
RECENT CASE LAWS OF INDIRECT TAX

1. Does the process of washing of iron ore for removal of foreign materials from such ore amount to manufacture?

Commissioner v. Steel Authority of India Ltd. 2012 (283) E.L.T. A112 (S.C.)

The Supreme Court held 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.

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 exigible to excise duty?

CCE v. Osnar Chemical Pvt. Ltd. 2012 (276) E.L.T. 162 (S.C.)

The Supreme Court was of the view that “manufacture” could be said to have taken place only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use. It was a well settled principle that mere improvement in quality did not amount to manufacture.

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

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

(Refer Page No: 7)

The generation of metal scrap or waste during the repair of the worn out machineries/parts of cement manufacturing plant does not amount to manufacture.

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

Medley Pharmaceuticals Ltd. v. CCE & C., Daman 2011 (263) E.L.T. 641 (S.C.) **(Refer Page No: 12)**

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

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

Usha Rectifier Corpn. (I) Ltd. v. CCE., New Delhi 2011 (263) E.L.T. 655 (S.C.) **(Refer Page No: 12)**

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

equipments were saleable and marketable. Hence, the Apex Court held that duty was payable on such testing equipments.

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

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (260) E.L.T. 338 (S.C.) (Refer Page No: 11)

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

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

Bata India Ltd. v. CCE 2010 (252) ELT 492 (SC) (Refer Page No: 12)

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

CCE v. Solid & Correct Engineering Works and Ors 2010 (252) ELT 481 (SC) (Refer Page No: 11)

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

CCE v. Sony Music Entertainment (I) Pvt. Ltd. 2010 (249) E.L.T. 341 (Bom.) (Refer Page No: 7)

10. Does the process of preparation of tarpaulin made-ups after cutting and stitching the tarpaulin fabric and fixing the eye-lets amount to manufacture? (Refer Page No: 7)

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

The Apex Court opined that stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product. The process did not bring into existence a new and distinct product with total transformation in the original commodity. Conversion of tarpaulin into tarpaulin made-ups would not amount to manufacture.

11. In case of a specific entry viz-a-viz a residuary entry, which one should be preferred for classification purpose?

CCE v. Wockhardt Life Sciences Ltd. 2012 (277) E.L.T. 299 (S.C.) (Refer Page No: 24)

12. Whether the price used for selling of a product below the cost price for penetration of market can be considered as transaction value?

CCEx., Mumbai v. Fiat India Pvt. Ltd. 2012 (283) E.L.T. 161 (S.C.)

The Fiat India Pvt. Ltd. (Fiat) was the manufacturer of motor cars. They were selling Fiat UNO model cars below cost and were making losses in wholesale trade.

The Department disputed that 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 invoked Best Judgment Assessment.

Supreme Court opined that this is a case of extra commercial consideration in fixing of price, and artificially depressing it. Full commercial cost of manufacturing and selling was not reflected 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.

- 13. Whether the charges towards pre-delivery inspection and after-sale-service recovered by dealers from buyers of the cars would be included in the assessable value of cars?**
Maruti Suzuki India Ltd. v. CCE 2010 (257) E.L.T. 226 (Tri. – LB) (Refer Page No: 56)
- 14. 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?**
Flex Engineering Ltd. v. Commissioner of Central Excise, U.P. 2012 (276) E.L.T. 153 (S.C.) (Refer Page No: 63)
- 15. The assessee claimed the CENVAT credit on the duty paid on capital goods which were later destroyed by fire. The Insurance Company reimbursed the amount inclusive of excise duty. Is the CENVAT credit availed by the assessee required to be reversed?**
CCE v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.) (Refer Page No: 100)
- 16. In case of combo-pack of bought out tooth brush sold alongwith tooth paste manufactured by assessee; is tooth brush eligible as input under the CENVAT Credit Rules, 2004?**
CCus. v. Prime Health Care Products 2011 (272) E.L.T. 54 (Guj.) (Refer Page No: 78)
- 17. Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice?**
CCE v. Bhuwalka Steel Industries Ltd. 2010 (249) ELT 218 (Tri-LB) (Refer Page No: 69)
- 18. Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company?**
Ashok Kumar H. Fulwadhya v. UOI 2010 (251) E.L.T. 336 (Bom.) (Refer Page No: 78)
- 19. Can CENVAT credit be taken on the basis of private challans?**
CCEx. v. Stelko Strips Ltd. 2010 (255) ELT 397 (P & H) (Refer Page No: 78)

20. Whether Additional Director General, Directorate General of Central Excise Intelligence can be considered a central excise officer for the purpose of issuing SCN?

Raghunath International Ltd. v. Union of India, 2012 (280) E.L.T. 321 (All.)

In this notification, Additional Director General, Directorate General of Central Excise Intelligence was specified as Commissioner of Central Excise. Hence, he was fully competent to issue the impugned show cause notice.

21. Would the copy of the order mandatory to be served via registered post or a speed post also suffice?

Amidev Agro Care Pvt. Ltd. v. Union of India 2012 (279) E.L.T. 353 (Bom.)

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.

22. 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?

Commissioner of C. Ex., Mumbai-III v. Tikitar Industries, 2012 (277) E.L.T. 149 (S.C.)

The Supreme Court observed that since the Revenue had not questioned the correctness or otherwise of the findings on the 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.

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

Hans Steel Rolling Mill v. CCE., Chandigarh 2011 (265) E.L.T. 321 (S.C.) (Refer Page No: 111)

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

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

Assessee was engaged in manufacture of various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. The respondent procured Extra Natural Alcohol (ENA) from the local market on payment of duty, to which Di-ethyl Phthalate (DEP) is added so as to denature it and render the same unfit for human consumption.

Denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP) Act. Thus, addition of DEP to ENA to make the same unfit for human consumption was a statutory requirement. Hence, failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement. Further, as similarly situated assesses were not paying duty on denatured ethyl

alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

25. Whether under section 11BB the interest on delayed refund would be payable from the date of deposit of tax or from the date of receipt of application for refund?

Kanyaka Parameshwari Engineering Ltd. v. Comm of Cus & Cx 2012 (26) STR 380 (A.P)

Under section 11BB of the Central Excise Act, 1944, if any duty is not refunded within threemonths 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.

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

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

The liability of the revenue to pay interest under section 11BB commences from the date of expiry of three months from the date of receipt of application for refund under section 11B(1) and not on the expiry of the said period from the date on which order of refund is made.

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

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

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

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

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

The claim of the assessee had been rejected on the ground that if the application was allowed, it would amount to unjust enrichment because all the materials sold by the assessee had been inclusive of the duty. Therefore, the burden had been heavy on the assessee to prove that while computing the cost of the material it had not included the duty paid by it.

The Court elucidated that merely because the assessee had sustained the loss in the relevant year, could not be a ground to hold it had not been a case of unjust enrichment.

29. Whether doctrine of merger is applicable when appeal dismissed on the grounds of limitation and not on merits?

Raja Mechanical Co. (P) Ltd. v. Commissioner of C. Ex., Delhi-I, 2012 (279) E.L.T. 481 (S.C.)

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.

30. 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. 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' ?

Commissioner of Central Excise v. Rajendra Narayan 2012 (281) E.L.T. 38 (Del.)

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.

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

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

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

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

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

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

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

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

- 33. 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?**

Commissioner v. Elex Knitting Machinery Co. 2012 (283) E.L.T. A18 (S.C.)

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.

- 34. 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?**

Bonanzo Engg. & Chemical P. Ltd. v. CCEx. 2012 (277) E.L.T. 145 (S.C.)

The Supreme Court opined that SSI exemption would be allowable to the assessee.

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

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

The clearance of the common goods under the same brand name manufactured by both the firms had been rightly clubbed.

- 36. Can the Settlement Commission decline to grant immunity from prosecution and confirming the demand and imposing the penalty without placing the burden on the Department to prove the clandestine manufacture and clearances of goods?**

Maruthi Tex Print & Processors P. Ltd. v. C. & C. Ex. Sett.Comm., Chennai 2012(281) E.L.T. 509 (Mad.)

Settlement Commission should not have refused the benefit of immunity from prosecution.

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

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

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

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

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

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

CUSTOMS

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

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

(Refer Page No: 203)

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

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

(Refer Page No: 171)

- 41. 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?**

Keihin Penalfa Ltd. v. Commissioner of Customs 2012 (278) E.L.T. 578 (S.C.)

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

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

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.

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

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

Decision of the case: The High Court held that the description of the goods as per the documents submitted along with the Shipping Bill would be a relevant criteria for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test.

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

- 44. 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?**

Commissioner of Cus., Vishakhapatnam v. Aggarwal Industries Ltd. 2011 E.L.T. 641 (S.C.)

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 collusion. Thus, the appeal was allowed in the favour of the respondent- assessee.

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

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

(Refer Page No: 212)

- 46. Whether Revenue can prefer an appeal in case of a consent order?**

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

The High Court held that an appeal against the consent order cannot be filed by the Revenue.

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

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

(Refer Page No: 299)

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

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

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

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].

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

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

The Kerala High Court decided that the petitioner could not be denied the refund claim.

- 50. Whether discharge of liability on indicated value would still make the assessee liable for confiscation of goods if he has initially made a mis-declaration of the value thereof?**

Wringley India Pvt.Ltd. v. Commr.of Cus.(Imports), Chennai 2011 (274) E.L.T. 172 (Mad.)

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 local 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.

- 51. Whether the smuggled goods can be re-exported from the customs area without formally getting them release from confiscation?**

In Re: Hemal K. Shah (Order No. 102/2011-Cus., Dated 14-6-2011 In F.No. 380/82/B/10-RA)

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

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

(Refer Page No: 299)

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

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

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.

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

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

(Refer Page No: 299)

- 55. 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?**

(Refer Page No: 299)

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

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.

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

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

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

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

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

(Refer Page No: 148)

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

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

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

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

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

Decision of the case: The High Court observed that as per section 127M of the Customs Act, 1962, the order passed by the Settlement Commissioner is in judicial proceedings and it is a judicial order. Further, the appellants had not challenged the said order.

SERVICE TAX

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

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

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

It was held that Municipality can pass on the burden of service tax to the tenants.

61. Were services provided to the pilgrims taxable under short term accommodation service?

Tirumala Tirupati Devasthanams, Tirupati V. Superintendent of Customs, Central Excise, Service Tax (2012-TIOL-97-HC-AP-ST)

Facts of the Case: Tirumala Tirupati Devasthanams, Tirupati was running guest houses for the pilgrims. The department issued S.C.N stating that the assessee were liable to get service tax registration under "short term accommodation service" and thus liable to pay service tax. The assessee, on the other hand, submitted that they were not club or any other association and thus, were not liable to get registered under service tax.

Point of Dispute: Assessee contested that since they were running guest houses without any profit motive hence they were not liable to pay service tax.

Decision of the Case: The Andhra Pradesh High Court held that the petitioner was religious and charitable institution and was running guest houses by whatever name 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.

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

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

***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.

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

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

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'.

The storage of specific quantity of free sale sugar could not be treated as providing 'storage and warehousing' services to the Government of India.

64. Whether the penalty is payable even when service tax and interest has been paid before issue of show cause notice?

CCE & ST v. Adecco Flexione Workforce Solutions Ltd. 2012 (26) S.T.R 3 (Kar)

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.

65. Whether the service tax liability created under law can be shifted by a clause entered in the contract?

Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran 2012 (26) S.T.R. 289 (S.C.)

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. 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.

Note: In present context, liability to pay service tax does not lie on service recipient under clearing and forwarding agent's services. However, the principle derived in the above judgment that 'service tax liability can be shifted by one party on to the other by way of contractual clause' still holds good.

66. Will service tax paid mistakenly arouse service tax liability?

CCE (A) v. KVR Construction 2012 (26) STR 195 (Kar.)

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.

67. Is the service tax and excise liability mutually exclusive?

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

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

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