CENTRAL EXCISE

1

BASIC CONCEPTS

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 (S.C.)

Facts of the case: The assessee was mining iron ore from mines by fully mechanized system. It excavated iron ores from mines and then subjected them to process of crushing, grinding and screening and washing with a view to remove foreign materials.

Decision of the case: No. The Tribunal held that removing of foreign matters would not, in the present case, bring into existence a new and different article having a distinctive name, character or use. The use of iron ore as mined or iron ore after the process undertaken by the assessee remained the same; that is, to be used in metallurgical industry for the extraction of metals. The said decision of the Tribunal has been affirmed by the Supreme Court in the instant case.

2. Whether the addition and mixing of polymers and additives to base bitumen with a view to improve its quality, amounts to manufacture?

CCE v. Osnar Chemical Pvt. Ltd. 2012 (S.C.)

Decision of the case: No. The Supreme Court held that since (i) the said process merely resulted in the improvement of quality of bitumen and no distinct commodity emerged, and (ii) the process carried out by the assessee had nowhere been specified in the Section notes or Chapter notes of the First Schedule, the process of mixing polymers and additives with bitumen did not amount to manufacture.

3. Whether the process of generation of metal scrap or waste during the repair of worn out machineries/parts of cement manufacturing plant amounts to manufacture?

Grasim Industries Ltd. v. UOI 2011 (S.C.)

Decision of the case: No. The Apex Court observed that manufacture in terms of section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. However, in the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, (the end product). The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product.

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 (S.C.)

Decision of the case: No. Supreme Court observed that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Physician sample was capable of being sold in open market. Moreover, the Drugs and Cosmetics Act, 1940 (Drugs Act) and the Central Excise Act, 1944 operated in different fields. The restrictions imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss.

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

Usha Rectifier Corpn. (I) Ltd. v. CCEx., New Delhi 2011 (S.C.)

Decision of the case: Yes. The Supreme Court observed that 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.

6. Can a product with short shelf-life be marketable?

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (S.C.)

Decision of the case: Yes. 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 (SC)

Decision of the case: No. The Apex Court observed that the mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold. The Supreme Court further ruled that the burden to show that the product is marketed or capable of being bought or sold is entirely on the Revenue. (Also confirmed by Sec 2(d) of Central Excise Act, 1944.)

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 (SC)

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

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

CCE v. Tarpaulin International 2010 (S.C.)

Decision of the case: No. The Apex Court opined that the process did not bring into existence a new and distinct product with total transformation in the original commodity. The original material used i.e., the tarpaulin, was still called tarpaulin made-ups even after undergoing the said process.

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

CCE v. GTC Industries Ltd. 2011 (Bom.)

Decision of the case: No. The High Court pronounced that cutting and embossing did not transform aluminium foil into distinct and identifiable commodity. It did not change the nature and substance of foil. The said process did not render any marketable value, only made it usable for packing.

11. 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 (Bom.)

Decision of the case: No. The High Court observed that the activities carried out by the respondent did not amount to manufacture since the compact disc had been complete and finished when imported by the assessee.

2

CLASSIFICATION OF EXCISABLE GOODS

1. (Imp) Whether a heading classifying goods according to their composition is preferred over a specific heading?

Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd. 2012 (S.C.)

Decision of the Case: No. The Supreme Court held that there was a specific entry which speaks of Slagwool and Rockwool under sub-heading 6803.00 chargeable at 18%, but there was yet another entry which was consciously introduced by the Legislature under sub-heading 6807.10 chargeable at 8%, which speaks of goods in which Rockwool, Slag wool and products thereof were manufactured by use of more than 25% by weight of blast furnace slag. It was not in dispute that the goods in question were those goods in which more than 25% by weight of one or more of red mud, press mud or blast furnace slag was used. If that be the case, then, in a classification dispute, an entry which was beneficial to the assessee was required to be applied. Further, tariff heading specifying goods according to its composition should be preferred over the specific heading. Sub-heading 6807.10 was specific to the goods in which more than 25% by weight, red mud, press mud or blast furnace slag was used as it was based entirely on material used or composition of goods.Therefore, the Court opined that the goods in issue were appropriately classifiable under Sub-heading 6807.10 of the Tariff.

2. Whether antiseptic cleansing solution used for cleaning/ degerming or scrubbing the skin of the patient before the operation can be classified as a 'medicament'?

CCE v. Wockhardt Life Sciences Ltd. 2012 (S.C.)

Observations of the Court: The Supreme Court observed that the factors to be considered for the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the use to which the product is put to. In the instant case, it is not in dispute that the product is used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient. The Apex Court, therefore, stated that the product is basically and primarily used for prophylactic purposes i.e., to prevent the infection or diseases, even though the same contains very less quantity of the prophylactic ingredient.

Decision of the Case: The Apex Court held that the product in question can be safely classified as a "medicament" which would fall under Chapter Heading 3003, a specific entry and not under Chapter Sub-Heading 3402.90, a residuary entry.

3. Can the 'soft serve' served at McDonalds India be classified as "ice cream" for the purpose of levying excise duty?

CCEx. v. Connaught Plaza Restaurant (Pvt) Ltd. 2012 (S.C.)

Observations of the Court: Yes. The Apex Court considered the various submissions of the assessee as under:-

(i) The assessee quoted that as per the definition of "ice cream" under the Prevention of Food Adulteration Act, 1955 (PFA), the milk fat content of "ice-cream" and "softy ice-cream" shall not be less than 10%. Hence, if the 'soft serve', containing 5% milk fat content is classified as "ice-cream", it would make the assessee liable to prosecution under the PFA. The SC observed that the definition of one statute (PFA) having a different object, purpose and scheme could not be applied mechanically to another statute (Central Excise Act). The object of the Excise Act is to raise revenue whereas the provisions of PFA are for ensuring quality control. Thus, the provisions of PFA have nothing to do with the classification of goods subjected to excise duty under a particular tariff entry.

(ii) The assessee submitted that "soft serve" could not be considered as "ice-cream" as it was marketed by the assessee world over as 'soft serve'. SC rejected this averment on the ground that the manner, in which a product might be marketed by a manufacturer, did not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters was the way in which the consumer perceived the product notwithstanding marketing strategies.

An average reasonable person who walked into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', could not be expected to be aware of intricate details such as the percentage of milk fat content, milk nonsolid fats, stabilisers, emulsifiers or the manufacturing process, much less its technical distinction from "ice-cream".

(iii) The assessee pleaded that in the matters pertaining to classification of a commodity, technical and scientific meaning of the product was to prevail over the commercial parlance meaning. The Apex Court observed that none of the terms in Heading 04.04, Heading 21.05 and Heading 2108.91 had been defined and no technical or scientific meanings had been given in the chapter notes. Further, 'soft serve' was also not defined in any of the said chapters. Supreme Court, after considering various judgments, concluded that in the absence of a statutory definition or technical description, interpretation ought to be in accordance with common parlance principle and not according to scientific and technical meanings.

(iv) The assessee contended that based on rule 3(a) of the General Rules of Interpretation which stated that a specific entry should prevail over a general entry, 'soft serve' would fall under Heading 04.04 since it was a specific entry. The Supreme Court rejecting this contention held that in the presence of Heading 21.05 (ice cream), "ice cream" could not be classified as a dairy product under Heading 04.04. Heading 21.05 was clearly a specific entry. Further, referring to a trade notice issued by the Mumbai Commissionerate relating to classification of softy ice-cream being sold in restaurant etc. dispensed by vending machine, the Apex Court observed that the said trade notice indicated the commercial understanding of 'soft-serve' as 'softy ice-cream'.

Decision of the case: In the light of the aforesaid discussion, the Apex Court held that 'soft serve' was classifiable under Heading 21.05 as "ice cream" and not under Heading 04.04 as "other dairy produce".

3

VALUATION OF EXCISABLE GOODS

1.(Imp) In a case where a product is sold below the cost price for penetrating the market, whether such price can be considered as transaction value?
CCEx., Mumbai v. Fiat India Pvt. Ltd. 2012 (S.C.)

Decision of the Case: No. Hon. 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. It is immaterial that the cars were not sold to related persons. In view of the above resorting to best judgment assessment was proper.

2. Can the pre-delivery inspection (PDI) and free after sales services charges be included in the transaction value when they are not charged by the assessee to the buyer?
Tata Motors Ltd. v. UOI 2012 (Bom.)
Decision of the case: Yes. It may be noted that CBEC clarified vide Circular No.936/26/2010-CX. dated 27-10-2010 that pre-delivery inspection charges and after-sale service charges collected by the dealers are to be included in the assessable value under section 4 of the Central Excise Act, 1944.101

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4

CENVAT CREDIT

1. Whether CENVAT credit of the testing material can be allowed when the testing is critical to ensure the marketability of the product?

Flex Engineering Ltd. v. Commissioner of Central Excise, U.P. 2012 (S.C.)

Decision of the Case: Yes. The Supreme Court held that the process of manufacture would not be complete if a product is not saleable as it would not be marketable. The Hon. Court was of the opinion that the process of testing was inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the in the purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence, not marketable at the factory gate.

2. 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 (Kar.)

Decision of the case: No. The High Court observed that merely because the Insurance Company paid the assessee the value of goods including the excise duty paid, that would not render the availment of the CENVAT credit wrong or irregular. At the same time, it did not provide a reason to the Excise Department to demand reversal of credit or default to pay the said amount. The assessee had paid the premium and covered the risk of this capital goods and when the goods were destroyed in terms of the Insurance policy, the Insurance Company had compensated the assessee. It was not a case of double payment as contended by the Department. The High Court, therefore, answered the substantial question of law in favour of the assessee.

3. In case of combo-pack of a tooth paste (manufactured by assessee) and a tooth brush (bought out from market); is tooth brush eligible as input under the CENVAT Credit Rules, 2004?

CCus. v. Prime Health Care Products 2011 (Guj.)

Decision of the case: Yes. The High Court noted that the process of packing and re-packing the input, that was, toothbrush and tooth paste in a unit container would fall within the ambit of "manufacture" [as per section 2(f)(iii) of the Central Excise Act, 1944].Further, the word "input" is defined in rule 2(k) of the CENVAT Credit Rules, 2004. As per the new definition, input includes accessories of the final products cleared along with the final product if the value of such accessory should be included in the value of the final product.

4. 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 (Bom.)

Decision of the case: No. The Court observed that, in the instant case, CENVAT credit had been availed by the company and the penalty under rule 13(1) [now rule 15(1)] was imposable only on the person who had availed CENVAT credit [company in the given case], who was a manufacturer and not on the director.

5. Can CENVAT credit be taken on the basis of private challans?
CCEx. v. Stelko Strips Ltd. 2010 (P & H)
Decision of the case: Yes. It was held that once duty payment is not disputed and it is found that documents are genuine, not fraudulent, their receipt in manufacturer's factory and utilization for manufacturing a final product is not disputed, credit cannot be denied.

6. (Imp)Whether (i) Technical testing and analysis services availed by the assessee for testing of clinical samples prior to commencement of commercial production and
(ii) Services of commission agent are eligible input services for claiming CENVAT?
CCEx v. Cadila Healthcare Ltd. 2013 (Guj.)
Decision of the case: The High Court held that technical testing and analysis services availed for testing of clinical samples prior to commencement of commercial production were directly related to the manufacture of the final product and hence, were input services eligible for CENVAT credit.
With respect to the services provided by foreign commission agents, the High Court held that since the agents were directly concerned with sales rather than sales promotion, the services provided by them were not covered in main or inclusive part of definition of input service as provided in rule 2(l) of the CENVAT Credit Rules, 2004.
7. (Imp)Will two units of a manufacturer surrounded by a common boundary wall be considered as one factory for the purpose of CENVAT credit on inputs used in generation of electricity, if they have separate central excise registrations?
Sintex Industries Ltd. vs. CCEx 2013 (Guj.)
Decision of the case: No. The High Court held that credit could be availed on eligible inputs utilized in the generation of electricity only to the extent the same were used to produce electricity within the factory registered for that purpose. However, credit on inputs utilized to produce electricity which was supplied to a factory registered as a different unit would not be allowed.
8. 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 (Tri-LB)
Decision of the case: Yes. The Larger Bench of the Tribunal held that each case had to be decided according to merit and no hard and fast rule can be laid down for dealing with different kinds of shortages. Tolerances in respect of hygroscopic, volatile and such other cargo has to be allowed as per industry norms excluding, however, unreasonable and exorbitant claims. Similarly, minor variations arising due to weighment by different machines will also have to be ignored if such variations are within tolerance limits.

5

DEMAND, ADJUDICATION AND OFFENCES

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

Hans Steel Rolling Mill v. CCEx., Chandigarh 2011 (S.C.)

Decision of the case: No. The Apex Court elucidated that compounded levy scheme is a separate scheme from the normal scheme for collection of excise duty on goods manufactured. Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty. Since the compounded levy scheme is comprehensive scheme in itself, general provisions of the Central Excise Act and rules are excluded from this scheme.

2. Whether Additional Director General, Directorate General of Central Excise Intelligence can be considered a central excise officer for the purpose of issuing show cause notice?

Raghunath International Ltd. v. Union of India, 2012 (All.)

Decision of the Case: Yes. The Court held that Additional Director General, Directorate General of Central Excise Intelligence having been authorized to act as a Commissioner of Central Excise was a Central Excise Officer, within the meaning of section 2(b) of the Central Excise Act, 1944 and was fully authorized to issue the Show Cause Notice.

Note: CBEC vide Notification No. 38/2001-C.E. (N.T) dated 26-6-2001 as amended has confirmed the same.

3. 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 (Guj.)

Decision of the case: No. The denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP) Act. 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.

4. In a case where the assessee has been issued a show cause notice regarding confiscation, is it necessary that only when such SCN is adjudicated, can the SCN regarding recovery of dues and penalty be issued?

Jay Kumar Lohani v. CCEx 2012 (M.P.)

Decision of the case: The High Court held that there was no legal provision requiring authorities to first adjudicate the notice issued regarding confiscation and, only thereafter, issue show cause notice for recovery of dues and penalty.

5. Is assessee required to pay interest in case of voluntary payment of time-barred duty?

C.C.E. & C. v. Gujarat Narmada Fertilizers Co. Ltd. 2012 (Guj.)

Decision of the Court: No. The High Court observed that in case the recovery of the unpaid or short paid duty has become time-barred, if the manufacturer does not pay it voluntarily, it would not be possible for the Department to recover the same. Thus, if he does it voluntarily despite completion of period of limitation, he should not, further be saddled with the liability to pay statutory interest. The High Court held that the assessee was not required to pay interest in case of voluntary payment of time-barred duty.

6. Can Appellate Authorities or Courts permit the assessee to pay reduced penalty of 25% beyond the time prescribed under section 11AC(1)(c)**?**

CCEx. v. Castrol India Ltd. 2012 (Bom.)

Decision of the case: No. The High Court elucidated that when the 25% penalty under section 11AC(1)(c) was required to be paid within 30 days from the date of communication of the order of the Central Excise Officer determining duty under erstwhile section 11A(10), it would not be open to the appellate authority or the Court to direct the assessee to pay 25% penalty beyond the stipulated time period. Further, the Court noted that the section 11AC(1)(d) made it clear that, it was only when the duty determined as payable under section 11A(10) was increased by the appellate authority/Court in the appellate proceedings, the appellate authority/Court was authorized to permit the assessee to pay 25% of the increased penalty within 30 days from the date of communication of the order increasing the duty.

7. In a case where the manufacturer clandestinely removes the goods and stores them with a firm for further sales, can penalty under rule 25 of the Central Excise Rules, 2002 be imposed on such firm?

CCEx. v. Balaji Trading Co. 2013 (Del.)

Decision of the case: No. Rule 25(1)(c) of the Central Excise Rules 2002 provides that in case of manufacture, production or storage of any excisable goods without having applied for them registration certificate, a penalty not exceeding the duty on such excisable goods or Rs 2,000, whichever is greater is leviable on the producer, manufacturer, registered person of a warehouse or a registered dealer committing such contravention only and not on any other person..

8. Can a decision pronounced in the "open court" in the presence of the advocate of the assessee, be deemed to be the service of the order to the assessee?

Nanumal Glass Works v. CCEx. Kanpur, 2012 (All.)

Decision of the case: Yes. The High Court noted that in terms of section 37C(a) of the Central Excise Act, 1944, containing the provisions relating to service of decisions, orders, summons etc., an order is deemed to be served on the person if it is tendered to the person for whom it is intended **or his authorized agent.** The High Court opined that the communication of the order to the authorised agent of a person, therefore, is sufficient communication.

The High Court held that when a decision is pronounced in the open court in the presence of the advocate of the assessee, who is the authorized agent of the assessee within the meaning of section 37C, <u>the date of pronouncement of order would be deemed to be the date of service of order.</u>

6

REFUND

1. 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 (S.C.)

Decision of the Case: No. The Supreme Court held that since the Revenue had not questioned the correctness or otherwise of the findings on the conclusion reached by the first appellate authority, it might 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.

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

CCE v. Techno Rubber Industries Pvt Ltd. 2011 (Kar.)

Decision of the case: Yes. The High Court elucidated that once it is admitted that the Department has received excess duty, they are bound to refund it to the person who has paid the excess duty. If the buyer of the goods has paid that excess duty, he would have been entitled to the said refund. In the instant case, when the buyer had refused to pay excess duty claimed and had raised a debit note, the only inference to be drawn was that the assessee had not received that excess duty which he had paid to the Department. Consequently, Department was bound to refund to the assessee the excess duty calculated.

2. 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 the non-inclusion of duty in the cost of production?

CCE v. Gem Properties (P) Ltd. 2010 (Kar.)

Decision of the case : No. The Court elucidated that merely because the assessee had sustained the loss in the relevant year, could not be a ground to hold it had not been a case of unjust enrichment. It was evident from the Chartered Accountant's certificate that the cost of the duty was included while computing the cost of production of the material.

7

APPEALS

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

Raja Mechanical Co. (P) Ltd. v. Commissioner of C. Ex., Delhi-I, 2012 (S.C.)

Decision of the Case: No. 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.

2. 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) (S.C.)

Decision of the case: No. 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.

3. Can CESTAT decide an appeal on a totally new ground which had not been urged before adjudicating authority?

CCE v. Gujchem Distillers 2011 (Bom.)

Decision of the case: No. The High Court explained that had the CESTAT not been satisfied with the approach of the adjudicating authority, it should have remanded the matter back to the adjudicating authority. However, it could not have assumed to itself the jurisdiction to decide the appeal on a ground which had not been urged before the lower authorities.

4. 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 which exempts 'goods manufactured at the site of construction for use in construction work at such site' ?

Commissioner of Central Excise v. Rajendra Narayan 2012 (Del.)

Decision of the Court: Yes. The Court held that keeping in view the facts of the present case and that the construction was done virtually all over Delhi and construction sites were interconnected, practically prefabrication was done on construction site only.

5. Can the deposit of 50% of tax amount be made a condition for condoning the delay in filing of an appeal?

Mihani Network v. CCus. & CEx. 2012 (MP)

Decision of the case: No. The High Court observed that there is no legal provision which provides for condoning the delay in filing the appeal on a condition of depositing 50% of tax amount. Delay in filing the appeal is condoned or refused depending upon the sufficiency of cause for delay. If the party is found to be prevented by a sufficient cause to the satisfaction of the appellate authority/Tribunal, the delay is condoned and if not found to be prevented by a sufficient cause, the delay is not condoned.

The High Court held that the condition of depositing 50% of tax amount for condoning the delay is illegal and that the CESTAT ought not to have mixed the issue with the separate application filed for stay.

8

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. 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 for computing value of clearances while claiming SSI exemption?

Bonanzo Engg. & Chemical P. Ltd. v. CCEx. 2012 (S.C.)

Decision of the Case: Yes. Merely because the assessee by mistake paid duty on the goods which were exempted from the duty payment under some other notification, did not mean that the goods would become goods liable for duty under the Act. Secondly, merely because the assessee had not claimed any refund on the duty paid by him would not come in the way of claiming benefit of the SSI exemption.

2. Can the brand name of another firm in which the assessee is a partner, be considered as the brand name belonging to the assessee for the purpose of claiming SSI exemption?(Dec 2013- CS Professional)

Commissioner v. Elex Knitting Machinery Co. 2010 (P & H)

Decision of the case: Yes. The Supreme Court was of the view that the benefit of exemption could be availed only when the company is manufacturing the goods <u>under its own brand name or the brand name being used belonged to a sister concern of that company.</u> 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, <u>he could not be said to have used the brand name of another person</u>

3. 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 (P & H)

Decision of the case: Yes. The High Court held that indisputably, in the instant case, that the partners of both the firms were common and belonged to same family. They were manufacturing and clearing the goods by the common brand name, manufactured in the same factory premises, having common management and accounts etc.

4.(IMP) Whether the manufacture and sale of specified goods, not physically bearing a brand name, from branded sale outlets would disentitle an assessee to avail the benefit of small scale exemption?

CCEx vs. Australian Foods India (P) Ltd 2013 (SC)

Observations of the Court: The Supreme Court made the following significant observations:

(i) <u>Physical manifestation of the brand name on goods is not a compulsory requirement as such an interpretation would lead to absurd results in case of goods</u>

(ii) <u>The test of whether the goods is branded or unbranded, must not be the physical presence of the brand name on the good, but whether it is used in relation to such specified goods for the purpose of indicating a connection in the course of trade between such specified goods and some person using such name with or without any indication of the identity of the person</u>. The Court opined that a brand/ trade name must not be reduced to a label or sticker that is affixed on a good.

(iii) Once it is established that a specified good is a branded good, whether it is sold without any trade name on it, or by another manufacturer, it does not cease to be a branded good of the first manufacturer.

Example: Soft drinks of a certain company do not cease to be manufactured branded goods of that company simply because they are served in plain glasses, without any indication of the company, in a private restaurant.

Decision of the case: Yes. The Supreme Court held that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods for the purpose of SSI exemption.

9

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

1. Whether a circular necessarily needs to be issued under section 37B, in order to be binding on the Department?

Darshan Boardlam Ltd. v. UOI 2013 (Guj.)

Decision of the case: No. The High Court observed that any clarification issued by the Board is binding upon the Central Excise Officers who are duty-bound to observe and follow such circulars. Whether section 37B is referred to in such circular or not, is not relevant. When other Central Excise authorities of equal and higher rank have followed and acted as per the clarifications, the jurisdictional Commissioner in the instant case, could not have taken a contrary view on the assumption that the clarifications are only letters and not orders under section 37B. Central Excise is a central levy and, therefore, such a levy has to be collected uniformly from all similarly situated manufacturers located all throughout the country.

10

SETTLEMENT COMMISSION

1. Can the Settlement Commission decline to grant immunity from prosecution after 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 (Mad.)

Decision of the Court: No. The Settlement Commission can be approached if a person, who suffered a show cause notice on the charge of evasion of duty, finally wants to settle the matter, by making full disclosure admitting certain omissions/commissions. The Settlement Commission, by looking at the onus upon the Department to prove about the nature of goods cleared without payment of duty, should decide the matter. Settlement Commission should not have refused the benefit of immunity from prosecution. However, the Hon High Court did not interfere with the Commission's order relating to the demand and penalty.

2. 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 (Del.)

Decision of the case: No. The High Court noted that certain riders have been provided in section 32E(1) for entertaining applications for settlement. Clause (a) of first proviso clearly lays down that such application shall be entertained, only if applicant has filed returns, showing production, clearance and Central Excise duty paid in the prescribed manner,. Hence, the concept of return has to be understood in context of rule 12 of the Central Excise Rules, 2002. In case of consolidated returns filed in the instant case, the applicant would not be able to indicate 'duty paid' in the prescribed manner (or even in any manner) and question would continue to agitate about the details of production and clearance to be filled in such belated returns.

3. Is the Settlement Commission empowered to grant the benefit under the proviso to erstwhile section 11AC [now section 11AC(1)(c)] in cases of settlement?

Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (Del.)

Decision of the case: No. The scheme of settlement is contained in Chapter-V of the Central Excise Act, 1944 while adjudication undertaken by a Central Excise Officer is contained in the other Chapters of the said Act. Both are distinct, having their own pros and cons.

Note-This case was maintained by Supreme Court in 2011 (267) ELT A128 (SC). Section 11AC(1)(c) grants an option to the assessee to pay the reduced penalty of 25% of the duty amount in case where the there is a short levy/non-levy, short payment/nonpayment or erroneous refund of excise duty by fraud, collusion etc. provided:-

(i) the default has been found during the course of any audit, investigation or verification,

(ii) the details of such transaction are available in the specified records, and

(iii) duty, interest thereon along with the penalty is paid within 30 days of the date of communication of order of the Central Excise Officer who has determined such duty.

CUSTOMS

1

BASIC CONCEPTS

1. In case no statutory definition is provided under law, can the opinion of a trade expert who deals in those goods be considered while determining duty liability?

Commissioner of Customs (Import), Mumbai v. Konkan Synthetic Fibres 2012 (S.C.)

Decision of the Case: Yes. The Supreme Court on referring to the case of Collector of Customs v. SwastikWoollens (P) Ltd. 1988 (37) E.L.T. 474 (S.C.), held that when no statutory definition was provided in respect of an item in the Customs Act or the Central Excise Act, the trade understanding, i.e. the understanding in the opinion of those who deal with the goods in question was the safest guide.

2. 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 (A.P.)

Decision of the case: -No. With regard to the Customs Act, 1962, a conjoint reading of section 12(1) with sections 2(18), 2(23) and 2(27) of the Customs Act, 1962 makes it clear that customs duty can be levied only on goods imported into or exported beyond the territorial waters of India. Since both the SEZ unit and the DTA unit are located within the territorial waters of India, Section 12(1) of the Customs Act 1962 (which is the charging section for levy of customs duty) is not attracted for supplies made by a DTA unit to a unit located within the Special Economic Zone. Karnataka High Court in case of CCE v. Biocon Ltd. 2011 (267) E.L.T. 28 has also taken a similar view as elucidated in the aforesaid judgment.

2

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

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

CCE v. Decorative Laminates (I) Pvt. Ltd. 2010 (Kar.)

Decision of the case: No. The High Court, while interpreting section 23, stipulated that section 23 states that only when the imported goods have been lost or destroyed at any time before clearance for home consumption, the application for remission of duty can be considered. Therefore, the expression “at any time before clearance for home consumption” would mean the time period as per the initial order during which the goods are warehoused or before the expiry of the extended date for clearance .The goods continued to be in the warehouse, even after the expiry of the warehousing period, it would be a case of goods improperly removed from the warehouse as per section 72(1)(b) read with section 71.When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not attract section 23 of the Act.

3

CLASSIFICATION OF GOODS

1. Where a classification (under a Customs Tariff head) is recognized by the Government in a notification at 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 (S.C.)

Decision of the Court: Yes. The Apex Court observed that the Central Government has issued a exemption notification dated 1-3-2002 and in the said notification it has classified the Electronic Automatic Regulators under Chapter sub-heading 9032.89. Since the Revenue itself has classified the goods in dispute under Chapter sub-heading 9032.89 from 1-3-2002, the said classification need to be accepted.

2. 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 (Cal.)

Decision of the case: No. The Court noted that **if a product undergoes some change after importation till the time it is actually used, the classification will not be effected provided it remains the same product and it is used for the purpose specified in the classification**. Therefore, in the instant case, it examined whether the nature and character of the product remained the same.

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

3. (i) 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? (ii) 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 (Mad.)

Decision of the case: Yes. The petitioner could not plead that the exported goods should be classified under different headings contrary to the description given in the invoice and the Shipping Bill which had been assessed and cleared for export.

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

4

VALUATION UNDER THE CUSTOMS ACT, 1962

1. 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 (S.C.)

Decision of the Case: No. The Supreme Court held that in the instant case, the contract for supply of crude sunflower seed oil @ US $ 435 CIF/ metric ton was entered into on 26th June 2001. It could not be performed on time because of which extension of time for shipment was agreed between the contracting parties. It is true that the commodity involved had volatile fluctuations in its price in the international market, but having delayed the shipment; the supplier did not increase the price of the commodity even after the increase in its price in the international market. There was no allegation of the supplier and importer being in collusion. Thus, the appeal was allowed in the favour of the respondent- assessee.

5

IMPORTATION, EXPORTATION AND TRANSPORTATION OF GOODS

1. Can the time-limit prescribed under section 48 of the Customs Act, 1962 for clearance of the goods within 30 days be read as time-limit for filing of bill of entry under section 46 of the Act?

CCus v. Shreeji Overseas (India) Pvt. Ltd. 2013 (Guj.)

Decision of the case: No. The aforesaid question came up for consideration before the High Court. The High Court noted that though section 46 does not provide for any time-limit for filing a bill of entry by an importer upon arrival of goods, section 48 permits the authorities to sell the goods after following the specified procedure, provided the same are not cleared for home consumption/ warehoused/ transhipped within 30 days of unloading the same at the customs station. The High Court however held that the time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be read into section 46 and it cannot be inferred that section 46 prescribes any time-limit for filing of bill of entry.

Note: Section 46 of the Customs Act, 1962 contains the provisions relating to filing of bill of entry in relation to imported goods by the importer with the proper officer. It provides that the bill of entry may be presented at any time after the delivery of the import manifest/import report as the case may be, but does not prescribe any specific time-limit for the presentation of the same. Section 48 provides that if any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within 30 days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof.

6

WAREHOUSING

1. Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption?
Paras Fab International v. CCE 2010 (Tri. – LB)

Decision of the case: No. The entire premises of a 100% EOU has to be treated as a warehouse if the licence granted under section 58 to the unit is in respect of the entire premises. Imported goods warehoused in the premises of a 100% EOU (which is licensed as a Customs bonded warehouse) and used for the purpose of manufacturing in bond as authorized under section 65 of the Customs Act, 1962, cannot be treated to have been removed for home consumption.

7

DEMAND & APPEALS

1. Can Tribunal condone the delay in filing of an application consequent to review by the Committee of Chief Commissioners if it is satisfied that there was sufficient cause for not presenting the application within the prescribed period?

Thakker Shipping P. Ltd. v. Commissioner of Customs (General) 2012 (S.C.)

Decision of the case: Yes. The High Court ruled that the Tribunal was competent to invoke section 129A(5) where an application under section 129D(4) had not been made within the prescribed time and condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.

Note: The provisions of **section 129A(5) and 129D(4)** of the Customs Act, 1962 have been outlined below:-

Section129A(5): The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period. **Section 129D(4):** Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Commissioner of Customs, makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of one month from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, **including the provisions of section 129A(4)** shall, **so far as may be**, apply to such application.

2. Whether extended period of limitation for demand of customs duty can be invoked in a case where the assessee had sought a clarification about exemption from a wrong authority?

Uniworth Textiles Ltd. vs. CCEx. 2013 (SC)

Decision of the case: No. The Supreme Court held that mere <u>non-payment of duties could not be equated with collusion or wilful misstatement or suppression of facts</u> as then there would be no form of non-payment which would amount to ordinary default. The Apex Court opined that something more must be shown to construe the acts of the assessee as fit for the applicability of the proviso.

Note: Section 28 of the Customs Act, 1962 as stated in the above case is based on the old provisions of law. As per the amended section 28, the time limit for issuing a demand notice in case of inadvertent non-payment of duty is one year from the relevant date and such provisions find place in sub-section (1) of section 28. Issue of demand notice by invoking the extended period of limitation (five years from the relevant date) in case of deliberate default is covered under sub-section (4) of section 28. However, it may be noted that the principle enunciated in the above case will hold good even after the amendment made in section 28.

3. Whether non-filing of additional documents despite several opportunities being given to the assessee to produce the same, could be a sufficient ground for passing a non-speaking order?

DBOI Global Service Pvt. Ltd. v. UOI 2013 (29) S.T.R. 117 (Bom.)

Decision of the case: No. The High Court held that if the assessee had failed to furnish additional information, it had been obligatory on the part of the adjudicating authority <u>to record a finding</u> as to why the documents furnished by the assessee were not sufficient to allow his claim and why additional documents were necessary, especially when on the basis of similar documents furnished by the assessee in the past, the claims had been allowed. Thus, deciding the petition in favour of the assessee, the High Court set aside the order of the adjudicating authority.

8

REFUND

1. Whether a Chartered Accountant's certificate acknowledging certain facts is a sufficient evidence to rule out the unjust enrichment under customs?

CCus., Chennai v. BPL Ltd. 2010 (Mad.)

Decision of the case: No.The High Court noted that section 27 of the Customs Act mandates the importer to produce such documents or other evidence, while seeking refund, to establish that the burden of duty in relation to which such refund is claimed, has not been passed on by him to any other person. A certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain facts. It would not automatically entitle a person to refund in the absence of any other evidence.

2. Can the assessee be denied the refund claim of pre-deposit if he produces the attested copy of GAR 7 challan* and not the original GAR 7 challan?

Narayan Nambiar Meloths v. CCus. 2010 (Ker.)

Decision of the case: No. The Kerela High Court decided that the petitioner could not be denied the refund claim for pre-deposit on account of following mentioned grounds:- Firstly, the Court opined that the only contention raised against the petitioner that GAR 7 Challan produced by him was only an attested copy, was purely a technical contention and could not be accepted. **S**econdly, as per clarification issued vide F.No. 275/37/2K-CX. 8A dated 2-1-2002, **a simple letter from the person who made the deposit, requesting for return of the amount, along with the appellate order and attested Xerox copy of the Challan in Form GAR 7 would suffice for processing the refund application**. Evidently, in the instant case, the petitioner had fully complied with the requirement laid down in this clarification.

9

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

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

CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (SC)

Decision of the case: No. The Apex Court held that the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962.The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling on the economy.

2. Whether declaration of a value lower than the value indicated by the foreign valuer amounts to mis-declaration of value leading to confiscation of goods even if subsequently, duty is paid by the importer on the higher value indicated by the local valuer?

Wringley India Pvt. Ltd. v. Commr.of Cus.(Imports), Chennai 2011 (Mad.)

Decision of the Case: Yes. The High Court held that since the appellant made an attempt to mis-declare the value of the imported goods and to misguide the Customs Department, which was also evident from the fact that when the Customs Department directed the appellant to obtain the certificate from the local Chartered Engineer, even at that time they did not disclose the true value assessed by the load port Chartered Engineer. 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.

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

Manish Lalit Kumar Bavishi v. Addl. DIR. General, DRI 2011 (Bom.)

Decision of the case: Yes. The High Court held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document/seeking extract and not the officer. If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents.

4. Is it necessary to establish omissions/commissions leading to evasion of duty before imposing the penalty under section 112(a)(ii) of the Customs Act, 1962?

O.T. Enasu v. UOI 2011 (Ker.)

Decision of the case: Yes. The High Court noted that under sub-clause (ii) of clause (a) of section 112, the liability to penalty is determined on the basis of duty sought to be evaded. Being a penal provision, it requires to be strictly construed. The concept of evading involves a conscious exercise by the person who evades. In view of the above discussion, the High Court inferred that unless it is established that a person has, by his omissions or commissions, led to a situation where duty is sought to be evaded, there cannot be an imposition of penalty in terms of section 112(a)(ii) of the Act.

Note: Section 112(a)(ii) provides that any person who, in relation to any dutiable goods other than prohibited goods, does or omits to do any act which would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act shall be to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater.

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

Textoplast Industries v. Additional Commissioner of Customs 2011 (Bom.)

Decision of the case: Yes. The High Court observed that in case of Apex Court judgment of Standard Chartered Bank v. Directorate of Enforcement, there emerged the principle that the deeming fiction is not confined to a criminal prosecution but will also extend to an adjudication proceeding as well. The High Court explained that had it been otherwise, it would have led to strange situation where, for criminal prosecution, partner as well as person in charge responsible for conduct of business of partnership firm would be liable whereas for adjudication purposes, a narrower construction had to be adopted.

6. In case of undervaluation of goods, can the confiscation order be cancelled for the want of evidence from the foreign supplier?

CCus. v. Jaya Singh Vijaya Jhaveri 2010 (Ker.)

Decision of the case: **No**. 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.

7. Whether the smuggled goods can be re-exported from the customs area without formally getting them released from confiscation?

In Re: Hemal K. Shah 2012 (GOI)

Decision of the Case: No. The Government noted that the passenger had grossly misdeclared the goods with intention to evade duty and smuggle the goods into India. As per the provision of section 80 of the Customs Act, 1962 when the baggage of the passenger contains article which is dutiable or prohibited and in respect of which the declaration is made under section 77, the proper officer on request of passenger detain such article for the purpose of being returned to him on his leaving India. Since passenger neither made true declaration nor requested for detention of goods for re-export, before customs at the time of his arrival at airport. So, the re-export of said goods cannot be allowed under section 80 of Customs Act.

Note: The aforesaid case is the revision application filed to the Central Government under section 129DD of the Customs Act, 1962.

10

SETTLEMENT COMMISSION

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

Sanghvi Reconditioners Pvt. Ltd. V. UOI 2010 (SC)

Decision of the case: No. 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**.

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

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

Decision of the case: Yes. Following the principal laid down by the Supreme Court in the case of Liberty India v. Commissioner of Income Tax (2009) , High Court observed that drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India. The duty drawback or claim for duty drawback is nothing but a claim for refund of duty may be as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act.

11

MISCELLANEOUS PROVISIONS

1. Can a former director of a company be held liable for the recovery of the customs dues of such company?

Anita Grover v. CCEx. 2013 (Del.)

Decision of the case: No. The Court held that since the company was not being wound up, the juristic personality the company and its former director would certainly be separate and the dues recoverable from the former could not, in the absence of a statutory provision, be recovered from the latter. There was no provision in the Customs Act, 1962 corresponding to section 179 of the Income-tax Act, 1961 or section 18 of the Central Sales Tax, 1956 (refer note below) which might enable the Revenue authorities to proceed against directors of companies who were not the defaulters.

Note:

1. As per the provisions of section 179 of the Income-tax Act, 1961 and section 18 of the Central Sales Tax, 1956, in case of a private company in liquidation, where any tax dues of the company under the relevant statutes cannot be recovered, every person who was a director of the said company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. Thus, Revenue authorities are empowered to proceed against the directors of the company for recovery of dues from the company under the said statutes.

SERVICE TAX

1

BASIC CONCEPTS OF SERVICE TAX

1. Can the service tax liability created under law be shifted by virtue of a clause in the contract entered into between the service provider and the service recipient?

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

Decision of the Case: Yes. The Supreme Court observed that on reading the agreement between the parties, it could be inferred that service provider (contractor) had accepted the liability to pay service tax, since it arose out of discharge of its obligations under the contract. With regard to the submission of shifting of service tax liability, the Supreme Court held that service tax is an indirect tax which may be passed on. Thus, assessee can contract to shift its liability. The Finance Act, 1994 is relevant only between assessee and the tax authorities and is irrelevant in determining rights and liabilities between service provider and service recipient as agreed in a contract between them. There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under the contract between them.

Note: Under present position of law, 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 to the other by way of contractual clause** still holds good.

2. 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 erection and commissioning of the finished products. The customer was charged for the services rendered as well as the value of the manufactured products. The assessee 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 on the same transaction.

Decision of the case:Yes. 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 is liable to pay service tax on the value of services.

Note: 1. It is important to note here that erection and commissioning charges are includible in the transaction value only when the finished product is not an immovable property.

2. Two events are **mutually exclusive** if they cannot occur at the same time. An example is tossing a coin once, which can result in either heads or tails, but not both.

3. 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.)

Observations of the case: No. The High Court rejected the contentions of the assessee and observed as under:-

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

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

Decision of the case: The High Court held that Municipality can pass on the burden of service tax to the tenants.

Note: Article 289 of the Constitution of India relating to exemption of property and income of a State from Union taxation provides as under:-

(1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. (3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

4. Whether the activity of running guest houses for the pilgrims is liable to service tax?

Tirumala Tirupati Devasthanams, Tirupati v. Superintendent of Customs, Central Excise, Service Tax 2013 (30) S.T.R. 27 (A.P.)

Observations of the Court: Yes. The High Court observed that as per erstwhile section 65(105)(zzzzw) of the Finance Act, 1994, service provided to any person by a hotel, inn, guest house, club or camp-site, by whatever name called, whether it was a shelter for pilgrims or any other name, it was providing the taxable services and was thus liable to pay service tax, for providing of accommodation for a continuous period of less than three months is a taxable service.

Note: This case would be relevant under the new regime of taxation of services as well.

5. 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.)

Observations of the Court: A software, whether customized or non-customised, would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed.

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

Decision of the case: The High Court held that though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA.

Note: Services of development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software are one of the declared services provided under section 66E.

6. Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar by the assessee?

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

Decision of the case: No. The High Court noted that apparently, service tax could be levied only if service of storage and warehousing was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance with the directions of the Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. Hence, the High Court held the act of assessee could not be called as rendering of services.

7. A society, running renowned schools, allows other schools to use a specific name, its logo and motto and receives a non-refundable amount and annual fee as a consideration. Whether this amounts to a taxable service?

Mayo College General Council v. CCEx. (Appeals) 2012 (28) STR 225 (Raj)

Decision of the case: Yes. The High Court held that when the petitioner permitted other schools to use their name, logo as also motto, it clearly tantamounted to providing ‘franchise service’ to the said schools and if the petitioner realized the ‘franchise’ or ‘collaboration fees’ from the franchise schools, the petitioner was duty bound to pay service tax to the department.

2

PLACE OF PROVISION OF SERVICE

1. Whether filing of declaration of description, value etc. of input services used in providing IT enabled services (call centre/BPO services) exported outside India, after the date of export of services will disentitle an exporter from rebate of service tax paid on such input services?

Wipro Ltd. v. Union of India 2013 (29) S.T.R. 545 (Del.)

Observations of the Court: The High Court observed that nature of the services was such that they were rendered seamlessly, on continuous basis without any commencement or terminal points. Since the calls were received and attended to in the call centre on a continuous basis, it was impossible for the appellant to not only determine the date of export but also anticipate the call so that the declaration could be filed "prior" to the date of export. The High Court noted that the appellant was also required to describe, value and specify the amount of service tax payable on input services actually required to be used in providing taxable service to be exported. The High Court opined that except the description of the input services, the appellant could not provide the value and amount of service tax payable as any estimation was ruled out by the use of the word "actually required" and the bill/invoice for the input services were received by the appellant only after the calls were attended to. Further, the High Court also observed that one-to-one matching of input services with exported services was impossible since every phone call was export of taxable service but the invoices in respect of the input-services were received only at regular intervals, viz. monthly or fortnightly etc. Thus, the High Court was of the view that in the very nature of things, and considering the peculiar features of the appellant's business, it was difficult to comply with the requirement "prior" to the date of the export. Furthermore, the High Court elaborated that if particulars in declaration were furnished to service tax authorities within a reasonable time after export, along with necessary documentary evidence, and were found to be correct and authenticated, object/purpose of filing of declaration would be satisfied.

Decision of the case: The High Court, therefore, allowed the rebate claims filed by the appellants and held that the condition of the notification must be capable of being complied with as if it could not be complied with, there would be no purpose behind it.

Note: With effect from 01.07.2012, provisions of rebate of service tax/excise duty paid on input services/inputs used in providing taxable service exported out of India are being governed by Notification No. 39/2012 ST dated 20.06.2012 issued under rule 6A of the Service Tax Rules, 1994. Since the said notification also requires filing of the declaration 'prior to export', the principle enunciated in the above case will hold good under the present law as well.

3

VALUATION OF TAXABLE SERVICE

1. Whether expenditure like travel, hotel stay, transportation and the like incurred by service provider in course of providing taxable service should be treated as consideration for taxable service and included in value for charging service tax?

Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India 2013 (29) S.T.R. 9 (Del.)

Observations of the Court: No. The High Court observed that since section 67(1) of Finance Act, 1994 is subject to provisions of Chapter V - which includes section 66 (now section 66B) – the value of taxable services has to be in consonance with section 66 which levies tax only on **taxable service.** Thus, there is an inbuilt mechanism to ensure that only taxable service are evaluated under section 67 which provides that value of taxable service is the gross amount charged by service provider 'for such service'. The High Court, therefore, opined that it is only the consideration for the taxable service which is chargeable to tax under the relevant Sections. However, rule 5(1) goes far beyond the charging provisions as it includes the expenditure and costs - which are incurred by the service provider "in the course of providing taxable service" - in the value of the taxable service.

The High Court elaborated that power to make rules could not exceed or go beyond the section which provides for charge or collection of service tax. The High Court clarified that even though section 94 prescribes to lay every rule framed by Central Government before each House of Parliament, which have power to modify them; the same cannot add any greater force to the Rules than what they ordinarily have as species of subordinate legislation. The High Court further observed that rule 5(1) may also result in double taxation, if expenses like air travel tickets, had already been subjected to service tax. The High Court was of the view that double taxation can be imposed only when it is clearly provided for and intended. It can never be enforced by implication.

Decision of the case: The High Court, therefore, held that rule 5(1) of the Rules runs counter and is repugnant to sections 66 and 67 of the Act and to that extent it is ultra vires the Finance Act, 1994.

Note: It may be noted that the since the Delhi High Court didn't refer to other judgements in this regard, which sought to include reimbursements as part of taxable value, it may be challenged at the Supreme Court.

4

DEMAND, ADJUDICATION AND OFFENCES

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

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

Decision of the Case: No. The Karnataka High Court held that the authorities had no authority to initiate proceedings for recovery of penalty under section 76 when the tax payer paid service tax along with interest for delayed payments promptly. As per section 73(3), no notice shall be served against persons who had paid tax with interest; the authorities can initiate proceedings against defaulters who had not paid tax and not to harass persons who had paid tax with interest on their own. If the notices were issued contrary to this section, the person who had issued notice should be punishable and not the person to whom it was issued.

2. Can an amount paid under the mistaken belief that the service is liable to service tax when the same is actually exempt, be considered as service tax paid?

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

Observations of the Court: The High Court opined that once there was lack of authority to collect such service tax from the assessee, it would not give authority to the Department to retain such amount and validate it. Further, provisions of section 11B of the Central Excise Act, 1944 apply to a claim of refund of excise duty/service tax only, and could not be extended to any other amounts collected without authority of law.

Decision of the Case: In view of the above, the High Court 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.

3. In a case where the assessee has acted bona fide, can penalty be imposed for the delay in payment of service tax arising on account of confusion regarding tax liability and divergent views due to conflicting court decisions?

Ankleshwar Taluka ONGC Land Loosers Travellers Co. OP. v. C.C.E., Surat-II 2013 (29) STR 352 (Guj.)

Observations of the Court: No. The High Court made the following three important observations:

(i) The levy was comparatively new and therefore, both unawareness and confusion were quite possible particularly considering the strata to which the members of the appellant society belonged to. They were essentially agriculturists, who lost their lands when plant of ONGC was set up, and therefore, had created society and for many years they were providing rent-a-cab service to the ONGC.

(ii) There were divergent views of different benches of Tribunal, which may have added to such confusion.

(iii) The fact that the appellant had persuaded their right of reimbursement of payment of service tax with the ONGC by way of conciliation and arbitration cannot deprive them of the defence of bona fide belief of applicability of service tax

Decision of the case: The High Court held that even if the appellants were aware of the levy of service tax and were not paying the amount on the ground of dispute with the ONGC, there could be no justification in levying the penalty in absence of any fraud, misrepresentation, collusion or wilful mis-statement or suppression. Moreover, when the entire issue for levying of the tax was debatable, that also would surely provide legitimate ground not to impose the penalty.

5

OTHER PROVISIONS

1. Can an appeal be filed in a High Court for deciding the question relating to the taxability of service?

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

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

Note: Section 35G(1) of the Central Excise Act, 1944 provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal (not being an order **relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment)**, if the High Court is satisfied that the case involves a substantial question of law. Further, section 35L of the Act, inter alia, provides that an appeal shall lie to the Supreme Court from any order passed by the Appellate Tribunal **relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment**.