

CENTRAL EXCISE

BASIC CONCEPTS

1. Can improvement in quality of base bitumen by adding and mixing polymers and additives to it, amount to manufacture?

CCE v. Osnar Chemical Pvt. Ltd. 2012 (276) ELT 162 (SC)

SC OBSERVATIONS

The Supreme Court observed that:

- (i) “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.
- (ii) **It is a well settled principle that mere improvement in quality did not amount to manufacture.**
- (iii) The process of mixing polymers and additives with bitumen merely resulted in the improvement of quality of bitumen. However, bitumen remained bitumen. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use.
- (iv) As per **section 2(f)(ii)** of the Central Excise Act, 1944, the expression manufacture includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Tariff Act.
- (v) However, a plain reading of the Schedule to the Act made it clear that the process carried out by the assessee had nowhere been specified in the Section notes or Chapter notes so as to indicate that the said process amounts to manufacture.

SC DECISION -

- In the light of the above discussion, the Supreme Court held that since the said process merely resulted in the improvement of quality of bitumen and no distinct commodity emerged, and 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.**

2. **Does the process of generation of metal scrap or waste during the repair of worn out machineries/parts of cement manufacturing plant amount to manufacture?**

GRASIM INDUSTRIES LTD

NOV 13

SC OBSERVATIONS

- The apex court observe that for imposition of excise duty u/s 3 of the central excise act, two conditions-**goods being excisable goods U/s 2(d)** and **goods being manufactured in term of section 2(f)** of the act need to be satisfied conjunctively
- The metal scrap and waste were excisable goods u/s 2(d) of the act.
- Further manufacture in terms of section 2(f), includes any process incidental or ancillary to the completion of manufactured product.
- However in the present case, it is clear that the process **of repair and maintenance of machinery** of the cement manufacturing plant had no contribution on the process of manufacturing of the cement (the end product)
- The repairing activity can never be called as manufacturing activity.
- Therefore, the metal scrap and waste could not said to be a byproduct of the final product.

SC DECISION

- SC held that generation of metal scrap or waste during repair of worn out machineries of cement manufacturing plant did not amount to manufacture.

3. **Are the physician samples excisable goods even when they are being statutorily prohibited from being sold?**

MEDLEY PHARMACEUTICALS LTD.

MAY 2014

SC OBSERVATIONS -

- 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.
- Sale is not a necessary condition for charging duty as excise duty is payable in case of free supply also.
- Since physician samples were capable of being sold in open market, the same were marketable and thus, liable to excise duty.
- The restrictions imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss.
- Prohibition on sale of physician samples under the Drugs Act did not have any bearing or effect on levy of excise duty.

SC DECISION-

Based on the above observations, the SC held that physician samples are also excisable goods.

4. **Whether assembling of the testing equipment's for testing the final product in the factory amounts to manufacture?**

USHA RECTIFIER CORP (I) LTD

SC OBSERVATIONS

- (i) Once the appellant had themselves made admission regarding the development of testing equipment's in their own Balance Sheet, which was further substantiated in the Director's report, it could not make contrary submissions later on.
- (ii) 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.

- (iii) Testing equipment manufactured and self-consumed which would have been imported if not self-manufactured is marketable.

SC DECISION

- **Based on the above observation, SC held that duty was payable on such testing equipments used for testing the final product.**

5. Can a product with short shelf-life be considered as marketable?

Nicholas Piramal India Ltd.

SC DECISION

- **SC held that short shelf life could not be equated with no shelf-life would not ipso facto mean that it could not be marketed.**
- **A shelf life with 2 to 3 days was sufficiently long enough for a product to be commercially marketable.**

6. 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?

SOLID AND CORRECT ENGINEERING WORKS AND ORS

Facts of the case:

The assessee was engaged in the manufacture of asphalt batch mix and drum mix/ hot mix plant at sites and undertook contracts for supplying, erection, commissioning of such plant and after sale services relating thereto.

SC OBSERVATIONS AND DECISION

- 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.**
- It opined that an attachment without necessary intent of making the same permanent cannot constitute permanent fixing.
- Hence, the Supreme Court held that the plants in question were not immovable property so as to be immune from the levy of excise duty. Consequently, duty would be levied on them.

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

TARPAULIN INTERNATIONAL

NOV 11

SC OBSERVATIONS AND DECISION

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

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

GTC INDUSTRIES LTD

HC DECISION

- The HC held 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 to the foil but only made it usable for packing
- It could not be considered as distinct marketable commodity and hence it was not liable to excise duty.

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

SONY MUSIC ENTERTAINMENT (I) PVT LTD.

HC DECISION

- None of the activity that the assessee undertook involved any process on the compact discs.
- It held that activities carried out by the assessee did not amount to manufacture **since the compact disc has been complete and finished when imported by the assessee.**

10. Whether bagasse which is marketable product but not a manufactured product can be subjected to excise duty?

Balrampur chini mills Ltd.

NOV 15

HC OBSERVATIONS

- SC held that (in civil appeal No 2791) reversal of 6% is not applicable in case of bagasse as the same is not a final product, but a waste

- Bagasse is never manufactured, but it only emerges as a waste from the crushing of sugarcane for the manufacture of final product, namely sugar, thus rule 6(3) would not be applicable.

HC DECISION

- HC concluded that, though bagasse is an agricultural waste of sugarcane, it is marketable product.
- However, duty cannot be imposed thereon, as it does not involve any manufacturing activity by virtue of explanation added u/s 2(d) of the Central excise act.

11. **Whether contaminated, under or over filled bottles or badly crowned bottles amount to manufactured finished goods which are required to be entered in R.G.-1 register, and which are eligible to payment of excise duty?**

AMRIT BOTTLERS PVT LTD

Facts of the case

- The appellant was engaged in manufacturer of aerated water.
- The appellant contended that such aerated water was drained out as certain bottles were found to be defective on account of contamination, under / over filling of the aerated water in bottles or such bottles were badly crowned.
- Under and over filling of the bottles make them unusable under the erstwhile Weights and Measures Act [now Legal Meteorology Act, 2009] as well as under the Prevention of Food Adulteration Act. Consequently, the aerated water which was drained out was not marketable. Thus, it was not required to be entered in R.G.-1 register.

HC OBSERVATIONS and DECISION

- The court observed that only a finished product can be entered in RG 1 register.
- A finished product is a product which is manufactured as well as which is marketable.
- Finished product was required to be accounted for in R.G.1 register only after undergoing the screening test and having found that they were fit for sale.

- Under filled or over filled or badly crowned caps bottles could not be treated as being fully manufactured nor they could be treated as finished goods
- Moreover, bottles filled with less or more aerated water were not marketable under the erstwhile Weights and Measures Act (now Legal Meteorology Act 2009).
- Consequently, such goods could not be entered in R.G.1 register and accordingly, no excise duty was payable on them.

PROVISION – RG 1 REGISTER IS A DAILY STOCK ACCOUNT REQUIRED TO BE MAINTAINED UNDER RULE 10 OF THE CENTRAL EXCISE RULES, 2002.

CLASSIFICATION OF EXCISABLE GOODS

1. How will a cream which is available across the counters as also on prescription of dermatologists for treating dry skin conditions, be classified if it has subsidiary pharmaceutical contents - as medicament or as cosmetics?

CIENS LABORATORIES

MAY 15

SC OBSERVATIONS AND DECISION

- The proportion of ingredients like prophylactic or curative properties is not invariable the decisive factor in classification.
- The relevant factor is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.
- Though a product is sold without prescription of medical practitioner ,it does not lead to immediate conclusion that all products that are sold across the counter are cosmetics
- There are several products that are sold across the counter and are yet, medicaments.
- If a product's primary function is 'care' and not 'cure', it is not a medicament.
- A product that is used mainly for curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be treated as a medicament.
- **Based on the above observations, court held that product would be classifiable as a medicament.**

2. Whether a heading classifying goods according to their composition is preferred over a specific heading?

MINWOOL ROCK FIBRES LTD

HC OBSERVATIONS AND DECISION

- HC observed that there was a specific entry which speaks of slagwool and rockwool under the sub-heading 6803.00 chargeable @ 18% but there was another entry introduced by legislature under the sub-heading 6807.10 chargeable @ 8% which speaks of goods in which slagwool and rockwool were manufactured by use of more than 25% by weight of blast furnace slag.
- In 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 specific heading.

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

WOKHARD LIFE SCIENCES LTD.

SC OBSERVATIONS AND DECISION

- The SC observed that factors to be considered for the purpose of 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 their hands and scrubbing the surface of the skin of the patient
- Therefore, 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.
- **Based on the above discussion, sc held that the product would fall under the heading medicament.**

4. Can the soft serve at Mcdonalds India be classified as 'ice cream' for the purpose of levying excise duty?

CONNAUGHT PLAZA RESTAURANT PVT LTD.

SC OBSERVATIONS AND DECISION

- The definition of one statute (PFA) having a different object and purpose and scheme could not be applied mechanically to another statute (Central excise act)
- The assessee's plea that 'soft serve' is marketed and sold around the world as 'soft serve' is not acceptable as the manner in which product may be marketable by manufacture does not play a decisive role in affecting the commercial understanding of such product.
- What matter is the way in which consumer perceives the product notwithstanding marketing strategies.
- Thus, person entering the MC outlets would enter with intention of simply having an ice-cream unaware of its milk fats, contents, distinction from the soft serve etc.
- In the absence of statutory definition or technical description interpretation ought to be in accordance with the common parlance principle and not according to scientific and technical meaning.
- Applying Rule 3(a) of General rules of interpretation Specific heading will prevail over general heading.
- **Based on the above observations SC held that soft serve was classifiable as "ice cream" for the purpose of levying excise duty.**

VALUATION OF EXCISABLE GOODS

1. Is the amount of sales tax /VAT collected by the assessee and retained with him in accordance with any State Sales Tax Incentive Scheme, includible in the assessable value for payment of excise duty?

SUPER SYNOTEX (INDIA) LTD

NOV 14

PROVISION

As per section 4(3)(d), Transaction value means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to or on behalf of the assessee , by reason of or in connection with the sale, whether at the time of the sale or at any other time including but not limited to , any amount charged for , or to make provision for, advertising or publicity , marketing and selling organization expenses , commission or any other matter, **but does not include the amount of duty or excise, sales tax and other taxes , if any actually paid or actually payable on such goods.**

SC OBSERVATIONS

- SC observed that unless the SALES TAX is actually paid to the sales tax department of state government , no benefit towards excise duty can be given under the concept of 'transaction value' under section 4(3)(d)
- It is seen from the facts 25% of the Sales tax amount had been paid to state and the remaining amount had been retained by the assessee.
- The apex court held that such retained amount has to be treated as the price of the goods under the

basic fundamental conception of 'transaction value' and therefore , the assessee is bound to pay excise duty on the said sum.

Similar case in Maruti Suzuki Indian Limited.(Same issued , it had retained 50% sales tax)

2. Can the 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

PROVISION

As per section 4(3)(d), Transaction value means the price actually paid or payable for the goods ,when sold, and includes in addition to the amount charged as price, any amount that the **buyer(dealer) is liable to pay to** or on behalf of the **assessee(TATA)** , by reason of or in connection with the sale, whether at the time of the sale or at any other time.

SC OBSERVATIONS AND DECISION

- HC observed that assessee did not charge the dealer for the expenses incurred by the dealer towards PDI and after sales services.
- It further noted that when a car was sold by assessee to the dealer, Price was the sole consideration and assessee and dealer were not related to each other.
- Hence, since the requirement of section 4(1)(a) were being complied with the assessable value would be the transaction value.
- Accordingly , the expenses incurred for PDI and after sales services should not be included in the transaction value of the car.
- As per section 4(3)(d) , the PDI and free after sales service charges could be included in the TV only when such charges were charged by assessee to buyer by reason of or in relation to sale of car.

What about the cost of after sales service charges and PDI charges, incurred by the dealer during the warranty period?

- **Since these services are provided free by the dealer on behalf of the assessee , the cost towards this is included in the dealer's margin (or reimbursed to him).**
- **This is one of the consideration for sale of the goods to the dealer and will therefore be governed by the Rule 6 of the valuation rules on the same ground as indicated in respect of advertisement and publicity charges.**
- **That is, in such cases the after sales service charges and PDI charges will be included in the assessable value.**

CENVAT CREDIT

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

FLEX ENGINEERING LTD

MAY 13

FACTS

As per purchase order, machine was to be inspected at the assessee's premises in the presence of customer's engineer before dispatch, using duty paid testing material.

SC OBSERVATIONS AND DECISION

- The SC was of the opinion that the process of testing the customized packing machines was inextricably (intimately) connected with the manufacturing process.
- Until this process was carried out in terms of the covenant in the purchase order, the manufacturing process was not complete, the machines were not fit for sale and hence, not marketable at the factory gate.
- The court, therefore of the opinion that the **manufacturing process in the present case got completed on testing of the said machines.**
- Hence the testing material used for testing the packing machines were **inputs used in relation to the manufacture of the final product** and would be eligible for cenvat credit.

2. Will Rule 6 of CCR 2004 apply, if the assessee clears an **exempted by-product and a dutiable final**

product?

HINDUSTAN ZINC LTD

ISSUE - Whether assessee is required to pay 6% of the sale price of by-product?

SC DECISION

- The SC held that since in the rule 6 of CCR ,2004 the term used is, 'final product' and not 'by product'.
- Therefore, Rule 6 cannot be applied in case of by-product when such by-product emerged as a technological necessity.

3. Can cenvat credit of duties , other than NCCD, be used to pay NCCD?

PRAG BOSIMI SYNTHETICS LTD

PROVISIONS

- As per **rule 3(1)** of the CCR,2004, manufacturer of final product is allowed to take cenvat credit of NCCD.
- As per **rule 3(4)** of the CCR,2004 Cenvat credit may be utilized for payment of any duty of excise on any final product.
- As per **rule 3(7)(b)** Cenvat credit in respect of NCCD shall be utilized for payment of NCCD.

CASE LAW - The facts of the case are similar to the case ' PRAG BOSIMI SYNTHETICS LTD'.

In that case, HC held that merely because Cenvat credit in respect of NCCD can be utilized only for payment of NCCD, it does not lead the conclusion that credit of any other duty cannot be utilized for payment of NCCD.

Note - *Fourth proviso to rule 3(4) of the CENVAT Credit Rules, 2004 provides that in case of mobile phones, credit of only NCCD can be utilised for payment of the NCCD payable thereon. In other words, in the absence of the credit of NCCD, NCCD payable on mobile phones will have to be paid in cash (even if credit of other duties/tax is available) as no other credit can be utilized to pay such duty.*

- 4. Is assessee is required to reverse the CENVAT credit availed on capital goods destroyed by fire when insurance company reimburses value of such capital goods inclusive of excise duty?**

TATA ADVANCED MATERILAS LTD.

HC OBSERVATIONS AND DECISION

- HC observed that , assessee had paid the insurance premium and covered the risk of capital goods
- And when goods destroyed in terms of insurance policy the insurance company had compensated the assessee.
- It was not a case of double benefit to assessee.
- HC held that merely because the insurance company had paid the assessee, the value of goods including the excise duty paid, that would not render the availment of the CC wrong or irregular.

- 5. Whether penalty can be imposed on the directors of the company for the wrong CC availed by the company?**

ASHOK KUMAR H.FULWADHYA

PROVISION

Penalty under rule 15(1) is imposable on the person who had availed CC.

CASE LAW –

- The facts of the case are similar to the case 'ASHOK KUMAR H.FULWADHYA', in which HC observed that words "any person" used in rule 15(1) of the CC clearly indicate that the person who has availed CC shall only be the person liable to penalty.
- The HC held that directors of the company could not be said to be manufacture availing CC and penalty cannot be imposed on them.

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

STELKO STRIPS LTD

HC OBSERVATIONS AND DECISION

- HC placed reliance on its decision in the case of **M/s Auto spark industries**, wherein it was held that **once duty payment is not disputed and it is found that documents are genuine and not fraudulent**, the manufacturer would be entitled to CC.
- HC held that CC could be taken on the strength of private challans as the same were not found to be fake and there was a proper certification that duty had been paid.

7. 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 foreign commission agent are eligible input services for claiming CENVAT?

CADILA HEALTHCARE LTD

Facts

- The assessee availed the services of various technical testing and analysis agencies for testing of clinical samples prior to commencement of commercial production

HC OBSERVATIONS AND DECISION

- The HC observed that activity of testing and analysis of the trial batches was in relation to the manufacturer of final product **as unless such trial batches were tested the final product could not be manufacture.**
- Trial batches were removed on payment of excise duty and thus, CC of service tax paid in respect of such services could not be denied.
- **As regards commission,** HC observed that there was nothing on record to indicate that foreign agents were actually involved in any sales promotion activities like advertising which was covered in inclusive part of definition of input service.
- HC further explained that **neither** were such services used in relation to the manufacture of final product or clearance of final product upto the place of removal **nor** they similar to illustrative activities mentioned in rule 2(1) accounting, auditing etc.
- **Based on the above observation HC held that technical testing and analysis services were input service eligible for CC.**

8. **Will two units of manufacturer surrounded by a common boundary wall be considered as one factory for the purpose of CENVAT credit, if they have separate central excise registrations?**

SINTEX INDUSTRIES LTD.

FACTS

- In order to receive continuous and uninterrupted supply of electricity, the assessee installed DG sets/electricity generation plant to be used **in the** factory of the **textile division** and it used furnace oil as fuel in the generation of electricity.
- The assessee availed CENVAT credit on furnace oil, used as fuel for the generation of electricity, which was used for captive consumption in its own factory.

- When the assessee's **other unit(plastic division)** required electricity, the assessee supplied part of the electricity so generated to its other unit.

HC OBSERVATIONS

HC observed that though both the **separately registered** factories/divisions are situated within a common boundary wall **it could not be said that the other division is also within the factory of the assessee wherein the electricity is generated.**

- Assessee itself had described the factory of its other division as a separate place of business by applying for separate central excise registration and had obtained such registration.
- **Based on the above observations, HC 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 of input utilized to produce electricity which was supplied to a factory registered as a different unit would not be allowed.**

9. Whether CC can be availed of ST paid on customs house agents" (CHA) services, shipping agents and container services and services of overseas commission agents used by the manufacturer of final product for the purpose of export, when the export is on FOB Basis?

DYNAMIC INDUSTRIES LTD.

HC OBSERVATIONS

- The High Court referred to definition of 'input service' as also placed reliance on various cases dealing with subject and made the following observations:
- In case of all three services in relation to which substantial question of law has been framed **there is no specific inclusion of such services in the definition of input service.**

- Any service used by the manufacturer directly or indirectly in relation to manufacture of final products and clearing of final products upto the place of removal would certainly be covered within the definition of input service. In the present case, the place of removal would be the port.
- Revenue has not disputed the fact that the services in relation to which the CENVAT credit is claimed by the assessee were availed for the purpose of clearing the goods for the purpose of export.
- As regards **customs house agent service and shipping agents and container services**, the decision of this Court in *Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.)* would apply and the definition of input service would cover both these services, considering the nature of services and the place of removal being the 'port' in this case.
- With regard to the services of overseas commission agent also, decision of this court in 'Cadila Healthcare Ltd' would apply wherein it was held that CC on service could be availed if that service is used directly or indirectly in the manufacture or clearance of final product.
- As the service of overseas commission agent have not been used in the manufacture of final product, CC would not be admissible in respect of commission paid to foreign agents.
- **Based on above observations HC held that CC is available on CHA services shipping agent and container services and cargo handling services but is not available services of overseas commission agent.**

10. Can CC availed on inputs (contained in the work-in-progress destroyed on account of fire) be ordered to be reversed under rule 3(5C) of CCR?

FENNER INDIA LTD

FACTS

- The respondent assessee was engaged in manufacturing of Oil Seals. On account of fire accident in the factory, the work in progress stocks were burnt and rendered unfit for usage. The assessee had availed CENVAT credit on the raw materials, which were to be used for production of Oil Seals.

HC DECISION

- HC held that Rule 3(5C) can be invoked where on any goods manufactured by an assessee, the payment of duty is ordered to be remitted under rule 21 of Central excise rules 2002.
- In the present case assessee has not claimed any remission and no final product has been removed, hence assessee need not reverse the CC taken on inputs (contained in WIP) destroyed in fire.

11. Is a cellular mobile service provider entitled to avail CENVAT credit on tower parts & pre-fabricated buildings (PFB)

BHARTI AIRTEL LTD

FACTS

- The appellant availed CENVAT credit of excise duty paid on the Base Transceiver Station (BTS) claiming to be a single integrated system consisting of tower, GSM or Microwave Antennas, Prefabricated building (PFB), isolation transformers, electrical equipments, generator sets, feeder cables etc. The appellant treated these systems as “composite system” classifiable under Chapter 85.25 of the Central Excise Tariff Act [CETA].

HC OBSERVATIONS

- HC observed that since the tower and parts thereof were fastened and were fixed to the earth **and after their erection became immovable, they could not be termed as goods.**
- The towers were admittedly immovable structures and non-marketable and non-excisable and hence could **neither** be regarded as capital goods under rule 2(a) **nor** could be **categorized as inputs under rule 2(k)** of the CCR
- Only the category of goods in rule 2(a)(A) falling under the clause (i) and (iii) and used for providing output services can qualify as capital goods in the relevant context.
- All **capital goods** are not eligible for credit and only those relatable to the output service would be eligible

for credit.

- The towers are structures fastened to the earth on which the antennas are installed and hence cannot be considered to be an **accessory** or part of the antenna.

HC DECISION

- HC held that mobile towers and parts thereof and shelters/prefabricated building are neither CG under rule 2(a) nor INPUT under rule 2(k) of the CCR.
- Hence CC of duty paid thereon by a cellular mobile service provider was not admissible.

12. Whether sales commission services are eligible input services for availment of CENVAT credit? If there is any conflict between the decision of the jurisdictional High Court and the CBEC circular, then which decision would be binding on the Department? Also, if there is a contradiction between the decision passed by jurisdiction High Court and another High Court, which decision will prevail?

ASTIK DYESTUFF PVT LTD.

HC DECISION

- The HC clarified that the **decision of the jurisdictional HC will be binding to the Department** rather than CBEC circular
- Therefore ,assessee would not be entitled to cenvat credit on sales commission services obtained by them.
- merely because there might be a contrary decision of **another HC** is no ground to refer the matter to the Larger Bench.
- When there are two contrary decisions, one of **Jurisdiction HC** and another of the **other HC**, then decision of the **jurisdictional HC** will be binding to the Department and not the decision of another HC

GENERAL PROCEDURES UNDER CENTRAL EXCISE

1. Is interest payable under rule 7(4) of the central excise rules 2002, if amount of differential duty is paid in full before final assessment order is passed?

CEAT LIMITED

HC OBSERVATIONS AND DECISION

- HC observed that liability to pay interest under rule 7(4) arises only when duty liability payable to central government **consequent to order for final assessment under rule 7(3)**
- The agreed that in the instant case final assessment resulted in nothing due and payable to government, later part of rule 7(4) was not attracted .
- Consequently no interest was recoverable from them.

HC DECISION

- **The HC held that if the amount of differential duty is paid in full before the final assessment order is passed, provision of rule 7(4) will not be applicable and interest would not be payable.**

EXPORT PROCEDURES

1. Can export rebate claim be denied merely for non-production of original and duplicate copies of ARE-1 when evidence of export of goods is available?

UM CABLES LTD

HC OBSERVATION

-The HC observed that the objective of the procedure laid down in notification is to enable the authority to be duly satisfied that the two fold requirement of goods.

i) Having been exported and ii) being duty paid is fulfilled.

- HC DECISION

- HC held that procedure cannot be raised to the level of mandatory requirement.

- While the condition and limitations for the grant of rebate are mandatory, matters of procedure are directory.

- The HC rules that non-production of ARE-1 forms IPSO FACTO cannot invalidate rebate claim.

- In such case, exporter can demonstrate by cogent evidence that goods were exported and duty paid and satisfy the requirement of Rule-18 of central excise rules,2002, read with notification No 19/2004.

2. In case of export of goods under rule 18 of the Central Excise Rules, 2002, is it possible to claim rebate of duty paid on excisable goods as well rebate of duty paid on materials used in the manufacture or processing of such goods?

RAJASTHAN TEXTILES MILLS LTD

NOV 2015

PROVISION

- Under Rule 18 of CER 2002 grant of rebate of duty is available **either** on excisable goods **or on material** used in the manufacture of such goods i.e on raw material or finished goods.
- It is open to the assessee to claim the benefit of rebate either on finished goods or on raw material , but **not on both.**
- Since combined form ARE-2 can be used to claim both the benefits , it cannot be inferred out that the rebate is available on both.

DEMAND, ADJUDICATION AND OFFENCES

1. **Whether time limit under section 11A of the Central Excise Act, 1944 would be applicable to recovery of amounts due under compounded levy scheme?**

HANS STEEL ROLLING MILL

SC OBSERVATIONS

- Compound levy scheme is a separate scheme from the normal scheme for collection of excise duty on goods manufactured.
- Rules under compounded levy scheme stipulated method, time and manner of payment of duty, interest and penalty.
- Since the compounded levy scheme is a comprehensive scheme in itself, general provisions of the central excise act and rules are excluded

2. **In case the revenue authorities themselves have doubts about the dutiability of a product, can extended period of limitation be invoked alleging that assessee has suppressed the facts?**

SANJAY INDUSTRIAL CORPORATION

FACTS

The appellant did not pay excise duty on the belief that the aforesaid process did not amount to manufacture as per section 2(f) of the Central Excise Act, 1944. Department issued a show cause notice demanding the excise duty and penalty alleging that the activity carried out by the appellant amounts to “manufacture”.

SC OBSERVATIONS

- SC observed that **even department had the doubts relating to excisability** of process of profile cutting.

- In view thereof if the appellant also had nurtured the belief that the process carried out by him did not amount to manufacture and did not pay excise duty, this conduct of the appellant was a bonafide conduct and could not be treated as willful suppression of facts.

SC DECISION

- It held that since revenue authorities themselves had the doubts relating to excisability of process of profile cutting, the bona fides of the appellant could not be doubted.
- Hence, extended period of limitation could not be invoked and penalty was set aside.

3. In a case where the assessee has been issued a show cause notice (SCN) 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

HC OBSERVATIONS AND DECISION

- HC observed that since the subsequent SCN only formed prima facie view in regard to allegations, it could not be said to be issued only after adjudicating first SCN.
- The HC held that there was no legal provision requiring authorities to first adjudicate the notice issued regarding confiscation and only thereafter issue SCN for recovery of dues and penalty.

4. 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?

BALAJI TRADING COMPANY

PROVISION

- Penalty under Rule 25(1) could be imposed only on four categories of persons
- i) Producer ii) Manufacturer iii) registered person of warehouse iv) a registered dealer.

CONCLUSION

Since the respondents were neither producers nor manufacturer neither were they the registered person of warehouse nor were the registered dealers, penalty under rule 25(1) could not be imposed on the respondents.

NOTE - **With effect from 01.03.2015**, penalty under rule 25(1) can also be imposed on an importer who issues an invoice on which CENVAT credit can be taken.

5. 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

OBSERVATIONS OF THE COURT AND DECISION

- The HC noted that in terms of **section 37C(a)** , 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 HC opined that the communication of the order to the authorized agent of person, is therefore sufficient communication
- When the order was passed by the tribunal **in presence of advocate of the assessee**, the order would be deemed to be communicated to the authorized agent of the assessee.
- **The HC held that when a decision is pronounced in the open court in the presence of the advocate of the assessee , who is authorized agent of the assessee within the meaning of section 37C(1)(a) of central excise act 1944 the date of pronouncement of order would be deemed to be the date of service of order.**

6. Whether the amendment made by Finance Act, 2013 in section 37C(1)(a) of Central Excise Act, 1944 to include speed post as an additional mode of delivery of notice is merely clarificatory in nature having retrospective effect or does it operate prospectively?

JAY BALAJI JYOTI STEELS LTD.

LAW

- Any postal article registered at post office and a receipt issued in respect of such article is to be treated as 'registered post' in view of section 28 of Indian Post Office Act.
- Since, both 'speed post' and 'registered post' satisfy said requirements, they have to be treated as 'registered post'.
- It is well settled in law that where amendment being 'clarificatory in nature', which was brought up to clean up omissions and doubt as to the meaning of the previous act, **would operate retrospectively from the date on which original provision was introduced.**

CONCLUSION

- As discussed above, communication of notices through speed post would be valid.

REFUND

1. Whether filing of refund claim under section 11B of Central Excise Act, 1944 is required in case of *suo motu* availment of CENVAT credit which was reversed earlier (i.e., the debit in the CENVAT Account is not made towards any duty payment)?

ICMC Corporation Ltd.

HC DECISION

- HC held that, process involves only an account entry reversal and **factually there is no outflow of funds from the assessee.**
- Thus, filing of refund claim under section 11B is not required.

NOTE – Assessee can claimed debit in the CENVAT Account towards duty payment.

2. Does the principle of unjust enrichment apply to State Undertakings?

SUPRINTENDING ENGINEER TNEB

LAW

- The doctrine of unjust enrichment means no person can be unjustly enriched at expense of another person.
- Law authorized recovery of indirect taxes **from buyer.**
- The doctrine of unjust enrichment is a just and salutary doctrine.
- No person can seek to collect the duty from both ends.

DISCUSSION

- As stated above, person cannot collect the duty from his purchaser at one end and also collect the same duty from the state on the ground that it has been collected from him contrary to the law.
- State represents the people of the country. No one can speak of the people being unjustly enriched.
- State or state undertaking cannot be treated as buyer for the purpose of collecting indirect taxes from them.

CONCLUSION

- As discussed above, the doctrine of unjust enrichment is inapplicable to the state and state undertaking.

APPEALS

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?

TIKITAR INDUSTRIES

MAY 2014

FACTS

The adjudicating authority, in the assessee's case, concluded that excise duty was payable on assessee's product. Aggrieved by the order, the assessee carried an appeal before the Commissioner (Appeals), who accepted the assessee's stand and held that excise duty was not payable on its product. Department did not appeal against it and the said order of the appellate authority attained finality.

SC DECISION

The SC held that since the revenue had not questioned the correctness 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 impugned SCN.

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?

RDC CONCRETE (INDIA) PVT LTD.

NOV 2012

LAW

- **As per section 35C(2)**, the Appellate tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from record, amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the commissioner of central excise **or** the other party to appeal.

FACTS

- Arguments were submitted before the tribunal at an earlier stage. The tribunal rejected these arguments and decided the appeal.
- Subsequently, when an application for rectification of mistake apparent from record was filed with Tribunal, these arguments were again submitted. This time, arguments were accepted by the CESTAT.

SC OBSERVATION IN A DECIDED CASE LAW 'RDC CONCRETE (INDIA) PVT LTD

- It observed that arguments not accepted earlier during disposal of appeal cannot be accepted while rectification of mistake application.
- It is well settled law that a mistake apparent from record must be an obvious and patent mistake.
- Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record.

CONCLUSION

As discussed above, re-appreciation of evidence by CESTAT cannot be considered as rectification of mistake apparent on record under section 35C(2)

- 3. Can an appeal be filed before the Supreme Court against an order of the CESTAT relating to clandestine removal of manufactured goods and clandestine manufacture of goods?**

FACTS PAPER MILLS PRIVATE LIMITED

LAW

- As per section 35L of the central excise act, an appeal shall lie to the SC from
 - **A)** any judgment of the HC delivered,-
 - i) in an appeal made u/s 35G, **or**
 - ii) on a reference made u/s 35G by the appellate tribunal before 01/07/2003 **or**
 - iii) on a reference made under section 35H

if the HC certifies the case to be fit for appeal to the SC.

- **B)** any order of Appellate Tribunal having relation to the determination of rate of duty or value of goods, among other things.

SC in the case of 'Facts Paper Mills Private Limited' HELD THAT appeals relating to clandestine removal of manufactured goods and clandestine manufacture of goods are not maintainable before the Apex court under section 35L of the Central Excise Act, 1944.

4. **In a case where an appeal against order-in-original of the adjudicating authority has been dismissed by the appellate authorities as time-barred, can a writ petition be filed to High Court against the order-in-original?**

KHANAPUR TALUKA CO-OP SHIPPING MILLS LTD.

FACTS

- In this case, assessee filed the appeal to the Commissioner (Appeals) and then further appeal to CESTAT against the order-in-original passed by the adjudicating authority. However, the appeals were dismissed as time-barred.

DECISION

- HC held that, if appeal filed against the order in original is dismissed as time barred, then HC in exercise of writ jurisdiction can **neither** direct the appellate authority to condone the delay **nor** can interfere with the order passed by the adjudicating authority.

Note

However, contrary ruling has been expressed by court in TEXCELLENCE OVERSEAS, it was held that HC can condone the delay if filing appeal if the case have extremely good ground on merits to sustain and Court's non-interference at that stage would cause gross injustice and hardship to the petitioner.

5. **Can the High Court condone the delay - beyond the statutory period of three months prescribed under section 35 of the Central Excise Act, 1944 - in filing an appeal before the Commissioner (Appeals)?**

TEXCELLENCE OVERSEAS

DECISION

- Court held that u/s 35 of the act, the appellate authority cannot condone the delay beyond a period of 30 days.
- However, in exercise of writ jurisdiction, the court may issue writ or order, even where the order is appealable has been dismissed as barred by time if case have extremely good ground on merits to sustain.

6. Can delay in filing appeal to CESTAT for the reason that the authorised representative dealing with the case went on a foreign trip and on his return his mother expired, be condoned?

HABIB AGRO INDUSTRIES

HC DECISION

- HC observed that there did not appear to be deliberate neglect on the part of the authorized representative to file the appeal.
- It held that the reason for delay in filing appeal to CESTAT, that the person dealing with the case went on a foreign trip and on his return his mother expired, **could not be considered as unreasonable** for condonation of delay.

7. Does the Commissioner (Appeals) have the power to review his own order of pre - deposit?

M/S VENUS RUBBERS

LAW

- There is no provision of law under central excise act, 1944 which gives power to the commissioner (Appeals) to review his order.
- However, such power is available to the tribunal under **section 35C(2)** of the central excise act 1944 to rectify any mistake apparent on record.

DISCUSSION

As stated above, when there is no power under statute, the commissioner (appeals) has no authority to entertain the application for review of the order.

CONCLUSION

- As discussed above, commissioner does not have the power to review his own order of pre-deposit?

EXEMPTION BASED ON VALUE OF CLEARANCES

1. 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?

AUSTRALIAN FOODS INDIA (P) LTD

NOV 13

SC OBSERVATIONS

- **Physical manifestation** of the brand name on goods is **not** compulsory requirement.
- **Goods on which brand name was not printed *would continue to be* branded goods** as long as its environment conveys so.
- **Once it is established that a specified goods are branded goods whether they are sold without any trade name on it, or by another manufacturer**, it does not cease to be a branded goods.
- **The test** whether the goods is branded or unbranded, must not be the physical presence of the brand name on the good, **but whether brand name is used in relation to such specified goods** for the purpose of indicating a connection in the course of trade.

DECISION.

Cookies are branded goods and not eligible for SSI exemption even if brand name not affixed physically on cookies.

2. Where clearances of a dubious company are clubbed with clearances of the original company, whether penalty can be imposed on such dubious company if all the clearances have been made by the original company?

XENON

OBSERVATIONS

- Court observed that merely because the dubious company was in existence, it could not be said that it undertook the transactions.
- Its existence could not itself create any liability.
- The liability could arise only when the transactions were actually undertaken by the dubious company.
- If the transactions shown by the dubious company were not undertaken by the same but by the original company, then such transactions would be taken to be transactions of the original company and clubbed with the transactions of the original company.

DECISION

The HC held that penalty could not be imposed on the company who did not undertake any transactions.

3. 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?

ELEX KNITTING MACHINERY CO.

DECISION

- Tribunal held that since the assessee was a partner in the firm of whose brand name it was using, he was the co-

owner of such brand name.

- Hence, he could not be said to have used the brand name of another person in manufacture of goods in his capacity.
- Thus, the assessee was eligible for benefit of SSI exemption in the given case.

NOTE-

The said decision of the tribunal was affirmed by the HC and further by SC.

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

DEORA ENGINEERING WORKS

Facts of the given questions are similar to facts of a decided case law 'DEORA ENGINEERING WORKS' in which court have observed the following points and held that clearance of the goods under the same brand name manufactured by both the firms had been rightly clubbed.

- Partners of both the firms were common and belonged to the same family.
- They manufacturing and clearing the goods in the same factory premises, with common management and accounts etc.

NOTIFICATION, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

1. Where a circular issued under section 37B of the Central Excise Act, 1944 clarifies a classification issue, can a demand alleging misclassification be raised under section 11A of the Act for a period prior to the date of the said circular?

H.M.BAG MANUFACTURER.

DECISION

- The apex court held that demand u/s 11A cannot be raised for mis-classification, for a period prior to the date of circular.
- Time limit as provided u/s 11A of the act is not available to the department.
- Circular issued u/s 37B, which clarifies a classification issue, can **only apply prospectively** from the date of the circular and the same cannot be applied retrospectively.

SETTLEMENT COMMISSION

1. I) **Where a settlement application filed under section 32E(1) of the Central Excise Act, 194 is not accompanied with the additional amount of excise duty along with interest due, [can Settlement Commission pass a final order under section 32F(1) rejecting the application and abating the proceedings before it?**
II) **In the above case, whether a second application filed under section 32E (1), after payment of additional excise duty along with interest, would be maintainable?**

VADILAL GASES LTD

LAW

- **Section 32E(1)(D)** provides that no application for settlement shall be made unless applicant has paid the additional amount of excise duty accepted by him along with interest due u/s 11AB.
- **As per section 32E(1)**, the applications which are defective and non-maintainable cannot be decided or rejected to have abated u/s 32F(1)
- **As per section 32F(1)**, only valid applications can be considered and decided.
- **As per section 32-O**, where an order of settlement passed u/s 32F(5) provides for the imposition of penalty on the person who made the application, on the ground of concealment of particulars of his duty liability.

OR

After passing of an order of settlement, such person is convicted of any offence under this act in relation to that

case.

OR

The case of such person is sent back to the central excise officer having jurisdiction by the settlement commission u/s 32L

DISCUSSION

- As stated above, If an application is made without complying with section 32E(1)(d), it would be defective and non-maintainable. Only valid application can be considered and decided.
- Therefore, the application which are defective and non-maintainable cannot be decided or rejected.
- Rejection of application cannot be taken as amounting to a final order.
- Second application would not be barred u/s 32O as no direction had been issued u/s 32L

CASELAW

The facts given in the question are similar to facts of a decided case law '**VADILAL GASES LTD**' in which court have held in the same manner.

CONCLUSION

As discussed above,

- i) Settlement commission cannot reject the application since it was defective and non-maintainable.
- ii) Second application filed after payment of excise duty along with interest, would be maintainable.