grinding and screening and washing with a view to remove foreign materials and to concentrate such ores; that at each stage of washing water is added to improve the flowability of material by removing the sticky particles and the processes undertaken by them involved removal of parts of foreign material from the ores and increase the "Fe" content (i.e. iron content); thus goods so obtained by such process would qualify as concentrate.* *The SAIL submitted that the washing of iron ore by itself could never convert it into concentrates and that washing by itself did not amount to manufacture. SAIL also contended that the concentrates were manufactured by increasing the concentration of Fe content of the mineral by removing and separating different impurities; that concentrates were manufactured by enriching the material in terms of its Fe content; that under this process, raw iron ore of low Fe content was ground to very fine consistency and passed through various processes for making concentrates; that in the present matters neither they undertook any such process nor there was any variation in the Fe content of iron ore extracted from its mines and the Fe content of seized iron ore.* **Difference of opinion:** *Department said that any ore which after being subjected to physical or physico chemical process viz., crushing, screening, etc., has had part or whole of its extraneous, foreign matter removed, would be termed as "concentrate"; and thus the product obtained after the processes carried out by the Respondents was "iron ore concentrate" only and not iron ore.* **DECISION:** *The SC concluded that removal of foreign materials from iron ore, i.e., mining iron ore from mines and then subjecting to process of crushing, grinding, screening and washing with a view to remove foreign materials to concentrate such ores do not result in manufacture of different commercial commodity. No Central excise duty is leviable on iron ore concentrate.*	***Steel Authority of India Ltd. 2012 (S.C.)***

2)	**Whether the addition and mixing of polymers and additives to base bitumen results in the manufacture of a new marketable commodity and as such eligible to Excise duty?**	**FACTS**: *Osnar Chemical Pvt. Ltd. (Osnar) was engaged in the supply of Polymer Modified Bitumen (PMB). It entered into a contract for supply of PMB at their work site. As per the agreement, the base bitumen and certain additives were to be supplied directly at the site, where Osnar, at its plant, was required to heat the bitumen. To this hot bitumen, 1% polymer and 0.2% additives were added under constant agitation, for improving its quality by increasing its softening point and penetration. The process of agitation was to be continued till the mixture becomes homogenous and the required properties were met. The bitumen in its hot agitated condition was mixed with stone aggregates which were then used for road construction. The Osnar paid duty on PMB processed at their factory in Mumbai but had not paid the same for the conversion done at their work site.* **Difference of opinion:** *Department said that the process carried out by Osnar amounted to manufacture of PMB in terms of section 2(f) of the Central Excise Act, 1944. It was said that the end products, i.e. PMB and Crumbled Rubber Modified Bitumen were different from bitumen, as polymers and additives were the raw materials consumed in the process of manufacture of the said products and therefore, covered by the definition of the term "manufacture" in section 2(f) of the Act & accordingly were eligible to Excise duty,* • *Both items falling under a specific entry, while bitumen is classifiable under Chapter sub heading 271320.00, and polymer is classifiable under Chapter sub heading 390190.00, the finished products, PMB and CRMB were classifiable under Chapter sub heading 271500.90.* • *Further, Revenue said that PMB and CRMB were commercially known in the market for being bought and sold and therefore, satisfied the test of marketability which is one of the essential conditions for the purpose of levy of excise duty* **DECISION:** *The SC held that "manufacture" could be said only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use & mere improvement in quality did not amount to manufacture. Further the said process was not specified in Section or Chapter notes of the Tariff Act as amounting manufacture (as deemed manufacture) hence SC concluded that the process of mixing polymers and additives with bitumen did not amount to manufacture*	***Osnar Chemical Pvt. Ltd. 2012 (S.C.)***
3)	**Whether the metal scrap or waste generated during the repair of his worn out machineries/parts of cement manufacturing**	**FACTS:** *Mfr Assesee while repairing his machine generated waste metal & scrap, which he removed without paying excise duty. Deptt said this is liable for duty as per it tantamount to manufacture as per Sec 2(f) of Excise Act.* **DECISION:** *Apex court held that Mfr includes any process to get final product. Repairing activity cannot be said part of Mfr activity in relation to produce end product. Hence generation of*	***Grasim Industries Ltd 2011 (S.C.)*** ***{Asked in Nov-2012}***

	plant by a cement manufacturer amounts to manufacture?	*waste metal & scrap during repairs does not amount to manufacture & not liable for the duty.*	
4)	**Are the physician samples excisable goods in view of the fact that they are statutorily prohibited from being sold?**	**FACTS:** *The appellant contended that since the sale of the physician samples was prohibited under the Drugs and Cosmetics Act, 1940 and the rules made there under, the same could not be considered to be marketable.* **DECISION:** *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. Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss Therefore physician samples were excisable goods and were liable to excise duty.*	***Medley Pharmaceuticals Ltd. 2011(S.C.)***
5)	**Whether assembling of the testing equipments for testing the final product in the factory amounts to manufacture?**	**FACTS:** *The appellant was an mfr of electronics equipments During such manufacture, the appellant also manufactured machinery in the nature of testing equipments to test their final products. Balance sheet stated the addition to the plant and machinery included testing equipments. 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, not mfr also further submitted that the said project was only to avoid importing equipment from developed countries to save foreign exchange.* **DECISION:** *The Supreme Court observed 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.*	***Usha Rectifier Corpn. (I) Ltd. 2011 (S.C.)***
6)	**Does the process of cutting and embossing aluminum foil for packing the cigarettes is mfr?**	**FACTS**: *A roll of aluminum foil was cut to make pieces of the foil and word 'PULL' was embossed on it & Thereafter cigarettes were wrapped in it. The Aluminum foil was used as a protector for the cigarettes and to keep them dry.* **DECISION:** *Court pronounced that cutting and embossing did not transform aluminum foil into distinct and identifiable commodity also the nature and substance of foil is same. This process did not render any marketable value, only made it usable for packing 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.*	***GTC Industries Ltd. 2011***
7)	**Does a product with short shelf-life satisfy the test of marketability?**	**FACTS:** *In the instant case, the product had a shelf-life of 2 to 3 days. Appellant contended the product did not have shelf-life; it did not satisfy the test of marketability.* **DECISION:** *Court ruled that short shelf-life is not equal to no shelf-life. A shelf-life of 2 to 3 days was sufficiently enough for a product to be commercially marketed. Hence, product with the shelf life of 2 to 3 days was marketable & excisable*	***Nicholas Piramal India Ltd. (S.C.)***
8)	**Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?**	**DECISION:** *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.*	***Bata India Ltd. (SC)***

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9)	**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?**	**FACTS:** *The asseseee was engaged in the manufacture of asphalt batch mix & drum mix/hot mix plant by assembling and installing its parts and components Deptt considered to be moveable & dutiable under the Central Excise Act, 1944.* **DECISION:** *The Court observed that 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. , 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.*	***Solid & Correct Engineering Works & Ors(SC)***
10)	**Does the activity of packing of imported compact discs in a jewel box along with inlay card amount to manufacture?**	**FACTS:** *The appellant imported recorded discs in boxes of 50 & packed each disc in transparent plastic cases known as jewel boxes. An inlay card containing the content of the compact disc was also placed in the jewel box. The whole thing was shrink wrapped & sold in wholesale. Deptt contended the process is mfr.* **DECISION:** *Court observed that none of the activity involved any process on the compact discs that were imported. It held 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 & complete form.*	**Sony Music Entertainment (I) Pvt. Ltd.**
11)	**Does the process of preparation of tarpaulin made-ups after cutting and stitching the tarpaulin fabric and fixing the eye-lets amount to manufacture?**	**FACTS:** *The 'tarpaulin made-ups' was the tarpaulin cloth prepared by making solution of wax, aluminum stearate and pigments which were mixed & solution was heated in a vessel & was transferred to a tank. Grey cotton canvas fabric was then dipped into this solution and passed through two rollers, where after the canvas was dried by exposure to atmosphere. Then, the tarpaulin made-ups were prepared by cutting the cloth & stitched and eye-lets were fitted. Deptt viewed that the "tarpaulin made-ups" prepared by cutting, stitching and fixing of eye-lets amounted to manufacture and, hence, they were eligible to duty.* **DECISION:** *The Apex Court opined that stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product. Hence, the Supreme Court, upholding the decision of the Tribunal, held that conversion of tarpaulin into tarpaulin made-ups would not amount to manufacture.*	***Tarpaulin International (S.C.)***
12)	**In case of specific classification viz-à-viz classification based on material used/composition of goods, which one should be adopted?**	**FACTS:** *The assessee, a manufacturer of slagwool/rockwool containing more than 25% by weight "blast furnace slag" classified that said goods under Tariff Heading 6807.10 while the department sought classification under Tariff Heading 6803* ***Heading*** — ***Description of goods along with Rate of duty*** *6803* — *Slagwool, Rockwool and similar mineral wools (18%)* *6807.10* — *Goods, in which more than 25% by weight of blast furnace slag, have been used. (8%)* **DECISION:** *The Supreme Court held that Heading 6807.10 is a Heading based entirely materials used in composition of goods.*	***Minwool Rock Fibres Ltd. 2012 (S.C.)***

		A heading based on composition of goods is a more specific *heading, as it is based on commercial nomenclature. Hence goods fell under 6807.10*	
13)	**In case of a specific entry viz-a-viz a residuary entry, which one should be preferred for classification purpose?**	**FACTS:** *The assessee was a manufacturer of "**P**ovidone **I**odine **C**leansing **S**olution **U**SP" (PICSU) & **W**okadine **S**urgical **S**crub (WSS). The assessee said that the products were **"Medicaments"** under Tariff Heading 3003 as it was used for surgical cleaning, while the department said that it was **"Detergent"** under Tariff Heading 3402.90* **Difference of opinion:** *Surgical Cleansing Solution mostly used for medical purposes, though used in detergents also.* **DECISION:** *The Supreme Court observed that the products were medicaments in view of the following important test for classification:* ➢ **USE TEST:-** • The products were primarily used by surgeons for cleaning or de-germing their hands and scrubbing surface of skin of patients before operation. • Merely because they were used in detergents as cleansing agents would not affect the classification. • Therefore as per primary use test the products were medicaments. ➢ **COMMON PARLENCE TEST:-** • The products in question were understood as medicaments in common parlence & trade. *Therefore merely because of alternative used in making detergents, they could not be classified as detergents.*	***Wockhardt Life Sciences Ltd. 2012 (S.C.)***
14)	**Whether the price used for selling of a product below the cost price for penetration of market can be considered as transaction value?**	**FACTS:** *The Fiat was the manufacturer of motor cars & were selling cars below cost and making losses in wholesale trade with intention of penetrating market & competing with other manufacturers of similar goods. The prices were not based on manufacturing cost and profit. This was continued for the period of five years. The AC directed for provisional assessment of the cars at a price which would include cost of production, selling expenses including transportation and landing charges, wherever necessary and profit margin, on the ground that cars were not ordinarily sold in the course of wholesale trade as the cost of production is much more than their wholesale price, but were sold at loss for a consideration.* **Difference of opinion:** *The Department said as the extra commercial consideration was involved in this case an additional consideration should be added to the price for the purpose of duty. Thus, the Department applied Best Judgment Assessment* **DECISION:** *The SC held duty has to be paid on the "transaction value". Section 4(1)(a) of CEA defines transaction value as under "in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and thebuyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value If any of the ingredients in the above definition is missing then the price shall*	***Fiat India Pvt.Ltd. 2012 (S.C.)***

		not be considered as the sole consideration as transaction value. SC opined that this is a case of extra commercial consideration in fixing of price,& artificially depressing it. Full commercial cost of manufacturing and selling was hidden in the price as it was deliberately kept below the cost of production. Thus, price could not be considered as the sole consideration for sale. No prudent business person would continuously suffer huge loss only to penetrate market; they are expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. It is immaterial that the cars were not sold to related persons. In view of the above resorting to best judgment assessment was proper.	
15)	**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?**	**FACTS:** *The appellants manufactured various motor vehicles chargeable to duty on ad valorem basis. As per Deptt while selling 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. This dealer's margin contained provision for rendering pre-delivery inspection and three after sale services. Hence, the Deptt said the cost of post delivery inspection & after sale services form part of the assessable value of the automobile while discharging the duty liability* **DECISION:** *1) Transaction value includes the amount paid by reason of/in connection with sales of goods.* *2) Definition of transaction value is extensive, at the same time restrictive & exhaustive in relation to the items excluded therefrom.* *3) PDI and after sales service charges is a payment on behalf of the assessee to the dealer by the buyer.* 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.*	***Maruti Suzuki India Ltd.***
16)	**In case the testing is critical to ensure marketability of manufactured product i.e. the manufacture is not complete without testing; is CENVAT credit of the testing material allowed?**	**FACTS**: *A manufacturer was engaged in the manufacturing of various types of packaging machines, marketed Automatic Form Fill and Seal Machines. The machines were 'made to order', in as much as all the dimensions of the packaging/sealing pouches, for which the F&S machine is required, are provided by the customer. The purchase order contained the following inspection clause*: **"Inspection/trial will be carried out at your works in the presence of our engineer before dispatch of equipment for the performance of the machine."** *As per the above clause, testing material to be used was Flexible Laminated Plastic Film in roll form & Poly Paper which are duty paid.* **Difference of opinion:** *The Dept denied CENVAT credit on the material used for testing of the packaging machines. Two questions were raised to the High Court in this regard:-* 1) Whether duties paid on testing material would be eligible as credit under rule 57A of the erstwhile Central Excise Rules,	***Flex Engineering Ltd. 2012 (S.C.)***

		1944 [now rule 2(k) of the CENVAT Credit Rules,2004]? 2) Whether such use of material in testing in view of the purposes mentioned above, could be said to be used in the manufacture of or use in relation to the manufacture of the final products *viz*., machines as assembled? *The HC answered both the above questions in the negative. According to the HC, anything required to make the goods marketable must form a part of the manufacture & any raw material or any materials used for the same would be a component part of the end product. It thus observed that materials used for testing after manufacture of the final product, viz. the F&S machine, is only to detect the deficiency in the final product & therefore, could not be considered as the goods used in or in relation to the manufacture of the final product. The Flex made an appeal to the Supreme Court against the above order.* **DECISION:** *The SC held that the process of manufacture would not be complete if a product is not saleable as it would not be marketable. Thus, the duty of excise would not be leviable on it. The SC was of the opinion that the process of testing the customized F&S machines was inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the afore-extracted covenant in the purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence, not marketable at the factory gate. The Court was, therefore, of the opinion that the manufacturing process in the present case gets completed on testing of the said machines. Hence, the afore-stated goods viz. the flexible plastic films used for testing the F&S machines are inputs used in relation to the manufacture of the final product and would be eligible for CENVAT credit under rule 57A of the erstwhile Central Excise Rules, 1944 [now rule 2(k) of the CENVAT Credit Rules, 2004].*	
17)	**The assessee claimed the CENVAT credit on the duty paid on capital goods (CG) 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?**	**FACTS:** *The assessee purchased some CG & paid excise duty. The said CG were used in the manufacture of excisable goods, He claimed the CENVAT credit of the duty paid. Ater 3 years the said CG (which were insured) destroyed by fire. Insurance Co. reimbursed the amount to the assessee, which included the excise duty, which assessee had paid on CG. Excise Department demanded reversal of CENVAT credit on the ground that assessee had availed a double benefit.* **DECISION:** *The HC as per CENVAT Credit Rules, 2004, CENVAT credit taken irregularly stands cancelled and CENVAT credit utilized irregularly to be paid for but Insurance Co, in terms of the policy, had compensated the assessee. The HC said merely because the Insurance Co had paid 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 said by the Deptt. The HC answered in favour of the assessee and against the Revenue.*	***Tata Advanced Materials Ltd. 2011***

18)	**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?**	**FACTS:** *The assessee manufactured tooth paste. It was sold as a combo pack of tooth paste with a bought out tooth brush. He availed CENVAT credit of central excise duty paid on the tooth brush. Revenue said the tooth brush was not an input for the mfr of the tooth paste & cost of tooth brush was not added in the M.R.P. of the combo pack. Hence, assessee availed wrong CENVAT credit of duty paid on tooth brush.* **DECISION**: *The HC said 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 this 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. Considering the definition given in the rules of "input" and the provisions contained in rule 3, the HC said that the credit was admissible*.	***Prime Health Care Products 2011***
19)	**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?**	**DECISION:** *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.*	***Bhuwalka Steel Industries Ltd.***
20)	**Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company?**	**DECISION:** *It was held that words "any person" used in rule 13(1) of the 15(1) of the CENVAT Credit Rules, 2004 clearly indicate that the person who has availed CENVAT credit shall be liable to the penalty. The Court said CENVAT credit had availed by the CO. & the penalty under 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*	***Ashok Kumar H. Fulwadhya***

21)	**Can CENVAT credit be taken on the basis of private challans?**	**DECISION:** *The High Court placed reliance on its decision in the case of* ***M/s. Auto Spark Industries*** *wherein it was held that once duty payment is not disputed & it is found that documents are genuine & not fraudulent, the mfr would be entitled to MODVAT credit on duty paid on inputs also HC relied on its decision in the case of* ***Ralson India Ltd*** *. Where it said that duty paid character of inputs & their receipt in manufacturer's factory and utilization for manufacturing a final product is not disputed, credit cannot be denied. Thus, HC held MODVAT credit could be taken on strength of PVT challans as same were not found fake & there was certification that duty had been paid.*	***Stelko Strips Ltd.***
22)	**Whether Additional Director General, Directorate General of Central Excise Intelligence can be considered a central excise officer for the purpose of issuing SCN?**	**FACTS**: *The appellant was engaged in the manufacture and clearance of Gutkha & Pan Masala. Search and seizure was conducted at the appellant's premises by the officers of the Directorate General of Central Excise, New Delhi. A show-cause notice was issued by Additional Director General, Directorate General of Central Excise Intelligence, asking the petitioner to show cause to the Commissioner of Central Excise, Kanpur within 30 days as to why the duty, penalty and interest were not to be imposed.* **Difference of opinion:** *The appellant contended that Additional Director General, Directorate General of Central Excise Intelligence had no jurisdiction to issue the Show Cause Notice. It was contended that he was not a "Central Excise Officer" within the meaning of section 2(b) of the Central Excise Act, 1944. It was further contended that no notification regarding his appointment as Central Excise Officer was published in the Official Gazettee as required by the rule 3(1) of the Central Excise Rules, 2002. Another contention pressed by the appellant was that the authority who had issued the show cause notice ought to have obtained prior permission from the adjudicating authority before issuing the Show Cause Notice.* **DECISION:** *The Court on observing the issue held that Additional Director General, Directorate General of Central Excise Intelligence having been authorized to act as a Commissioner of Central Excise was a Central Excise Officer, within the meaning of section 2(b) of the Central Excise Act, 1944 and was fully authorized to issue the Show Cause Notice. It was held that the Additional Director General, Directorate General of Central Excise Intelligence having been specified as a Commissioner of Central Excise was fully entitled to issue the show cause notice under section 11A, being a Central Excise Officer. No such provision had been referred to nor shown which may require approval before issuing the show cause notice of the adjudicating authority/officer. The Government submitted that the Board had already issued notification dated 26-6-2001*, in exercise of power under section 2(b) of the Central Excise Act, 1944 read with sub-rule (1) of rule 3 of the Central Excise Rules, 2002, appointing the specified officers as Central Excise*	***Raghunath International Ltd. 2012***

23)	**Is the copy of the order mandatory to be served via "registered post" or a speed post would also suffice?**	**FACTS**: *The appellant-assessee had filed an appeal in May 2010. The date of order was 31st March 2008. The assessee contended that the copy of the order passed by the Commissioner of Central Excise (Appeals) on was not served upon the assessee. It was only when the recovery proceedings were initiated, the assessee sought a copy of the order dated 31st March 2008 and the same was made available to the assessee on 26th February 2010. Immediately thereupon the assessee filed an appeal before the CESTAT on 17th May 2010.* **Difference of opinion:** *The Department contended that the appeal was not filed within the stipulated time of 3 months from 31st March 2008 while the appellant contended that the appeal filed was within three months of serving of the order on 26 February 2010* **DECISION:** *As per section 37C(1)(a) of the Central Excise Act, 1944, it was obligatory on the part of the Revenue, either to tender a copy of the decision to the assessee or to send it by 'registered post with due acknowledgment' to the assessee or its authorized agent. In the present case, neither of the above had been complied with by the Revenue. The High Court thus held that in the facts of the present case, it cannot be accepted that the requirements of section 37C had been complied with. Accordingly, the contention of the assessee that a copy of the order of Commissioner of Central Excise (Appeals) was received for the first time on 26th February 2010 would have to be accepted.*	***Amidev Agro Care Pvt. Ltd. 2012***
24)	**If Revenue accepts judgment of the Commissioner (Appeals) on an issue for one period, can it be precluded to make an appeal on the same issue for another period?**	**FACTS:** *The assessee was a manufacturer of the 'Bitulux Insulation Board' known as 'TikkiExjo Filler'. The 'TikkiExjo Filler' is obtained by the process of bituminization of the Insulation board. The adjudicating authority concluding that the above process amounts to manufacture, levied excise duty on it. Aggrieved by the order, the assessee carried an appeal before the Commissioner (Appeals), who accepted the assessee's stand and held that the above process does not amount to manufacture. Department did not appealed against it and the above order of the appellate authority attained the finality.In the meantime, the Revenue issued several Show Cause-cum-Demand Notices to the assessee directing the assessee to pay the differential duty, but for a time period different from the period covered in the said appeal.* **Difference of opinion:** *The assessee was of the view that the process of bituminization of the Insulation board by which 'TikkiExjo Filler' is obtained is not manufacture. Revenue, on the other hand, was of the view that the process of bituminization of the Insulation Board resulted in manufacture and thus, duty should be levied on it.* **DECISION:** *The SC observed that since the Revenue had not questioned the correctness or otherwise of the findings on the*	***Tikitar Industries, 2012 (S.C.)***

		conclusion reached by the first appellate authority, it may not be open for the Revenue to contend this issue further by issuing the impugned show cause notices on the same issue for further periods.	
25)	**Whether time-limit under section 11A of the Central Excise Act, 1944 is applicable to recovery of dues under compounded levy scheme (CLS)?**	**DECISION:** *The Apex Court said CLS is a separate scheme from the normal scheme for collection duty . Rules under CLS stipulate method, time and manner of payment of duty, interest & penalty. Since CLS is comprehensive scheme so general provisions of Central Excise Act and rules do not apply here. S.C declared that importing one scheme of tax administration to a different scheme is inappropriate & would disturb smooth functioning of such unique scheme. Hence, the time-limit under section 11A is not applicable under compounded levy scheme.*	***Hans Steel Rolling Mill 2011 (S.C.)***
26)	**Whether non-disclosure of a statutory requirement under law would amount to Suppression for invoking the larger period of limitation under section 11A?** (non-disclosure as regards manufacture of Denatured Ethyl Alcohol amounts to Suppression of material facts attracting the larger period of limitation u/s 11A).	**FACTS:** *The assessee manufactured various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. He 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 & render the same unfit for human consumption. The Deptt alleged that intermediate product i.e. Di-ethyl Alcohol manufactured as a result of addition of DEP to ENA, was liable to central excise duty.* **DECISION:** *In cosmetics Industry denaturing process 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 Deptt, knowing the fact that the person was mfr cosmetics, must have the knowledge of the said req. 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 duty on such product. The HC upheld the Tribunal's judgment & pronounced 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*	***Accrapac (India) Pvt. Ltd.***
27)	**Whether the interest on delayed refund under section 11BB would be payable from the date of deposit of tax or from the date of receipt of application for refund?**	**FACTS:** *Kanyaka Parameshwari Engineering Ltd. was engaged in business of manufacture and sale of LPG cylinders. The appellant had paid excise duty under protest for the financial year 1999-2000 as the price was not finalized by the oil companies so the appellant undertook to pay the differential duty, if any, on fixation of exact price. Pursuant to the reduction in the prices of LPG cylinders, the appellant filed applications for finalization of assessments and for refund of excess duty so paid by them. The Department refunded the excess duty paid by the appellant with interest from three months after the application for refund filed till the date of payment.The appellant further filed an appeal demanding interest on the excess duty so paid by them as per section 11BB of Central Excise Act from the date of payment as duty was paid under protest.* **Difference of opinion:** *Whether under section 11BB, the interest on refund is payable from the date of deposit of tax or*	***Kanyaka Parameshwari Engineering Ltd.*** **2012**

		from the date three months after the submission of the application of the refund? **DECISION:** *Under section 11BB of the Central Excise Act, 1944, if any duty is not refunded within three months from the date of receipt of application under sub-section (1), the interest shall be paid on such duty from the date immediately after expiry of three months from the date of receipt of such application till the date of refund of such duty. The High Court upheld the order of the CESTAT and granted interest on delayed refund from the expiry of three months from the date of application till the date of refund.*	
28)	**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?**	**DECISION:** *The Apex Court said that interest under section 11BB becomes payable,on an expiry of a period of three months from the date of receipt of the application for refund, the interpretation can be arrived that interest becomes payable on the expiry of a period of 3 months from the date of receipt of the refund application under section 11B(1). 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 u/s 11BB commences from the date of expiry of 3 months from the date of receipt of application for refund u/s 11B(1) & not on the expiry of the said period from the date on which order of refund is made.*	***Ranbaxy Laboratories Ltd. 2011 (SC)*** ***{Asked in Nov-2012}***
29)	**Can the excess duty paid by the seller be refunded on the basis of the debit note issued by the buyer?** **ROD = Rate of Duty.**	**FACTS:** *The assessee cleared the goods paying higher ROD , although the ROD been reduced in the budget of the same FY. 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 same year. The assessee applied for the refund of excess excise duty paid. Revenue rejected his claim saying 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 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 later month & not in relevant month, it could not be the basis for refund.* **DECISION:** *The High Court said that once Dept t 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.Deptt was bound to refund to the assessee the excess duty calculated on basis of Debit Note. Hence, the decision was answered in favour of the assessee.*	***Techno Rubber Industries Pvt Ltd. 2011*** ***{Asked in MAY-2012}***
30)	**Merely because assessee has sustained loss more than the refund claim, is it justifiable to hold**	**DECISION**: *The HC answered in favour of 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 be unjust enrichment because all the materials sold by the assessee*	***Gem Properties (P) Ltd.***

	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?	*were including duty Therefore, the burden was on the assessee to prove while computing the cost of the material it had not included the duty paid by it. 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 the HC 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.*	
31)	**Whether doctrine of merger is applicable when appeal dismissed on the grounds of limitation and not on merits?**	**Difference of opinion:** *The issue under consideration is that in case the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, whether the orders passed by the original authority would merge with the orders passed by the first appellate authority. The learned counsel for the assessee contended that in given case, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal should consider the appeal filed by the assessee. It further submitted that the Tribunal ought to have considered the assessee's appeal not only on the ground of limitation but also on merits of the case. Since that has not been done, according to the learned counsel, the Tribunal has committed a serious error. The learned counsel further submitted that the "doctrine of merger" theory would apply in the sense that though the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal ought to have considered the appeal On the other hand, the learned counsel for the respondent submitted that the doctrine of merger would not apply to a case where an appeal was dismissed only on the ground of the limitation.* **DECISION**: *The Court observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits that order would not merge with the orders passed by the first appellate authority. Apex Court opined that the High Court was justified in rejecting the request made by the assessee for directing the Revenue to state the case and also the question of law for its consideration and decision. In view of the above discussion, Supreme Court rejected the appeal.*	***Raja Mechanical Co. (P) Ltd. 2012 (S.C.)***
32)	**Whether the construction of pre-fabricated components at one site to be used at different inter-connected metro construction sites in Delhi would get covered under exemption Notification No.**	**FACTS:** *The respondent-assessees were carrying on construction of the Delhi Metro. They had manufactured pre-fabricated components, which have been used in the construction of the Delhi Metro. The assessee claimed the exemption under Notification No. 1/2011-C.E. (N.T.) dated 17-2-2011 which exempts the goods covered under specified chapter headings for a specified period, manufactured at the site of construction for use in construction work at such site. The Department contended that the respondent-assessees were not entitled to claim the exemption stating that the goods were not manufactured at the site of the construction for use in the construction work at the site.*	***Rajendra Narayan 2012***

	1/2011-C.E.(N.T.) dated 17-2-2011 exempting the 'goods manufactured at the site of construction for use in construction work at such site' ?	**DECISION**: *The Court noted that Delhi Metro Rail Corporation Ltd. had contracted and called upon the respondent-assessee to construct pre-fabricated components of different segments to be used in elevated viaducts etc.. For the purpose of pre-fabricating the components a specific casting yard, premises was allotted by Delhi Metro Rail Corporation Ltd. The said casting yard constituted the construction site. From the said construction site, components had been moved to different locations where elevated viaducts of the tunnel were being constructed. The Court held that keeping in view the facts of the present case and that the construction was done virtually all over Delhi and construction sites were interconnected, practically prefabrication was done on construction site only.Therefore, it allowed the appeal in the favour of the respondent- assessee.*	
33)	**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?**	**DECISION**: *In the instant case, earlier arguments were not accepted but later on accepted by the CESTAT while hearing the application for rectification of mistake & it arrived at conclusion different from earlier one.The Apex Court said that re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. 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 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.*	***RDC Concrete (India) Pvt. Ltd. 2011 (S.C.)*** ***{Asked in Nov-2012}***
34)	**Is the CESTAT order disposing appeal on a totally new ground sustainable?**	**DECISION**: *The CESTAT disposed of appeal on a new ground which was not laid before adjudicating authority (A.A) & which would give a finding on facts The HC said if CESTAT was not satisfied with the AA, it should refer matter back to AA. it can not assumed itself jurisdiction to decide appeal on new ground.*	***Gujchem Distillers 2011***
35)	**Whether an assessee can claim the benefit of SSI exemption on the brand name of another firm if its proprietor is also a partner in such other firm?**	**FACTS:** *The Elex Knitting Machinery Co. was engaged in the manufacture of flat knitting machines. They had been availing the SSI exemption. They were found using the brand name "ELEX" on those machines which belonged to M/s. Elex Engineering Works and according to the Central Excise Authorities they were not entitled to avail the benefit of said notification.* **Difference of opinion:** *The Department denied the benefit of the SSI exemption notification solely on the ground that they had manufactured and cleared the goods (flat knitting machines) under the brand name "ELEX" which belonged to M/s. ELEX Engineering Works but on record there was no oral or documentary proof to substantiate this ground.* **DECISION**: *The Supreme Court was of the view that the benefit of exemption could be availed only when the company is manufacturing the goods under its own brand name or the*	***Elex Knitting Machinery Co. 2012 (S.C.)***

		brand name being used belonged to a sister concern of that company.The Supreme Court held that the appellant was eligible to claim benefit of the SSI exemption as the proprietor of Elex Knitting Machinery Co. was one of the partners in Elex Engineering Works. And hence being the co-owner of the brand name of Elex, he could not be said to have used the brand name of another person, in the manufacture and clearance of the goods in his individual capacity.	
36)	**Whether the exempted goods on which duty has been paid by mistake by the assessee and refund thereof has also not been claimed would be excluded while computing turnover for preceding year for claiming SSI exemption?**	**FACTS:** *The appellant was a manufacturer of goods falling under Chapter headings 32 and 84 of the first schedule to the Central Excise Tariff Act, 1985. The goods falling under Chapter heading 84 were wholly exempt from duty vide an exemption notification, but the appellant by mistake paid the excise duty on it and did not even claim refund of the same. For goods falling under Chapter heading 32, the appellant wanted to claim SSI exemption. It satisfied all the conditions for claiming the said exemption. For the purposes of computing the eligible turnover for SSI exemption, the assessee excluded the goods which were exempted although duty was paid mistakenly on them. However, the Revenue contended that clearances of such goods should be included while computing the eligible turnover.* **DECISION**: *The Supreme Court opined that SSI exemption would be allowable to the assessee, as they meet all the conditions thereof. The amount of clearances in the SSI exemption notification needs to be computed after excluding the value of exempted goods. Merely because the assessee by mistake paid duty on the goods which were exempted from the duty payment under some other notification, did not mean that the goods would become goods liable for duty under the Act. Secondly, merely because the assessee had not claimed any refund on the duty paid by him would not come in the way of claiming benefit of the SSI exemption. Accordingly the appeal was allowed in the favor of the appellant-assessee. The Court directed the adjudicating authority to apply the SSI exemption notification in the assessee's case without taking into consideration the excess duty paid by the assessee under the other exemption notification.*	***Bonanzo Engg. & Chemical P. Ltd.2012 (S.C.)***
37)	**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**	**FACTS:** *The respondent-assessee was using the common brand name of "Dominant" while clearing the goods manufactured by it in 2 units. 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:** *The HC said 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, HC said the*	***Deora Engineering Works***

	exemption?	*clearance of goods is rightly clubbed*	
38)	**Can the Settlement Commission decline to grant immunity from prosecution after confirming the demand and imposing the penalty?**	**FACTS:** *M/s. Maruthi Tex Print & Processors Pvt. Limited, Hyderabad, was a concern registered with the Excise Department for manufacture of man-made fabrics (MMF) and also for manufacture of cotton fabrics. During the course of business, search was carried out at various places, including the factory, registered office premises, their godown and dealers' premises, which resulted in recovery of certain records relating to delivery of processed fabrics, and seizure of certain quantities of grey and processed fabrics. The Department issued SCN confirming demand at the higher rate of duty and interest and penalty thereon and seized goods also. However, there was no clear evidence to hold that the fabrics mentioned in all delivery challans were attracting higher rate of duty. The assessee approached the Settlement Commission. The Settlement Commission confirmed the entire demand, penalty, seizure and denied the immunity from the prosecution. The assessee approached the High court.* **Difference of opinion:** *Can the Settlement Commission decline to grant immunity from prosecution after confirming the demand and imposing the penalty?* **DECISION:** *The High Court held that when an allegation of clandestine manufacture and clearances is made, the person making the allegation should establish the complete charge including the nature of the goods and its value involved for determining the appropriate demand of duty. Secondly, the Settlement Commission can be approached if a person, who suffered a show cause notice on the charge of evasion of duty, finally wants to settle the matter, by making full disclosure admitting certain omissions/commissions. The Settlement Commission, by looking at the onus upon the Department to prove about the nature of goods cleared without payment of duty, should decide the matter. However, in the present case, without placing the burden on the department to prove their case, the Settlement Commission confirmed the demand on the assessee. Settlement Commission should not have refused the benefit of immunity from prosecution. Hence, that part of refusal to grant immunity for prosecution is alone interfered with. Accordingly, the Court set aside the order relating to non-grant of immunity for prosecution and resultantly, the assessee was granted immunity from being prosecuted*	***Maruthi Tex Print & Processors P. Ltd 2012***
39)	**Whether a consolidated return filed by the assessee after obtaining registration, but for the period prior to obtaining**	**FACTS:** *The petitioner got its units registered after few days of search conducted in its units. Thereafter, it filed consolidated return with the Deptt 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*	***Icon Industries v. 2011*** ***{Asked in Nov-2012}***

	registration, could be treated as a return under clause (a) of first proviso to section 32E(1)?	*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:** *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 & 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. Where it held , 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 & clearance to be filled in such belated returns.*	
40)	**Is the Settlement Commission empowered to grant benefit under proviso to Sec 11AC in settlement cases?**	**DECISION***: The Court ruled that benefit under the proviso to Sec 11AC could not be granted by the Settlement Commission in cases of settlement. As settlement commissions order & Adjudicating officers order are covered by different chapters & A.O has no power to grant immunity from prosecution.*	***Ashwani Tobacco Co. Pvt. Ltd.***
		CUSTOMS	
41)	**In case no statutory definition is provided under law, can the opinion of expert in trade who deals in those goods be considered?**	**FACTS:** *Assessee was an importer & imported one unit of the equipment which was declared as "Kari Mayer High Speed Draw Warping Machine with 1536 ends along with essential spares". The importer claimed that these goods are covered under an exemption notification.Under said notification, exemption was available in respect of the High Speed Warping Machine with yarn tensioning, pneumatic suction devices and accessories. Undisputedly, the assessee had imported High Speed Warping Machine, but it had drawing unit and not the pneumatic suction device. The textile commissioner, who was well conversant with these machines, had stated that the goods imported by the assessee were covered under the exemption notification. He further stated that drawing unit was just an essential accessory to the machines imported by assessee and, therefore, was covered under said notification. The opinion so furnished is taken note of by the Tribunal while granting relief to the assessee. The Customs authorities refused to accept the request of the assessee and accordingly, had directed the assessee to pay the duty under the provisions of the Customs Act, 1962.* **Difference of opinion:** *Revenue contended that the machine*	***Konkan Synthetic Fibres 2012(S.C.)***

		imported by the assessee was not in consonance with the exemption notification and, therefore, the benefit of exemption should not be available under the notification to the assessee. **DECISION:** *The SC stated that it was a settled proposition in a fiscal or taxation law that while ascertaining the scope or expressions used in a particular entry, the opinion of the expert in the field of trade, who deals in those goods, should not be ignored, rather it should be given due importance. The Supreme Court on referring to the case of Collector of Customs v.* **Swastic Woollens (P) Ltd. 1988 (37) E.L.T. 474 (S.C.)**, *held that when no statutory definition was provided in respect of an item in the Customs Act or the Central Excise Act, the trade understanding, i.e. the understanding in the opinion of those who deal with the goods in question was the safest guide. Thus, the SC said the imported goods were covered under the exemption notification.*	
42)	**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?**	**DECISION:** *The HC made following observations:-* **1)** *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.* **2)** *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.* **3)** *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.*	***Tirupati Udyog Ltd. 2011*** ***{Asked in May-2012}***
43)	**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)?**	**FACTS:** *The respondent imported resin impregnated paper and plywood for mfr of furniture. The said goods warehoused from the date of import. The respondent opted extension of the warehousing period which the authorities granted. 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:** *H.C said Sec 23 states only when imported goods are lost or destroyed before clearance for home consumption then only application for remission of duty can be considered. 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 HC, overruled decision of the Tribunal, & held that the*	***Decorative Laminates (I) Pvt. Ltd.***

		circumstances u/s 23 were not applicable to the present case since destruction of the goods or loss of the goods had not occurred before the clearance for home consumption. 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.	
44)	**Where a classification (under a Customs Tariff head) is recognized by the Government in a notification any point of time, can the same be made applicable in a previous classification in the absence of any conscious modification in the Tariff?**	**FACTS:** *Department contended that 'Electronic Automatic Regulators' were classifiable under Chapter sub-heading 8543.89 whereas Keihin Penalfa Ltd. was of the view that the aforesaid goods were classifiable under Chapter sub-heading 9032.89. An exemption notification dated 1-3-2002 exempted the disputed goods classifying them under chapter sub-heading 9032.89. The period of dispute, however, was prior to 1-3-2002.* **Difference of opinion:** *The dispute was on classification of Electronic Automatic Regulators.* **DECISION:** *The Apex Court observed that the Central Government has issued a exemption notification dated 1-3-2002 and in the said notification it has classified the Electronic Automatic Regulators under Chapter sub-heading 9032.89. Since the Revenue itself has classified the goods in dispute under Chapter sub-heading 9032.89 from 1-3-2002, the said classification need to be accepted.*	***Keihin Penalfa Ltd. 2012 (S.C.)***
45)	**Whether classification of the imported product changes if it undergoes a change after importation and before being actually used?**	**DECISION:** *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.*	***Atherton Engineering Co. Pvt. Ltd.***
46)	**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?** **DECISION:** *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*		***M/s CPS Textiles P Ltd.***

	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.		
47)	**Whether subsequent increase in the market price of the imported goods due to inflation would lead to increase in customs duty although the contract price between the parties has not increased accordingly?**	**FACTS:** *On 26th June 2001, Aggarwal Industries Ltd. entered into a contract with foreign suppliers viz M/s. Wilmar Trading Pvt. Ltd., Singapore, for import of 500 metric tons of crude sunflower seed oil at the rate of US $ 435 CIF/metric ton. Under the contract, the consignment was to be shipped in the month of July 2001. However, the mutually agreed time for shipment was extended to 'mid August 2001'. Thus, the goods were actually shipped on 5th August 2001 at the price prevailing at the contract date.* **Difference of opinion:** *The Revenue contended that when actual shipment took place, after the expiry of the original shipment period, the international market price of crude sunflower seed oil had increased drastically, and, therefore, the contract price could not be accepted as the 'transaction value' in terms of rule 4 of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 [now rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]. Therefore the duty should be imposed on the increased prices.* **DECISION:** *The Supreme Court held that in the instant case, the contract for supply of crude sunflower seed oil @ US $ 435 CIF/ metric ton was entered into on 26th June 2001. It could not be performed on time because of which extension of time forshipment was agreed between the contracting parties. It is true that the commodity involved had volatile fluctuations in its price in the international market, but having delayed the shipment; the supplier did not increase the price of the commodity even after the increase in its price in the international market. There was no allegation of the supplier and importer being in ollusion. Thus, the appeal was allowed in the favour of the respondent- assessee.*	***Aggarwal Industries Ltd. 2011 (S.C.)***
48)	**Whether the issue of the imported goods warehoused in the premises of 100% EOU for mfr/prodn/processing in 100% EOU would amount to clearance for home consumption?**	**FACTS:** *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*	***Paras Fab International***

		assessee were required to pay duty on such removal. **DECISION:** *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.*	
49)	**Whether Revenue can prefer an appeal in case of a consent order?**	**DECISION***: 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.*	***Trilux Electronics***
50)	**Whether Chartered Accountant's certificate alone is sufficient evidence to rule out the unjust enrichment under customs?**	**DECISION***: 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*	***BPL Ltd.*** ***{Asked in Nov-2012}***

		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	
51)	**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?**	**FACTS:** *The assessee filed a Bill of Entry and paid the higher duty in ignorance of concessional rate notification . 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***: 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].*	***Aman Medical products Ltd.***
52)	**Can the assessee be denied the refund claim only on the basis of contention that he had produced the attested copy of GAR-7 challan* and not the original of the GAR-7 challan*?**	**FACTS***: 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 GAR-7 and what was produced was only an attested copy. According to repondents, production of original of the GAR-7 was a mandatory requirement for processing the refund application.* **DECISION:** *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 GAR-7 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 GAR-7 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.*	***Narayan Nambiar Meloths***
53)	**Whether discharge of liability on**	**FACTS***: Wringley India Pvt. Ltd. had imported second-hand machinery along with spare parts from its sister concern located*	***Wringley India Pvt.Ltd. 2011***

	indicated value would still make the assesse liable for confiscation of goods if he has initially made a mis-declaration of the value thereof?	*at Spain as per Bill of Entry dated 28-4-2006. There was indication in the invoice that the machinery was certified by M/s. S.G.S.Spain, the load port Chartered Engineer at Euro 35876.49. However, the certificate issued by M/s. S.G.S. Spain, the load port Chartered Engineer was not enclosed along with the Bill of Entry and only the invoice was submitted. Since the appellant didn't submit the valuation report, the Custom authorities referred the matter for valuation to local valuer. It entrusted the valuation to the local Chartered Engineer-M/s S.G.S. India Pvt. Ltd. During the process of valuation, M/s. S.G.S. India Private Limited found that the report originally issued by M/s. S.G.S. Spain was showing a higher value of goods than the value declared by the appellant to the customs authorities. Wringley India then paid duty on that high value indicated as per the original report of M/s. S.G.S. Spain.* **Difference of opinion:** *The revenue contended that since the appellant had mis-declared the value of the goods imported, therefore the imported goods should be confiscated under section 111(m) of the Customs Act, 1962.* **DECISION:** *The High Court held that since the appellant made an attempt to mis-declare the value of the imported goods and to misguide the Customs Department, which was also evident from the fact that when the Customs Department directed the appellant to obtain the certificate from the local Chartered Engineer, even at that time they did not disclose the true value assessed by the load port Chartered Engineer M/s. S.G.S. Spain. Even after obtaining the valuation certificate from M/s. S.G.S. India Private Limited, the appellant had no grievance. In fact the valuation so done by the local Chartered Engineer was readily accepted by the appellant as evident from the letter issued by them to the Customs Department and the subsequent payment made by them.The High Court was thus convinced that there was clear mis-declaration of value by the appellant and as per section 111(m) of the Customs Act, the revenue was asked to confiscate the goods so imported.*	
54)	**Whether the smuggled goods can be re-exported from the customs area without formally getting them release from confiscation?**	**FACTS:** *Shri Hemal K. Shah, a passenger, who arrived at SVPI Airport, Ahmedabad on 20-6-2009, had declared the total value of goods as Rs 13,500 in the disembarkation slip. On detailed examination of his baggage, it was found to contain Saffron, Unicore Rhodium Black, Titan Wrist watches, Mobile Phones, assorted perfumes, Imitation stones and bags. Since, the said goods were in commercial quantity and did not appear to be a bona fide baggage, the said goods were placed under seizure. The passenger in his statement admitted the offence and showed his readiness to pay duty on seized goods or re-shipment of the said goods. The adjudicating authority determined total value of seized goods as Rs 8,39,760/- (CIF) and Rs 10,91,691/- (LMV); ordered confiscation of seized goods u/s 111(d) and (m) of the Customs Act, 1962; imposed penalty of Rs2,50,000/- on Hemal K. Shah; confirmed and ordered for*	***Hemal K. Shah (Order No. 102/2011-Cus., Dated 14-6-2011 In F.No. 380/82/B/10-RA)***

		recovery of customs duty on the goods with interest and gave an option to redeem the goods on payment of fine of Rs 2,00,000/- which should be exercised within a period of three months from date of receipt of the order. On appeal by Hemal K. Shah, the appellate authority allowedre-export of the confiscated goods. **Difference of opinion:** *The Department disputed the re-export of confiscated goods. They said that the goods which have been confiscated were being smuggled in by the passenger without declaring the same to the Customs and are in commercial quantity. In view of these facts, the appellate authority has erred in by allowing the re-export of the goods by reducing the redemption fine and penalty. While doing so, he has not taken into account the law laid down by the Hon'ble Supreme Court in the case of CC, Kolkata v.Grand Prime Ltd. [2003 (155) E.L.T. 417 (S.C.)]* **DECISION:** *The Government noted that the passenger had grossly misdeclared the goods with intention to evade duty and smuggle the goods into India. As per the provision of Section 80 of Customs Act, 1962 when the baggage of the passenger contains article which is dutiable or prohibited and in respect of which the declaration is made under Section 77, the proper officer on request of passenger detain such article for the purpose of being returned to him on his leaving India. Since passenger neither made true declaration nor requested for detention of goods for re-export, before customs at the time of his arrival at Airport. So the re-export of said goods cannot be allowed under Section 80 of Customs Act.*	
55)	**Can the goods be detained indefinitely without any formal order under section 110 of the Customs Act, 1962?**	**DECISION:** *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.*	***S.J. Fabrics Pvt. Ltd. 2011***
56)	**Is it mandatory for the Revenue officers to make available the copies of the seized documents to the person from whose custody such documents**	**FACTS:** *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:** *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*	***Manish Lalit Kumar Bavishi 2011*** ***{Asked in May-2012}***

	were seized?	*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.*	
57)	**Under what circumstances can the penalty be imposed in terms of section 12(a)(ii) of the Customs Act, 1962?**	**FACTS:** *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 P rovision, 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.* **DECISION:** *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.*	***O.T. Enasu 2011***
58)	**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?**	**DECISION:** *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 , 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*	***Textoplast Industries 2011*** ***{Asked in Nov-2012}***
59)	**Is the want of evidence from foreign supplier enough to cancel the confiscation order of goods undervalued?**	**DECISION**: *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*	***Jaya Singh Vijaya Jhaveri***

		that they had received underhand payment of the differential price. Resultantly, the Court upheld the confiscation order.	
60)	**Whether the benefit of exemption meant for imported goods can also be given to the smuggled goods?**	**DECISION:** *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.*	***M. Ambalal & Co. (SC)*** ***{Asked in May-2012}***
61)	**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?**	**DECISION**: *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.*	***Sanghvi Reconditioners Pvt. Ltd. (SC)***
62)	**Can the order of the Settlement Commission be considered to be a judicial proceeding?**	**FACTS:** *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**: *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 onsidering 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.*	***East and West Shipping Agency***

63)	**Does the Settlement Commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the Revenue?**	**FACTS:** *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:** *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 (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.*	***Union of India*** ***{Asked in Nov-2012}***
		SERVICE-TAX	
64)	**Whether the service tax liability created under law can be shifted by a clause entered in the contract?**	**FACTS:** *Rashtriya Ispat Nigam Ltd., the appellant was engaged in the manufacture of steel products and pig-iron for sale in the domestic and export markets. The respondent was a partnership firm carrying on the business of clearing and forwarding agents. In the year 1997, the appellant appointed the respondent as the handling contractor in respect of appellant's iron and steel materials from their stockyard. A formal contract was entered into between the two of them. One*	***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran 2012 (S.C.)***

		of the terms and conditions of the contract read as follows:- "The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the service recipient shall provide the contractor with required tax deduction certificate." *In the year 2000, liability to pay service tax in case of clearing and forwarding agent's services was shifted from service provider (contractor in the given case) to service receiver retrospectively from 16-7-1997 (refer note below). Consequent thereupon, the appellant deducted 5% tax on the bills of the respondent. The respondent, however, refused to accept the deductions saying that the contractual clause cannot alter the liability placed on the service recipient (appellant) by law.* **Difference of opinion:** *Where the law places liability to pay service tax on the service recipient, can the service provider be made liable to pay service tax on account of such clause provided in the contract?* **DECISION:** *The Supreme Court observed that reading the agreement between the parties as a whole and harmonizing various provisions thereof, it can be inferred that service provider (contractor) accepted liability to pay service tax, since it arose out of discharge of their obligations under contract. With regard to the submission of shifting of tax liability, Supreme Court held that service tax is indirect tax which may be passed on. Thus, assessee can contract to shift their liability. Finance Act, 1994 is relevant only between assessee and tax authorities; it is irrelevant to determine rights and liabilities between service provider and recipient as agreed in contract between them. There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under contract between them.*	
65)	**Will service tax paid mistakenly arouse service tax liability?**	**FACTS:** *KVR Construction was a construction company rendering services under category of "construction of residential complex service" and were paying the service tax in accordance with Finance Act, 1994. They undertook certain construction work on behalf of a trust and paid service tax accordingly. However, later they filed refund claim for the service tax so paid contending that they were not actually liable to pay service tax as it was exempt. The appellant, on the other hand, rejected the refund claim on the ground that the refund application filed by the respondent-assessee was beyond the limitation period as stated in section 11B of Central Excise Act. Department did not dispute.* **Difference of opinion:** *Is assessee liable to claim refund on service tax paid on construction activity so done by them?*	***KVR Construction 2012***

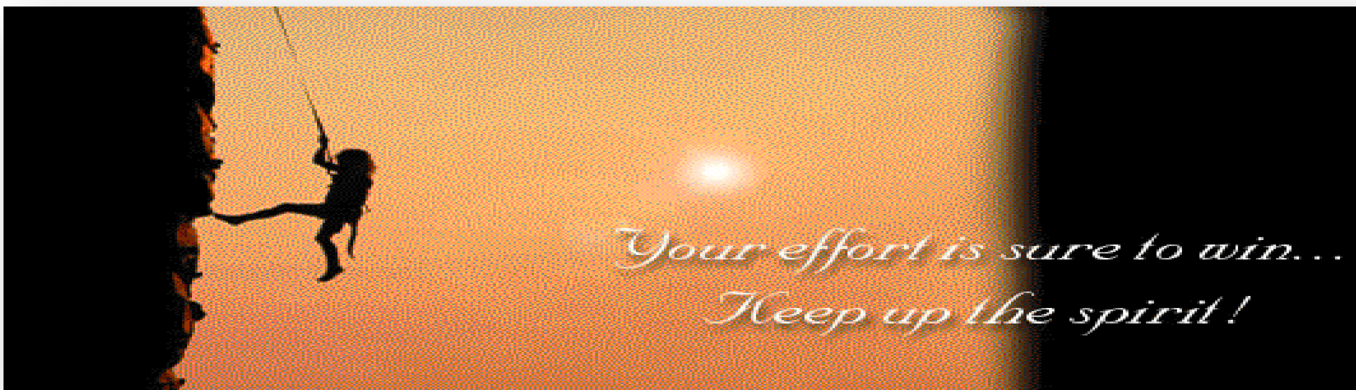
		DECISION: *The HC of Karnataka, distinguishing the landmark judgment by SC in the case of* **Mafatlal Industries** *v. UOI (S.C.) relating to refund of duty/tax, held that service tax paid mistakenly under construction service although actually exempt, is payment made without authority of law. Mere payment of amount would not make it 'service tax' payable by the respondents. When once there is lack of authority to collect such service tax from the respondent, it would not give authority to Department to retain such amount and validate it. In view of the above, it was held that refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation under Section 11B of the Central Excise Act, 1944.*	
66)	**Is the service tax and excise liability mutually exclusive?**	**FACTS:** *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:** *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.*	***Lincoln Helios (India) Ltd. 2011*** ***{Asked in May-2012}***
67)	**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?**	**FACTS:** *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:-* • *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.* • *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:** The High Court rejected the contentions of the assessee and opined as under:- • *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*	***Kishore K.S. v. Cherthala Municipality 2011*** ***{Asked in Nov-2012}***

		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. • *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.*	
68)	**Were services provided to the pilgrims taxable under short term accommodation service?**	**FACTS:** *TirumalaTirupatiDevasthanams, Tirupati was running guest houses for the pilgrims. The department issued S.C.N stating that the assesse were liable to get service tax registration under "short term accommodation service" and thus liable to pay service tax. The assesse, on the other hand submitted that they were not club or any other association and thus, were not liable get registered under service tax.* **Difference of opinion:** *Assessee contested that since they were running guest houses without any profit motive hence they were not liable to pay service tax.* **DECISION:** *The Andhra Pradesh High Court held that the petitioner was religious and charitable institution and was running guest houses by whatever name they were called, whether it was a shelter for pilgrims or any other name for a considerable time and thus was liable to get itself registered under 'Short term accommodation service' and pay service tax on the same.*	***Tirumala Tirupati Devasthanams, Tirupati (2012-TIOL-97-HC-AP-ST)***
69)	**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?**	**DECISION:** *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 noncustomised, 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*	***Infotech Software Dealers Association (ISODA) 2010***

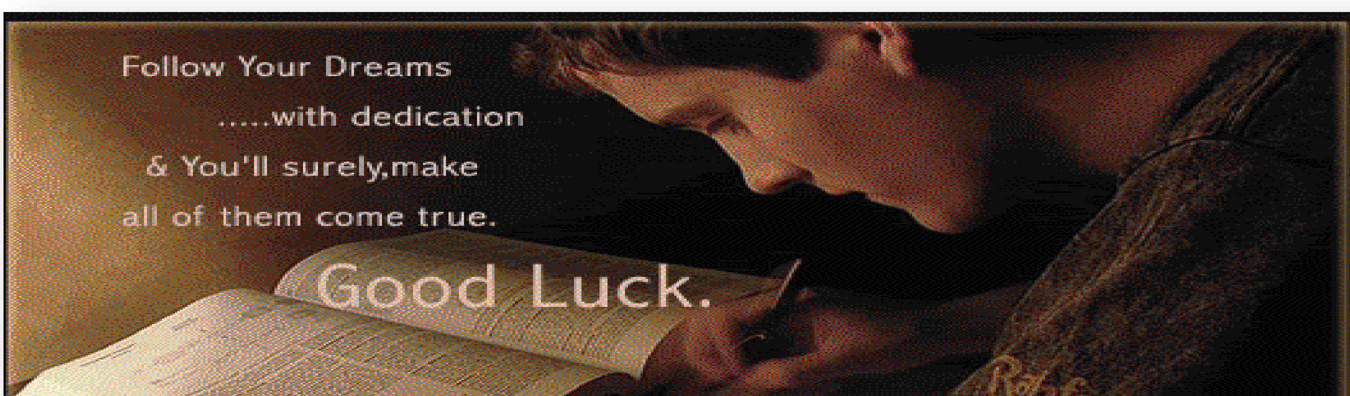
		exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax. The High Court explained that when a statute, particularly a taxing statute is considered with reference to the legislative competence, 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.* **Note:-** *Services of development, design, programming, customisation, adaptation,upgradation, enhancement, implementation of information technology software have now been included in the declared service under section 66E.*	

70)	**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'?**	**FACTS:** *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:** *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.*	***Nahar Industrial Enterprises Ltd.*** ***2010***
71)	**Whether the penalty is payable even when service tax and interest has been paid before issue of show cause notice?**	**FACTS:** *Adecco Flexione Workforce Solutions Ltd. had paid both the service tax and interest for delayed payment before issue of show cause notice under the Act. Section 73(3) of the Finance Act, 1994 categorically stated that if the payment of service tax and interest has been intimated to the authorities in writing, the authorities should not serve any notice for the amount so paid. But to the above, the authorities issued SCN to the appellant for delay in payment of service tax.* **Difference of opinion:** *Assessee contested the issue of SCN when they had already paid the service tax along with interest for delayed payment of service tax.* **DECISION:** *The Karnataka High Court held that the authorities had no authority to initiate proceedings for recovery of penalty under section 76 of the Act when the tax payer paid service tax along with interest for delayed payments promptly. As per section 73(3), no notice shall be served against persons who had paid tax with interest; the authorities can initiate proceedings against defaulters who had not paid tax and not to harass persons who had paid tax with interest on their own. If the*	***Adecco Flexione Workforce Solutions Ltd.*** ***2012***

		notices were issued contrary to this section, the person who had issued notice should be punishable and not the person to whom it was issued.	
72)	**Can appeal be filed to High Court for deciding the question relating to the taxability of service tax?**	**DECISION:** *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.*	***Volvo India Ltd. 2011 {Asked in May-2012}***



"Forget past mistakes. Forget failures. Forget everything except what you're going to do now and do it." ~ William Durant
"Though no one can go back and make a brand new start, anyone can start from now and make a brand new ending." ~ Carl Bard
"You're never a loser til you quit trying." ~ Anonymous
"Many of life's failures are people who did not realize how close they were to success when they gave up." ~ Thomas Edison



All the best to my friends appearing this attempt , hope this work of mine will ease your preparation. Kindly go through those 26 new case laws very well which are marked in the names while you were reading.

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