

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance Act, 2006 and Notifications/Circulars issued up to 30.04.2007 which are relevant for November 2007 examinations.

PAPER – 8 : INDIRECT TAXES

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

PART – A

Question 1

- (a) Briefly explain any two of the following with reference to the provisions of the Central Excise Act, 1944:
- (i) Manufacture and processing
 - (ii) Dutiability of site related activities
 - (iii) Labelling and branding activities (2 x 2 = 4 Marks)
- (b) Explain briefly the meaning of “Trade parlance test” in matters relating to classification under the Central Excise Tariff Act, 1985. (4 Marks)
- (c) Discuss the validity or otherwise of the following statements with brief reasons:
- (i) An assessee would lose the benefit to pay duty in monthly instalments if he has made a default in payment of duty by the due date and the same is discharged beyond a period of 30 days from the due date in terms of rule 8 of the Central Excise Rules, 2002.
 - (ii) Excise duty is payable on intermediate goods, manufactured by factory A which are removed without payment of duties of excise for use in the manufacture of subject goods, namely machines, in factory B of a Large Tax Payer Unit under rule 12BB of the Central Excise Rules, 2002. (2 x 3 = 6 Marks)
- (d) Answer briefly in the context of refund of CENVAT credit under rule 5 of the CENVAT Credit Rules, 2004, the following:
- (i) Under what circumstances will the benefit under the Rule be available for inputs or input services? (3 Marks)
 - (ii) How is the manufacturer or provider of output service allowed to utilize the CENVAT credit in respect of the inputs or input services? (3 Marks)

Answer

- (a) (i) Manufacture involves a series of processes, whereas a process is one of the activities undertaken for manufacture of a product from input materials. Manufacture is the cumulative effect of various processes to which raw materials are subjected and each step towards the finished product would constitute

processing in relation to manufacture.

- (ii) Excise duty is a levy on movable goods and not on immovable property. Excise duty is chargeable when, at site, there emerges movable goods, during the course of fabrication or bringing into being of immovable property, in the form of buildings, plant etc. In other words, if movable goods such as fabricated parts, structures, equipments are brought into being and they are thereafter mounted or fixed on civil foundations so as to complete the construction, excise duty will be chargeable on such movable goods, notwithstanding that the final products are items of immovable property.

On the other hand, if the site work is carried out on top of a civil foundation and such parts, structures etc. are erected piece by piece on such foundation, no movable goods are brought into being and hence no duty is chargeable on such activities.

- (iii) An unlabelled or a labelled product is normally treated in commercial parlance as the one and the same and consequently mere labelling of fully manufactured products does not constitute manufacture in law. However, the legislature has specifically provided in section 2(f)(iii) of the Central Excise Act, 1944 that in respect of goods specified in the Third Schedule of the Central Excise Act, 1944, labelling or re-labelling inter alia amounts to manufacture. As regards branding, it has been held in numerous decisions that this would not amount to manufacture.

- (b) According to the Trade Parlane test, if a product is not defined in the Schedules and Section Notes and Chapter Notes of the Central Excise Tariff Act, 1985, then it should be classified according to its popular meaning or meaning attached to it by those dealing with it i.e., in its commercial sense. However, where the Tariff headings itself uses highly scientific or technical terms, goods should be classified in scientific or technical sense.

The Supreme Court in *Akbar Badruddin Jiwani v. CC* [1990] 47 ELT 161 has held that the said doctrine of commercial nomenclature and trade understanding should be departed from in a case where the statutory context in which the Tariff entry appears, requires such a departure.

- (c) (i) Sub-rule (3A) of rule 8 of the Central Excise Rules, 2002 provides that if an assessee defaults in payment of duty beyond 30 days from the due date then he shall pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit. He shall continue to pay duty consignment-wise (from PLA) till the date he pays the outstanding amount including interest thereon. In the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided shall follow.

Hence, the given statement is valid.

- (ii) As per rule 12BB of the Central Excise Rules, 2002, the given statement would be valid in all cases where:
 - (i) the machines are not exported under bond or letter of undertaking within 6

months from the date of receipt of the intermediate goods in the recipient premises (factory B), or

- (ii) the machines are removed without payment of duty, or
- (iii) the machines are removed by paying appropriate excise duties beyond a period of 6 months, or
- (iv) any duty of excise is payable on intermediate goods and the said duty is not payable on machines.

However, the statement would be invalid in cases not covered by points (i) to (iv) mentioned above.

- (d) (i) The benefit under rule 5 of the CENVAT Credit Rules, 2004 for inputs or input services would be available when the same are used:
 - (a) in the manufacture of final product which is cleared for export under Bond or Letter of Undertaking (LUT), or
 - (b) in the manufacture of intermediate product cleared for export; or
 - (c) in providing output service which is exported.
- (ii) The CENVAT credit in respect of the input or input services shall be allowed to be utilized by the manufacturer or provider of output service towards payment of:
 - (a) duty of excise on any final product cleared for home consumption or for export on payment of duty; or
 - (b) service tax on output service.

Where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Question 2

- (a) M/s. KE Ltd. manufactured elastics with brand name of M/s. XYZ Ltd., who in turn used these elastics in the manufacture of other excisable goods. These elastics were never sold in the open market. The general public only received the manufactured excisable goods. M/s. KE Ltd. claimed the exemption based on value of clearances (SSI) in terms of Notification No. 8/2003-C.E. dated 01.03.2003 on the ground that they did not use the brand name on the final product and that the brand name was used only in respect of the goods meant for captive consumption. This claim was disputed by the Excise Department on the basis that it is immaterial that the ultimate customer got only the final product as the use of the brand name on elastics, even if not sold in the open market, would convey to the customer that the elastics had connection with the owner of the brand name. Briefly discuss whether the stand of the Department is valid in law?

(5 Marks)

- (b) With reference to the CENVAT Credit Rules, 2004, discuss briefly whether the following statements are correct or not:
- (i) CENVAT credit cannot be taken on the inputs lying in stock on the date when the final product becomes dutiable because the said product was initially exempt.
 - (ii) CENVAT credit of duties of excise on inputs can be availed on the basis of an invoice, while credit of service tax paid on input services can be availed only upon payment of the full invoice value including service tax.
 - (iii) In case of transfer of ownership of the factory by way of sale along with inputs and capital goods, the unutilized input credit shall lapse. (3 x 2 = 6 Marks)
- (c) Briefly answer with reference to the provisions of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 whether in the following cases any notional interest on the advance received is includible in the value for purpose of assessment:
- (i) An assessee sells his goods against full advance payment to X. He also sell such goods to Y without any advance payment at the same price per unit.
 - (ii) A, the assessee manufactures and supplies certain goods as per design and specification of B. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. (2 x 2 = 4 Marks)

Answer

- (a) The facts of the given case are identical to the case of Kohinoor Elastics Pvt. Ltd. v. CCEx. [2005] 188 ELT 3 (SC). In the instant case, the Supreme Court has observed that as per the small scale exemption notification, the benefit of small scale exemption is available only in respect of those goods which do not bear a brand/trade name of another person. However, the notification does not provide that exemption shall be lost only for those goods (bearing the brand name of other person) which are sold in the market or those goods which reach the customers without any change in form. Therefore, the Apex Court has held that goods manufactured for captive consumption would not be any exception and the exemption would not be available if brand name of another person is used on them.

Hence, in the given case the Department's stand is valid in law and M/s. KE Ltd. will not be entitled for the small scale exemption in respect of the elastics (meant for captive consumption) bearing the brand name of M/s. XYZ Ltd.

- (b) (i) False. Manufacturer of final products shall be allowed to take CENVAT credit of the duty paid on-
- inputs lying in the stock or
 - inputs in process or
 - inputs contained in the final products lying in stock
- on the date on which such final product cease to be exempted goods [Rule 3(2)].

- (ii) True. Credit of service tax paid on input services can be availed only after the recipient of input service makes payment of input services and the service tax payable on it, as shown in the invoice [Rule 4(7)].

However, in case of excise duty, credit is available as soon as the goods are received in the factory. The reason for such different treatment is that the input supplier can clear the inputs from his factory only after paying the applicable duty irrespective of the time at which he receives the payment against the invoice, whereas the input service provider pays the service tax only after he realizes the payment for taxable services as the service tax is due upon realization only.

Note: If the recipient of input service settles the bill on a value less than the invoice value, service tax payable shall also be reduced proportionately and the assessee would be eligible to avail the reduced CENVAT credit.

- (iii) False. The manufacturer shall be allowed to transfer the credit lying unutilized provided the transfer takes place with specific provision for transfer of liabilities of such factory [Rule 10(1)] and the said inputs and capital goods are duly accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise [Rule 10(3)].

Note: It is also possible to answer as 'True' if it is assumed that there is no specific provision of transfer of the liabilities of such factory or the inputs and the capital goods have not been accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise.

- (c) Explanation 2 to rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 provides that where any advance payment from the buyer is received against delivery of excisable goods, no notional interest on such advance shall be added to the value unless the central excise officer has evidence to the effect that the advance received has influenced the fixation of price of the goods by way of charging a lesser price or by offering of a special discount to the buyer who has made the advance deposit.
- (i) No notional interest on the advance received by the assessee is includible in the transaction value in the present case as same price is also charged from Y (another buyer) who has not given the advance deposit.
- (ii) Notional interest would be includible only if there is evidence available with the central excise officer that advance has resulted in lowering of prices. In the absence of any such evidence, no notional interest on the advance received shall be added to the transaction value.

Question 3

- (a) M/s PQR Ltd. were granted a refund by the Appellate Authority under the Central Excise Act, 1944. The jurisdictional Assistant Commissioner of Central Excise has issued a notice under section 11A of the Central Excise Act, 1944 demanding the amount of

refund on the ground that such a refund is erroneous. Briefly discuss whether the action taken by the Assistant Commissioner of Central Excise is valid in law. (4 Marks)

- (b) Answer briefly with reference to rule 21 of the Central Excise Rules, 2002 (regarding remission of duty and destruction of goods) the following:
- (i) The circumstances under which remission of duty may be ordered;
 - (ii) The manner of destruction. (2 x 2 = 4 Marks)
- (c) Briefly explain the procedure for removal of goods by an hundred percent export oriented unit for domestic tariff area. (4 Marks)
- (d) Write a brief note on “electronic maintenance of records and preparation of returns and documents” under the Central Excise Rules, 2002. (3 Marks)

Answer

- (a) The facts of the given case are similar to the case of *Dynamite Technologies Ltd. v. Union of India* 2005 (186) ELT 277 (Kar.) wherein the High Court has held that where refund arises only as a consequence of an order/direction issued by the Appellate Authority, as a quasi judicial functionary, any recovery of amount could only be made if the order is again modified further in appeal proceedings and not otherwise. The High Court observed that even in such an event the amount could be recovered only as a consequential action and not otherwise. The High Court stated that the show cause notice in the said case was unnecessary and not within the scope of the power under section 11A of the Central Excise Act, 1944. The expression “whether or not” in section 11A could not be extended to the case of short levy/non-levy or erroneous refund granted as a result of appellate proceedings.

Therefore, in view of the above-mentioned judgement the action taken by the Assistant Commissioner is not valid in law.

- (b) (i) Rule 21 of the Central Excise Rules, 2002 provides that where it is shown to the satisfaction of the Central Excise Officer that goods have been lost or destroyed by natural causes or by unavoidable accident or claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods subject to such conditions as may be imposed by him.
- (ii) The goods intended and presented before the proper officer must be destroyed in such a manner that they become irretrievable as excisable commodity. The actual method of destruction will depend upon the nature of the goods to be destroyed. For example matches, cotton, rayon and woolen fabrics, papers, cigar and cheroots may be destroyed by fire. Electric bulb and batteries may be destroyed by crushing into bits and scraps. Vegetable oils and vegetable products may be destroyed by mixing earth or kerosene and dumping into pits. Whatever method of destruction is adopted, the officer supervising the destruction will satisfy himself that the destroyed goods cannot be marketed.

- (c) Rule 17 of the Central Excise Rules, 2002 provides that where any goods are removed from a 100% EOU to domestic tariff area, such removal shall be made under an invoice in the procedure prescribed under Rule 11. Further, removal shall be made only after payment of appropriate duty by debiting the account current maintained for this purpose or by utilizing the CENVAT credit.

Such unit is required to maintain appropriate accounts related to production in the prescribed form giving the following details:-

- (i) description of goods
- (ii) quantity removed
- (iii) duty paid

Such unit is further required to submit a monthly return in the specified Form (ER-2) in respect of excisable goods manufactured in, and receipt of inputs and capital goods in, the unit. The return is to be submitted to the Superintendent of Central Excise within ten days from the close of the month to which the return relates.

- (d) Any person may electronically maintain or generate all or any of the records or returns, invoices and other documents prescribed under the rules made under the Central Excise Act using a computer, in an electronically readable format. The Department will maintain a record to the effect that records are maintained electronically. The records can be kept on any electronic media and besides this print outs may also be kept where required.

The records together with back-ups in electronic or other form should be preserved for a period of 5 years counted from the first day of the financial year following the financial year to which they relate. The person who maintains electronic records will have to produce the relevant records in hard copy and/or in an electronic readable format, policy and procedure manuals, instructions to record the flow of transactions through the accounting system from the stage of initiation to the closure and storage to the central excise officer or audit party deputed by the Commissioner or the Comptroller and Auditor General of India. An audit trail and inter-linkages including the source document and financial accounts record layout, data dictionary and explanation for the codes used and total number of records in each field along with sample copies of documents will also have to be produced when required. Changes made in the systems adopted by the assessee should be informed to the Department.

In case there is misuse of this facility or if the information required is not made available then the Assistant/Deputy Commissioner of Central Excise may withdraw the facility after giving a reasonable opportunity of being heard to the person.

Question 4

- (a) Section 35C(2) of the Central Excise Act, 1944 provides that the Appellate Tribunal, may at any time within six months of the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it. Briefly illustrate with two examples as to what would constitute "mistake apparent from the record" for the purpose of this provision.

(5 Marks)

- (b) Briefly explain the provisions under the Central Excise Act, 1944 relating to special audit in cases where credit of duty availed or utilized is not within the normal limits. (4 Marks)
- (c) Write a brief note on the following with reference to the Central Excise Act, 1944 and the rules made thereunder:
 - (i) Cancellation of export documents
 - (ii) Bond to be executed by 100% EOU for obtaining indigenous goods without payment of duty
 - (iii) Execution of bond by Government undertaking. (3 x 2 = 6 Marks)

Answer

- (a) Two illustrations of mistakes apparent on the face of the record:-
 - (i) Failure to take into consideration the material evidence, which is present on record, would amount to a mistake apparent on the face of the record. The Tribunal has jurisdiction to correct such a mistake in exercise of its powers under section 35C(2) of the Central Excise Act, 1944 [CCEx. v. Bharat Bijlee Ltd. 2006 (198) ELT 489 (SC)].
 - (ii) When a decision rendered by the Apex Court is not considered, non-consideration of such binding precedent constitutes an error apparent on the face of the record. Even in the context of decisions of the Apex Court and the jurisdictional High Courts rendered after the order of the Tribunal, there would be a case of error apparent on the face of the record on the reasoning that the superior court declared the law as it always was. The binding decision of the Apex Court would cover even the period prior to the inception of such law during which the orders contrary to such ratio of the subsequent decision were passed, thus giving rise to an error apparent on the face of the record. Therefore, rectification of such an error within the period permissible by the statute is required to be effected [Hindustan Lever Ltd. v. CCEx. 2006 (202) ELT 177 (Tri.-LB)].

Other mistakes apparent on the face of the record, which can be rectified by the Tribunal in terms of section 35C(2), can be typographical error, calculation mistakes, point raised in appeal but not considered, retrospective amendments in the statute etc.
- (b) Section 14AA of the Central Excise Act, 1944 states that the Commissioner of Central Excise may call for an audit if he has reason to believe that the credit of duty availed of or utilized by a manufacturer of any excisable goods:
 - (a) is not within the normal limits having regard to the nature of excisable goods produced or manufactured, the type of inputs used and other relevant factors as he may deem appropriate;
 - (b) has been availed of or utilized by reason of fraud, collusion or any willful misstatement or suppression of facts.

The Commissioner shall direct such manufacturer to get the accounts of his factory, depot, office, distributor or any other place, as may be specified by him, audited by a Cost Accountant nominated by him. The Cost Accountant has to submit the duly signed and certified audit report within the period specified by the central excise officer. The report should include any other particulars as are required by such officer. This audit shall be in addition to any other audit under any other law for the time being in force.

The manufacturer shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit and proposed to be utilized in any proceeding under the Act.

- (c) (i) If the excisable goods cleared under A.R.E.-1 are not exported for any reason and the exporter intends to divert the goods for home consumption, he may request the Bond/Letter of Undertaking accepting authority in writing to allow cancellation of application and diversion of goods for consumption in India. He will be permitted to do so if he pays the duty as specified in the application along with interest on such duty from the date of removal for export from the factory till date of payment. Since the duty has been assessed once, there will not be any need for reassessment. After the duty is discharged, the exporter may take credit in his running bond account on the basis of letter of permission, invoice and TR 6 challans.

If the exporter after clearing the goods without payment of duty intends to change the destination and cancel the original documents and issue fresh ones, the same may be done under permission and authentication by the bond/LUT accepting authority.

- (ii) In the case of 100% EOU obtaining indigenous goods without payment of duty under a notification issued under section 5A of the Central Excise Act, 1944, acceptance of surety bond instead of bank guarantee is permissible. EOUs may continue to execute bond in the format given in Form B 17. While executing the combined B 17 bond, security to the extent of 5% of the value of bond in the form of bank guarantee or cash deposit or any other mode of security may be accepted in lieu of surety.
- (iii) The Central Board of Excise and Customs has decided that every undertaking owned and managed directly through any Ministry, Directorate or Directorates of Central Government is exempt from execution of any bond. A State Government is exempt from furnishing any security or surety for bond, where the execution of such bond, or, as the case may be furnishing of security or surety is required under the rules.

An undertaking owned or controlled by the Central Government or State Government does not include any undertaking belonging to corporation owned or controlled by the Central Government or State Government and established by or under a Central or State Act, or any undertaking belonging to a Government Company within the meaning of section 617 of the Companies Act.

Question 5

- (a) Discuss briefly the validity of the following statement with reference to the powers of the Central Excise Department to launch prosecution proceedings under section 9 and section 9AA of the Central Excise Act, 1944:
- “Confiscation and penalty in departmental adjudication and prosecution in criminal proceedings are independent and do not amount to double jeopardy.” (4 Marks)
- (b) Write a brief note on the procedure for warehousing of excisable goods removed from a factory or warehouse with reference to rule 20 of the Central Excise Rules, 2002. (4 Marks)
- (c) State briefly the procedure to be followed by the Authority for Advance Ruling under section 23D of the Central Excise Act, 1944 on the receipt of an application. (4 Marks)
- (d) Write a brief note on the duty of excise not levied or short levied as a result of general practice that is notified as not recoverable under section 11C of the Central Excise Act, 1944. (3 Marks)

Answer

- (a) Besides the departmental adjudication, prosecution may also be launched under section 9 of the Central Excise Act, 1944 for offences under section 9(1) of the Act. As per the provisions of section 9AA, prosecution may be launched against any person, director, manager, secretary or other officers of the company or partner/ proprietor of the firm, who is responsible for the conduct of the business of the company/firm and is found guilty of the offences under the Central Excise Act. Section 9 of the Central Excise Act provides for prosecution of offences in a court of law and provides a minimum imprisonment of six months which can extend to a period of seven years in certain cases.
- Prosecution proceedings in a court of law are generally initiated after departmental adjudication of an offence has been completed. However, prosecution may be launched even where adjudication is not complete. Prosecution is launched in all cases where there is sufficient evidence to prove fraudulent intention. The Chief Commissioner of Central Excise or the Director General of Central Excise Intelligence has the power to sanction prosecution. Thus, confiscation and penalty in departmental proceedings and prosecution in criminal proceedings are independent.
- (b) Rule 20 of the Central Excise Rules, 2002 prescribes the following procedure for warehousing of excisable goods removed from a factory or a warehouse:
- (i) The consignor (i.e. manufacturer or registered person of the warehouse) shall prepare an application for removal of goods from a factory or a warehouse to another warehouse in quadruplicate in the specified form.
 - (ii) The consignor shall prepare the invoice in the manner prescribed in Rule 11.
 - (iii) The original, duplicate and triplicate application and the duplicate invoice shall be sent to the warehouse of the destination.

- (iv) The consignor shall send the quadruplicate copy to the Superintendent-in-charge having jurisdiction over his factory or warehouse within 24 hours of removal of the consignment.
 - (v) On arrival of the goods at the destination, the consignee (i.e., the registered person of the warehouse who receives the excisable goods from the factory or a warehouse) shall verify the goods with the copies of the application within 24 hours. The consignee shall send the original application to the Superintendent-in-charge, of his warehouse, the duplicate to the consignor and retain the triplicate for his records.
 - (vi) The Superintendent-in-charge of the consignee shall countersign the application received by him and forward the same to the Superintendent-in-charge of the consignor.
 - (vii) The consignor shall retain the duplicate application duly endorsed by the consignee for his record.
- (c) Section 23D of the Central Excise Act, 1944 prescribes the following procedure to be followed by the Authority for Advance Ruling on receipt of an application:
- (i) On receipt of the application for advance ruling, the Authority shall forward a copy to the relevant Commissioner.
 - (ii) The Authority has the sole discretion to accept or reject the application. However a hearing has to be given before rejection. Application is liable to be rejected in the following cases:-
 - (a) where the question raised in the application is already pending before any Central Excise Officer, Appellate Tribunal or any Court.
 - (b) where the question raised is the same as in a matter already decided by any Appellate Tribunal or Court.
 - (iii) The Authority shall pass an order admitting or rejecting the application. A copy of such order should be given to the applicant and the Department.
 - (iv) The Authority can further examine any material placed before it after admission of the application.
 - (v) The Authority should pronounce the final order within 90 days of the receipt of the application.
 - (vi) Copies of the order have to be given to the applicant and the Commissioner.
- (d) Sometimes goods liable to central excise duty may not be charged to duty on account of generally prevalent practice. They may also be subjected to a lower rate of duty than the applicable rate. In such cases, the Central Government has the power to direct by notification that such not-levied excise duty or short levied excise duty shall not be required to be paid in respect of such goods.

When such a notification in respect of such goods is issued, the whole of the excise duty (in case of non-levy) or excess excise duty (in case of short-levy) which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of section 11B(2) relating to refunds.

The person claiming refund of such duty or the excess duty has to make an application to the Assistant/Deputy Commissioner of Central Excise in the prescribed form before the expiry of six months from the date of issue of the said notification.

PART B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 any two of the following:

- (i) "Import" and "Importer"
- (ii) Meaning of "Assessment"
- (iii) "Clearance for home consumption" and "Clearance for warehousing"

(2 x 2 = 4 Marks)

- (b) XYZ ice cream company imported cone containers made from printed aluminium foils which according to the assessee were classifiable under Chapter 76: "Aluminium and Articles thereof" in section XV of the first schedule to the Customs Tariff Act, 1975. According to the Revenue, these were classifiable under Chapter 48: "Paper and Paperboard; articles of paperpulp, of paper or paperboard". The revenue's view was that where composite goods are made of different components and cannot be classified by reference to Rule 2 of the Interpretative Rules, then the classification has to be according to the principles contained in Rule 3. The classification has to be as if the goods consists of the material or components which give them their essential character. Since the contents of the material in this case was 70.7% paper, that was the essential component of the cone containers for ice cream and merit classification under Chapter 48.

The chapter notes to Chapter 48 read as follows:

Notes :

- 1.
2. This chapter does not cover;
 - (a)
 -
 - (n) metal foil backed with paper or paper board (Section XV)

Discuss briefly whether the action proposed by the Revenue is correct is law. (4 Marks)

- (c) Examine the validity of the following statements with reference to the Customs Act, 1962 giving brief reasons. (Answer any three):

- (i) Service charges paid to canalizing agent are not includible in the assessable value of imports.
 - (ii) Design and engineering charges are includible in the assessable value of the imported goods only if the goods imported are specifically manufactured on the basis of the design and engineering specifications provided by the importer.
 - (iii) Inspection charges are not includible in the assessable value of the imported goods if contract does not specify for certification by an independent agency.
 - (iv) Goods exempt from basic customs duty would automatically be exempt from additional duty of customs. (3 x 2 = 6 Marks)
- (d) (i) With reference to section 125 of the Customs Act, 1962 briefly explain the following:
- (a) Option to pay fine in lieu of confiscation.
 - (b) Whether this fine once paid could be claimed as a refund if the importer decides to abandon the goods? (2 x 2 = 4 Marks)
- (ii) Briefly explain the provisions of Section 89 of the Customs Act, 1962 with regard to supply of ship stores. (2 Marks)

Answer

- (a) (i) The term import under section 2(23) of the Customs Act, 1962 refers to bringing into India from a place outside India. Import of goods into India commences when the goods enter the territorial waters of India, but gets completed only when the goods become part of the mass of goods within the country.
- As per section 2(26) of the Customs Act, 1962 importer, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.
- (ii) In the context of customs duty, the term assessment means quantification of the amount of duty payable. The process of assessment involves determining:
- (i) the quantity and total value of the consignment
 - (ii) the proper tariff classification of the goods
 - (iii) the appropriate rate of duty after all abatements
 - (iv) whether the goods are to be cleared for home consumption or for warehousing.
- (iii) Clearance for home consumption implies that the customs duty on the imported goods has been discharged and goods are cleared for utilization. Clearance for warehousing implies that the goods may, instead of being cleared for home consumption, be deposited in a warehouse and cleared later. When the goods are deposited in a warehouse the collection of duty is deferred till the time such goods are cleared for home consumption. However, the importer has to execute a bond up to a sum equal to twice the amount of duty assessed on the goods at the time of import.

- (b) In the given case, the Chapter Note 2(n) specifically excludes metal foil backed with paper or paperboard from the purview of Chapter 48. The aluminium cone foil containers made up of 70.7% paper cannot be included under Chapter 48 by mere reference to the title of the Chapter 48: "Paper and Paperboard; articles of paper pulp, of paper or paperboard". The contention of the Revenue that the Chapter Note will not apply because of Rule 3(b) of the Interpretative Rules, is not correct as it has been specifically provided in Rule 1 of the Interpretative Rules that "the titles of sections and Chapters are provided for ease of reference only; for legal purposes classification shall be determined according to the terms of the headings and any relative section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained".

Therefore, only if there is no specific Chapter Note requiring otherwise, the subsequent rules i.e., rule 2 onwards, including rule 3(b) of the Rules for Interpretation, can be invoked. However, in the present case, Chapter 48 – Note – 2(n) is very specific leaving no option to resort to Rule 3(b).

The argument that the Interpretative Rules override the Chapter Note is not acceptable in view of the specific enumeration that the rules do not have any other purpose other than ease of reference.

Hence, the Revenue's contention that the cone containers should be classified under Chapter 48 is not correct.

- (c) (i) The statement is not correct. Since the canalizing agent is not the agent of the importer nor does he represent the importer abroad, purchases by canalizing agency from foreign seller and subsequent sale by it to Indian importer are independent of each other. Hence, the commission or service charges paid to the canalizing agent are includible in the assessable value as these cannot be termed as buying commission [Hyderabad Industries Ltd. v. UOI 2000 (115) ELT 593 (SC)].
- (ii) The Supreme Court in the case of TISCO Ltd. v. CCE & Cus. 2000 (116) ELT 422 (SC) has held that design and engineering charges paid for use during construction, erection, assembly etc. of imported goods, being relatable to post import activity, are not includible in the value. Thus, the design and engineering charges which relate to pre-importation activity are only includible in the value. Since, in this case the design and engineering charges are paid for manufacturing the imported product, i.e., they relate to pre-importation activity, the same are includible in the value. Thus, the statement is correct.

Note: With effect from 10.10.2007, new Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 have been notified under section 14 as amended by the Finance Act, 2007. Explanation to rule 10(1) of the said rules clarifies that the royalty, licence fee or any other payment for using a process shall be added to the price actually paid or payable, notwithstanding the fact that such goods may be subjected to the said process after their importation if such payments are related to imported goods and are a condition of the sale of imported goods.

- (iii) The statement is correct. Where there is no requirement in the contract for independent inspection and the inspection is carried out by foreign supplier on his own and is not required for the purpose of fulfilling the condition of the contract, then such charges incurred on inspection are not includible in assessable value [Bombay Dyeing & Mfg. v. CC 1997 (90) ELT 276 (SC)].
 - (iv) The statement is not correct. Exemption from basic customs duty would not mean exemption from additional duty. When goods are exempted from basic customs duty in terms of section 12 of the Customs Act, 1962 it would not mean that they are exempted from additional duty of customs also, as basic customs duty is leviable by virtue of section 12 of the Customs Act, 1962 while additional customs duty is leviable under section 3 of the Customs Tariff Act, 1975 [Kaur Sarin Traders v. Union of India 2006 (199) ELT 224 (Pat.)].
- (d) (i) (a) Section 125 of the Customs Act empowers a customs officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose custody such goods have been seized to pay fine in lieu of confiscation. The provisions in this regard are as follows:
- (i) In case of prohibited goods, the proper officer may give an option to pay fine in lieu of confiscation.
 - (ii) In case of other goods, the proper officer shall give an option of payment of fine, in lieu of confiscation.
- The amount of such fine cannot exceed the market price of the goods confiscated, less import duty paid (in the case of imported goods) thereon. Also, the assessee shall be liable to pay any duty and charges payable in respect of such goods.
- (b) In the case of Purfina Chemicals Pvt. Ltd. v. CEGAT Madras 2004 (167) ELT 145 (Mad.) the High Court has observed that the provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, the redemption fine becomes liable only in lieu of confiscation.
- The High Court has held that where the importer has abandoned the goods, the scope for confiscation comes to an end. Hence, the redemption fine, if already paid becomes liable to be refunded.
- (ii) Section 89 of the Customs Act, 1962 covers the case of indigenous goods, which are supplied to a vessel as ship stores. Goods produced or manufactured in India and required as stores on a foreign going vessel or aircraft may be exported free of duty in such quantities as the proper officer may determine having regard to the size of the vessel or the aircraft, the number of passengers and the crew and the length of voyage or journey on which the vessel or aircraft is about to depart. In other words, the duty free supply of ship stores should be reasonable and not in commercial quantities.

Question 7

- (a) M/s. HIL imports copper concentrate from different suppliers. At the time of import, the seller issues a provisional invoice and the goods are provisionally assessed under section 18 of the Customs Act, 1962 based on the invoice. When the final invoice is raised, based on the price prevalent in the London Metal Exchange on a predetermined date based on the covenant in the contract between the buyer and seller, the assessments are finalized on such invoices. M/s HIL had filed two refund claims arising out of the finalization of the bills of entry by the authorities on 01.03.2006 and on 15.03.2006. With effect from 13.07.2006 (Presidential assent on 13.07.2006) section 18 of the Customs Act, 1962 was amended with the insertion of certain provisions in terms of which it became necessary for the assessee to prove that they had not passed on the amount to their customers. Based on this amendment, the department has rejected the refund claims. Discuss in the light of decided case law, if any, whether the action of the department is correct in law? (5 Marks)
- (b) M/s. RIL Ltd. claimed duty drawback in respect of its export products. Over 97% of the inputs by weight of the product were procured indigenously and were not excisable. All Industry Rates under the Customs and Central Excise Duties Drawback Rules, 1995 were fixed taking into account the incidence of customs duty on imported inputs. Explain briefly with reference to Rule 3(1)(ii) of the said rules whether the claim of M/s. RIL will merit consideration by the authorities. (4 Marks)
- (c) In the context of section 65 of the Customs Act, 1962 dealing with waste or refuse arising during the manufacturing operations or other processes done in the warehouse:
- (i) Examine the validity of the following statement with brief reasons:
 "If finished products are cleared for home consumption on payment of appropriate import duty of customs, then appropriate duty of customs should be levied on the imported goods content in the waste or refuse." (3 Marks)
 - (ii) Explain briefly the "relevant date" for determination of rate of duty leviable on the imported material content in the waste or refuse. (3 Marks)

Answer

- (a) The Supreme Court in *M/s Oriental Exports v. Commissioner of Customs New Delhi* (2006) 200 ELT A/138 (SC) has held that bar of unjust enrichment does not apply in case of refund arising out of finalization of provisional assessment. However, with effect from 13.07.2006, the Taxation Laws Amendment Act has amended section 18 (dealing with provisional assessment) so as to incorporate the principle of unjust enrichment in case of refund arising out of finalization of provisional assessment.

In the instant case, the finalization of the bills of entry has taken place on 01.03.2006 and on 15.03.2006. However, the amendment, by which the provisions of unjust enrichment are incorporated in section 18, has come into effect from 13.07.2006 (Presidential assent on 13.7.2006). Thus, bills of entries have been finalized before the said amendment has become effective. The issue under consideration is whether the said provision will have

retrospective operation so as to enforce this amendment even in respect of bills of entry assessed prior to 13.07.2006. Prior to 13.07.2006, in order to claim refund arising out of finalization of provisional assessment, it was not necessary to prove that incidence of duty has not been passed on to the customers. The said requirement has been inserted in section 18 with effect from 13.07.2006. Thus, the assessments finalized by the authorities prior to 13.07.2006 would be governed by the provisions of section 18 as it stood during the relevant period. However, the assessments finalized by the authorities after 13.07.2006 and refund claim arising out of the same would be governed by the provisions as are incorporated on 13.07.2006.

Therefore in the instant case, the assessee M/s HIL will not be required to adduce proof that in respect of the bills of entry finalized on 01.03.2006 and 15.03.2006 they have not passed on the incidence of such duty to their customers.

- (b) Clause (ii) of second proviso to rule 3 of the Customs and Central Excise Duties Drawback Rules, 1995 inter alia provides that no drawback shall be allowed if the exported goods have been produced or manufactured using imported materials or excisable materials on which duties have not been paid.

In the given case, there was no duty incidence on 97% of the inputs of the export product except the duty incidence on remaining 3% of the inputs, which was insignificant. All Industry Rates fixed for particular export products are applicable to all exporters who export the same. However, in a case where there is clear evidence, as in the present one, that the inputs of such export products have not suffered any duty, no drawback can be claimed. Same view was expressed by the Tribunal in the case of Rubfila International Ltd. v. CCus. Cochin 2005 (190) ELT 485 (Tri.-Bang.).

Note: Circular No. 19/2005 Cus. dated 21.03.2005 clarifies that All Industry Rates of Duty Drawback shall be allowed on export goods manufactured partly of non-duty paid inputs. However, in the given case the said Circular shall not apply as almost whole of the inputs have not suffered duty at all.

- (c) (i) Section 65(2)(b) of the Customs Act, 1962 deals with the question whether import duty should be levied on imported goods content in the waste and scrap when finished products are cleared for home consumption. The said section lays down that if the finished products are cleared for home consumption on payment of appropriate duty of customs, then appropriate duty of customs should be levied on the imported goods content in the waste or refuse.
- (ii) The relevant date for determination of rate of duty leviable on the imported material content in the waste or refuse shall be decided as per the provisions of section 15(1) of the Customs Act, 1962. In the given case, the goods are not:-
- (a) cleared for home consumption on a bill of entry filed under section 46; or
 - (b) cleared from the warehouse, where the date of filing bill of entry for home consumption is relevant. Hence, in this case the third alternative namely the "date of payment of duty" under section 15(1)(c) shall apply.

Thus, in collecting the import duty on the imported material content in the waste or refuse, the rate of duty prevalent on the date of payment of duty shall apply.

Question 8

- (a) Briefly explain the salient features of the Customs Act, 1962 relating to Special Economic Zones. (5 Marks)
- (b) Explain briefly the provisions of section 28(1A) of the Customs Act, 1962 in respect of a person who voluntarily deposits full duty demanded along with interest and applicable penalty. (5 Marks)
- (c) Write a brief note on the provisions of section 28BA of the Customs Act, 1962 regarding property that may be attached provisionally to protect the interest of revenue in certain cases. (5 Marks)

Answer

- (a) The main features of Special Economic Zones (SEZ) are as follows:
 - (i) SEZ may be set up in the public, private or joint sector or by the State Government as notified by the Ministry of Commerce and Industry. The provisions of Chapter XA of the Customs Act, 1962 relating to SEZ are applicable to goods admitted to a SEZ. The Central Government may make rules regarding the requirements relating to goods or class of goods admissible to SEZ.
 - (ii) Any goods imported directly from outside India or procured from within India shall be authorized for admission to the SEZ. Goods admitted to SEZ are exempt from duties of customs subject to certain conditions.
 - (iii) Any goods admitted to SEZ from DTA shall be chargeable to export duties at such rates as are leviable on such goods when exported, subject to any rules made in this behalf. Any goods removed from the SEZ to DTA shall be chargeable to the duties of customs including antidumping, countervailing and safeguard duties as leviable on such goods when imported.
 - (iv) SEZ could be set up for manufacturing goods, rendering of services, production, processing, assembling, trading, repair, re-making, re-conditioning and re-engineering, making of gold, silver and other articles of precious metals and jewellery.
 - (v) It shall be under the administrative control of the Development Commissioner. All activities in the SEZ, unless otherwise specified, shall be carried out through self certification procedure.
 - (vi) Goods going into SEZ from DTA shall be treated as deemed exports. At the same time, goods coming from SEZ to DTA shall be treated as import of goods.

Note: The Finance Act, 2007 has omitted Chapter XA of the Customs Act, 1962 which contains the provisions relating to Special Economic Zones in view of the operationalisation of the Special Economic Zones, Act 2005.

- (b) With effect from 13.07.2006, the Taxation Laws Amendment Act, 2006 has inserted sub-section (1A) in section 28.

Section 28(1) prescribes the condition and time limit within which a show cause notice has to be served for recovery of customs duties. The new sub-section (1A) of section 28 provides an option to the importer or the exporter or the agent or employee of the importer or exporter to whom a notice has been served by the proper officer for short/non levy or non charging or short payment of interest or erroneous refund of duty and interest by reason of fraud, collusion or any willful mis-statement or suppression of facts.

Such a person may pay the duty in full or in part as may be accepted by him including the interest payable thereon under section 28AB and penalty equal to 25% of the duty specified within 30 days of the receipt of the notice.

Where duty is paid in full together with the interest and penalty under sub-section (1A), the proceedings in respect of such persons to whom notices have been issued shall be deemed to have been concluded in respect of the matters stated therein. Where the duty has been paid in part along with interest and penalty, the proper officer shall determine the amount of duty or interest which will not exceed the amount partly due from such person.

- (c) With effect from 13.07.2006, the Taxation Laws (Amendment) Act, 2006 has inserted a new section 28BA in the Customs Act, 1962. Section 28BA provides that during the pendency of any proceeding under section 28 or section 28B, the proper officer may provisionally attach any property belonging to the person on whom notice has been served under section 28(1) or section 28B(2), in accordance with section 142 of the Customs Act and the Rules made thereunder. This action requires prior approval of the Commissioner of Customs and must be necessary for protecting the interest of Revenue.

Such an attachment could be effected for a period of 6 months which shall commence from the date of the order of the Commissioner permitting such provisional attachment. This period may be extended by the Chief Commissioner of Customs by such further period or periods as may be determined by him. The reasons for such extension should be recorded in writing and the total period should not exceed 2 years.

If an application for the settlement of the case is made under section 127B, the period commencing from the date on which such an application is made and ending with the date on which order under section 127C(1) is made shall be excluded from the period of 2 years mentioned above.

PART C

Question 9

- (a) Service Tax (Determination of Value) Rules, 2006 (Valuation Rules) and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 (Import Rules) came into force from 19.4.2006.

Answer the following with reference to the said Rules:

- (i) Expenditure or costs incurred by the service provider as a “Pure agent” of the recipient of service shall be excluded from the value of the taxable service. Who is a “pure agent” under the Valuation rules?
 - (ii) What is the value of taxable service in the case of service provided from outside India under the Valuation Rules?
 - (iii) What are the three categories of taxable services specified in Rule 3 of the Import Rules? (3 x 2 = 6 Marks)
- (b) Answer the following with reference to the Finance Act, 1994 and the rules made thereunder relating to service tax:
- (i) Intimation regarding change in details furnished by an assessee in Form ST-1.
 - (ii) Cancellation of registration certificate.
 - (iii) Adjustment of excess amount paid towards service tax liability for the subsequent period. (3 x 1 = 3 Marks)
- (c) Answer any three of the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:
- (i) Manpower recruitment agency services in respect of staff not contractually employed by the recipient of service but who come under his direction.
 - (ii) Business support services in the context of “outsourced services”.
 - (iii) Construction of roads, airports, railways, bridges, tunnels in the context of “site preparation and clearance, excavation, earth moving and demolition services”.
 - (iv) Clearing and forwarding agent’s services. (3 x 2 = 6 Marks)

Answer

- (a) (i) Explanation 1 to rule 5 of the Valuation Rules provides that “pure agent” means a person who—
- (a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
 - (b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
 - (c) does not use such goods or services so procured; and
 - (d) receives only the actual amount incurred to procure such goods or services.
- (ii) Rule 7 of the Valuation Rules provides that the value of taxable service received under section 66A (i.e., the services which are provided from outside India and received in India) of the Finance Act, 1994 shall be such amount as is equal to the

actual consideration charged for the services provided or to be provided. Rule 7(2) provides that the value of the taxable services partly performed in India and specified in Rule 3(ii) of the Import Rules shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India.

(iii) The three categories of taxable services are:

- ◆ When the immovable property in respect of which the service is provided or to be provided is located in India [Rule 3(i) of Import Rules]
- ◆ When the service is performed in India [Rule 3(ii) of Import Rules]
- ◆ When the service is received by a recipient located in India for use in relation to business or commerce [Rule 3(iii) of Import Rules].

(b) (i) As per rule 4(5A) of the Service Tax Rules, 1994, change in any information or details furnished by an assessee in Form ST-1 at the time of obtaining registration or any additional information or detail intended to be furnished should be intimated in writing by the assessee to the jurisdictional Assistant/ Deputy Commissioner of Central Excise. Such intimation should be made within a period of 30 days of such change.

Further, the assessee would be required to submit a self-certified copy of the registration certificate while intimating any such change and the amended registration certificate shall be issued after canceling the original registration certificate issued earlier.

(ii) As per rule 4(7) of the Service Tax Rules, 1994, every assessee who is registered and ceases to provide taxable service shall surrender his registration certificate to the Superintendent of Central Excise immediately. Sub-rule (8) of rule 4 provides that on receipt of such certificate the Superintendent of Central Excise shall ensure that the assessee has paid all moneys due to the Central Government under the provisions of Act/Rules/Notifications and thereupon cancel the registration certificate.

(iii) Rule 6(3) of the Service Tax Rules, 1994 allows an assessee to adjust the excess service tax paid by him in respect of the services not wholly or partially rendered by him for any reason against the service tax liability for the subsequent period if the value of the services and service tax thereon is refunded to the person from whom it was received.

Further, rule 6(4A) of the Service Tax Rules, 1994 provides that where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be. However, such adjustment of excess amount paid shall be subject to certain conditions specified in sub-rule (4B).

- (c) (i) As per section 65(105)(k) of the Finance Act, 1994, the scope of taxable service in relation to recruitment or supply of manpower includes any service provided or to be provided to a client by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise in any manner.

In the instant case, the manpower recruitment agency is supplying manpower on a temporary basis as the staff is not contractually employed by the recipient. Since, the scope of taxable service includes temporary supply of manpower, the service in the instant case shall be liable to service tax. Further, the CBEC vide MF (DR) Letter F.No. B1/6/2005 TRU dated 27.07.2005 has also clarified that such service would be covered within the purview of service tax.

- (ii) Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as “Business Centre Services”. All such outsourced services are liable to service tax under business support services. Definition of support services of business or commerce gives indicative list of outsourced services [MF (DR) Letter DOF No. 334/4/2006 TRU dated 28.02.2006].
- (iii) Site formation and clearance, excavation and earthmoving and demolition and such other activities provided to any person by any other person in the course of construction of inter alia roads, airports, railways, bridges, tunnels are exempt from the whole of the service tax leviable thereon vide Notification No. 17/2005 ST dated 07.06.2005.
- (iv) As per section 65(25) of the Finance Act, 1994, clearing and forwarding agent means any person who is engaged in providing any service either directly or indirectly, connected with clearing and forwarding operations in any manner to any other person and includes a consignment agent.

The functions of a clearing and forwarding agent include receiving of goods from the factories of the principal, warehousing the goods, arranging the dispatch of the goods, maintenance of records etc. and preparation of invoices.