Self Study Guide to

INDIRECT TAXES

CENTRAL EXCISE, SERVICE TAX, CUSTOMS & FOREIGN TRADE POLICY

For

C.A./CMA/CS/MBA

By

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Applicable for Nov. 2016 onwards

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PREFACE

Dear friends,

It gives me immense pleasure to present the thoroughly revised and updated third edition of this book "Self Study Guide to Indirect Taxes" aiming to simplify the complicated subject and present in the lucid manner for ease of understanding.

As they say, "The pursuit of any creativity starts with Innocence" so I put forward this creative piece for all the readers which has indeed been a result of a very humble beginning.

This book would not have been a reality without the blessings of God, my Parents, un-ending support of my wife, my siblings & my friends. Of course, the ideology to deliver something simple yet qualitative for the readers has been an immense drive.

At this juncture, I would like to thank with lot of gratitude to my Guru CA Sudhir V.S., who has been my mentor and shown me the path of attaining highest professional attributes while upkeeping the values of ethics & integrity. Also, this book would not have been a reality without the acceptance and support of Mr. Sunil Gogia and Mr.Arun Gogia of Asia Law House.

Although, endeavour has been made to make this book error free, yet mistakes might have crept in for which I am apologetic.

I look forward to the readers for the suggestions, criticism and feedback to improve the contents of the book. Readers may post their suggestions, grievances, ciriticism, feedback & queries by e-mail to ravi.somani03@gmail.com.

16th May, 2016

– *CA Ravi Kumar Somani*
(Author)

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ABOUT THE BOOK

The book is designed to help read the complex provisions of Indirect Taxes in a simplified manner. Various key attributes of this book Includes:

- ✓ Headline summary (one-liner quick reference) of each provision for ease of understanding & revision for last minute reference. Only headlines are required to be referred at the time of exams and the task of revision becomes very easy. The one line headlines are kept simple and lucid for easy understanding.
- ✓ Reason for provision, its existence and the learning imparted in the provision has been explained in authors own language before the start of each question.
- ✓ In-depth analysis with historical background and introduction is provided for complicated provisions in order to provide conceptual and practical understanding of the subject.
- ✓ Multiple examples & Illustrations are incorporated for ease of readers understanding.
- ✓ Multiple dimensions and possibilities in law are explained by tabulated examples to encroach into out of box thinking.
- ✓ Where required tabulations and flow charts are incorporated for ease in understanding of provisions. Especially certain crucial chapters including entire common topics chapters are designed in tabulated form for ease of reading and revision.
- ✓ Important case laws are presented at one place in summarized form. One liner headlines are given for case laws as well for to ease revision during exam times.
- ✓ Past examination questions with answers have been covered for practice of students.
- ✓ Key amendment notes are provided to highlight the amendments and to explain the crux of the amendments.

This book incorporates all the amendments made by Finance Act, 2015 and notifications & circulars revised upto April 30th, 2016.

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Section - A

CENTRAL EXCISE

Chapter 1 - Basic Concepts

1.1 Introduction

Prior to 1944 there were 16 individual Acts which levied excise duty. Each such act dealt with one or same type of commodities. All these acts were consolidated and a consolidating Act was passed in 1944 called as Central Excises and Salt Act, 1944 which came into effect from 28th Feb 1944. In 1996 the Act was renamed as Central Excise Act, 1944. The Central Excise Act, 1944 (originally Central Excises and Salt Act, 1944) and Rules framed there under came into force on 28th February, 1944.

1.2 Administration of Central Excise tax law

1. Ministry of Finance
2. Department of Revenue
3. Central Board of Excise and Customs
4. Central Excise Zones headed by *Principal Chief Commissioners*/ Chief Commissioners
5. Central Excise Commissionerates headed by *Principal Commissioners*/ Commissioners
6. Service Tax Commissionerates
7. Additional Commissioner
8. Joint Commissioner
9. Assistant Commissioner /Deputy Commissioner
10. Superintendent
11. Inspector

1.3 Body of Central excise law

Central excise law covers the following:

- Central Excise Act, 1944;
- Central Excise Rules, 2002;
- CENVAT Credit Rules, 2004;
- Central Excise (Appeal) Rules, 2001;
- Central Excise (Advance Rulings) Rules, 2002;
- Central Excise (Settlement of Cases) Rules, 2007;
- Central Excise (Removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2016;
- Central Excise valuation (Determination of price of Excisable Goods) Rules, 2000;
- Central Excise (Compounding of Offences) Rules, 2005;
- Central Excise (Determination of Retail Sale price of Excisable goods) Rules, 2008;
- Central Excise Tariff Act, 1985 (CETA).

1.4 Important Definitions

Adjudicating Authority: It means any authority competent to pass any order or decision under this act, but does not include the Central Board of Excise or Customs constituted under Central Boards of Revenue Act, 1963. (Sec 2(a))

Broker or Commission agent: It means a person who in the ordinary course of business makes contracts for sale or purchase of excisable goods for others. (Sec 2(aaa))

Central Excise Officer: It means the Principal chief commissioner, Chief Commissioner, Principal commissioner, Commissioner, Joint Commissioner, Assistant Commissioner or Deputy Commissioner of Central Excise or any person (including an officer of the State Government) invested by the Central board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this act. (Sec 2(b))

Curing: It includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture. (Sec 2(c))

Excisable goods: It means goods specified in First Schedule and the Second Schedule to Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. (Sec 2(d))
Explanation to Sec 2(d): For the purpose of this clause goods includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

Factory: It means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process. (Sec 2(e))

Fund: It means the Consumer Welfare Fund established under section 12C. (Sec 2(ee))

Manufacture: It includes any process:
(i) Incidental or ancillary to the completion of a manufactured product; and
(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the CETA, 1985 as amounting to manufacture; or
(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labeling of containers including the declaration or

alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer. (Sec 2(f))

Note: The word **"Manufacturer"** shall also be construed accordingly and shall also include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account. For example: A Contractor.

Prescribed: It means prescribed by rules made under this act. (Sec 2(g))

Sale and Purchase: With their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration. (Sec 2(h))

Wholesale dealer: It means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale. (Sec 2(K))

1.5 Various duties under Central excise act, 1944

Basic excise duty: It is levied u/s 3(1)(a) of the Central Excise Act and is levied at the rates specified in First Schedule to CETA (Central Excise Tariff Act, 1985).

Special excise duty: It is levied u/s 3(1)(b) of Central Excise Act on some commodities like Pan masala, Cars etc. These items are covered in Second Schedule to CETA. However, w.e.f 01.03.2006, all goods are exempted from special excise duty.

Additional excise duty: It is levied as surcharge on pan masala and on certain tobacco products except biris to finance the National Rural Health Mission. It is charged at the prescribed specific rates on cigarettes and at the rate of 10% on other products.

National Calamity Contingent Duty (NCCD): It is imposed vide sec 136 of finance act, 2001 on pan masala, chewing tobacco and cigarettes.

Duty on 100% EOU & FTZ: Generally, 100% Export Oriented Undertakings and units in Free Trade Zone export all their production. However, if they clear their final products in Domestic Tarriff Area (DTA) then excise duty has to be paid. The duty amount in this case is equal to the aggregate of customs duty that would have been payable on the like article as if it is been imported in India. Even though the rate of customs duty is considered for payment of duty, actually the duty paid by them is central excise duty. The rate of customs duty is taken only as a measure.

Clean energy cess: It is levied @ Rs.200 per tonne.

1.6 Levy of excise duty by Constitution of India

No tax can be levied, unless the constitution of India authorizes the government to do so. In this question we shall try to understand which article of the constitution of India authorizes the central government to levy and collect Central excise duty. Further, we shall also understand the various lists in the constitution and its relevance. i.e. list 1 gives authorization to central government, list 2 for state government etc. We shall also understand if there are any goods on which no excise duty is levied as they are specifically excluded in the constitution itself.

1) Constitution of India gives authority to levy tax

Article 246 of Constitution of India gives the respective authority to Union and State governments for levying tax. Seventh schedule to the Constitution of India contains three lists setting out matters under which the state and Union have the authority to make laws.

List I [Union List]

This list enumerates the matters in respect of which the parliament (central government) has an exclusive rights to make laws.

List II [State List]

This list enumerates the matters in respect of which the legislature of any state (state government) has an exclusive rights to make laws.

List III [Concurrent List]

This enumerates the matters in respect of which both parliament and subject to list I legislature of any state, (both central government & state government) have powers to make laws.

2) Excise duty is levied under Entry 84 of Union List

Entry 84 of the union list of seventh schedule to the constitution of India empowers CG to levy excise duty on tobacco and other goods manufactured and produced in India except:

i. Alcoholic liquors for human consumption; and
ii. Opium, Indian hemp and other narcotic drugs and narcotics.

but including:

Medicinal and toilet preparations containing alcohol, or any substance stated before.

For example: Central excise, service tax, customs, income tax are the acts covered under union list, whereas entry tax, Octroi, entertainment tax, VAT etc. are the acts covered in the state list.

Conceptual Notes:

With the exception of Gujarat, Nagaland, Mizoram and Manipur, where liquor is officially prohibited, alcohol revenue takes the second, third or fourth place in terms of contributions to a State's coffers. Liquor provides 20 per cent of the share of the government's own revenue in most States. States desire to earn more revenue from this source which is on the constant rise has lead to most states denying merger of this produce in GST. Therefore, we shall see that even in GST regime, the tax on alcoholic liquor for human consumption will continue to be an exclusive domain of the states.

1.7 Charging section - [Sec 3(1)]

Charging section in any tax legislation is the most important section, since it gives out the event on occurrence of which excise duty can be levied. What is that event on occurrence of which excise duty can be levied and which act gives the rates for levy of excise duty is provided in this section

1) Duty to be levied at rates specified in first /second schedule to CETA, 1985

There shall be levied and collected in such manner as may be prescribed:

a) A duty of excise on all excisable goods which are **produced or manufactured in India** as, and at the rates set forth in the **First Schedule** to Central Excise Tariff Act, 1985 (CETA, 1985);
b) A special duty of excise on excisable goods specified in the Second Schedule to CETA, 1985 which are produced or manufactured in India as, and at the rates set forth in **Second Schedule** to Central Excise Tariff Act, 1985 (CETA, 1985).

2) Taxable event for levy of excise duty is manufacture or production

Excise duty is levied upon manufacture or production of goods in India. Therefore the taxable event for levy of excise duty is manufacture or production of goods.

Note:

1) No Excise duty shall be levied on excisable goods produced or manufactured in SEZ (Special Economic Zone).

Conceptual Notes:

1) The word 'manufacture' is not completely defined in the act. Definition as given u/s 2(f) of this act is only inclusive and not exhaustive, however there are ample case laws to understand and interpret the meaning of the term 'manufacture'. Basically, manufacture as specified in various court decision means a new product having distinctive name, character or use must emerge or deemed manufacture. For example: following can be termed as manufactured, since the process brings into existence a new and distinct commodity having separate name, characteristic or use:

- Conversion of a table from wood; or
- Conversion of pulp into a base paper; or
- Conversion of sugarcane to sugar.

2) Central excise tariff act contains three schedules. The first schedule gives the rates of basic excise duty leviable on various products, while the second schedule gives the list of items on which special excise duty is payable. (The second schedule has lost its relevance since all the goods in that schedule are currently exempted from special excise duty). The third schedule contains items covered under MRP provisions, which are covered under deemed manufacture provisions. *[The said concept shall be understood in more detail in chapter 2 of this book i.e. classification].*

3) The standard ad valorem rate of excise duty (i.e. CENVAT) has been increased from 12% to 12.50%. Further, Education Cess & secondary and higher education cess levied on all excisable goods has been fully exempted. Therefore, the effective standard rate of excise duty now is 12.5% and not 12.36% w.e.f 01.03.2015.

1.8 Excisable goods produced or manufactured by a 100% EOU - [Proviso to Sec 3(1)]

100% EOU (Export oriented units) are the units located in India which manufacture or produce goods with an intention to wholly export it. However, at times they may also remove certain goods within India. This section specifies the treatment in case 100% EOU's clear goods within India (i.e. Domestic Tariff Area).

1) Duty to be equivalent to the aggregate of customs duty

If a 100% EOU exports the excisable goods, then they are exempted from excise duty. However, if the excisable goods manufactured or produced by a 100% EOU are brought to any other place within India [i.e. Domestic Tariff Area (DTA)] then the duty in such a case shall be equal to the aggregate of customs duty that would have been payable on the like articles as if it were imported in India.

2) 50% of the Customs duty and 100% of Additional customs duty is exempted

However, 100% EOU has been granted an exemption from clearances in DTA (Domestic Tariff Area) from the following:

(a) 50% of the Basic customs duty leviable thereon; and

(b) 100% of the Additional duty of customs u/s 3(5) of the Customs Tariff Act, 1975.

3) No exemption of additional duty, if sales tax/VAT is exempted

Above exemption from additional duty u/s 3(5) of the customs tariff act, 1975 is available only if the goods so removed are not exempt from payment of sales tax/VAT in India. ***[Notification No. 23/2003-C.E., dated 31/3/2013]***

Conceptual Notes:

a) Even though the rate of customs duty is considered for payment of duty, actually the duty paid is central excise duty. The rate of customs duty is taken only as a measure.

b) In case there are different rates for the like goods then the higher of such rate should be considered for levying the duty.

c) The exemption is given to strengthen and boost the export oriented units in contrast to the domestic sellers.

1.9 Geographical coverage of act and applicability of act on Government

1) Act applies to whole of 'India' including 'Jammu' & 'Kashmir'

The act applies to whole of "India". India includes territorial waters of India and continental shelf and exclusive zone of India. Originally act did not apply to the state of Jammu & Kashmir but now its application is also extended to the State of Jammu & Kashmir.

2) Law applies to government as it applies to others

Even if goods are produced or manufactured by Central government/State government, excise duty shall be levied.

Conceptual Notes:

a) It is pertinent to note that the service tax law does not apply to Jammu & Kashmir, but the excise act 1944 applies to Jammu & Kashmir.

1.10 Analysis of Charging section

If we analyse the section 3(1) of the act i.e. charging section then it can be construed that in order to levy excise duty following four conditions must be satisfied:
(a) There must be a **'manufacture'**;
(b) Manufacture must be in **'India'**;
(c) Manufacture must result in **'Goods'**;
(d) The resultant goods must be **'Excisable Goods'**.

Since, the above four aspects are the basic conditions to be satisfied to levy excise duty, we shall now understand each of the above terms in length.

1.11 Meaning of the term 'Goods'

Excise duty is levied on 'excisable goods' but before we understand the term 'Excisable goods', let us first understand the meaning of the term 'Goods'. Its astonishing to know that the meaning of the term 'goods' is not defined in the act, therefore we shall understand the same from the landmark judgment of the apex court in case of **UOI v/s Delhi Cloth and General Mills (1977)**.

1) To be called 'Goods' article must be capable of coming to market to be bought and sold

Central excise act has not defined the term 'Goods'. However, in the landmark judgment of **UOI v/s Delhi Cloth and General Mills (1977)**, The apex court held that in order to be called **'Goods'** the article must be **capable of coming to the market to be bought and sold.** Therefore from the above decision two fundamental concepts emerge i.e. to be called goods, article must be:

- **Moveable;** and
- **Marketable**.

The term 'Moveable' and 'Marketable' both are not defined in Central excise act, 1944, Therefore the same has to be understood and interpreted based on various landmark court judgments.

1.12 When can goods be called 'Moveable'

In order to levy excise duty, goods need to be moveable and marketable but when can goods be called moveable is not defined anywhere in this act. Therefore, term has got its meaning from various landmark judgments as provided below:

Article must be capable of coming to market to be bought and sold	Based on these two landmark judgments the following principal are drawn: To be called **'Goods'** the article must be such that it is capable of being bought and sold in the market, they must be such that they can ordinarily come or can be brought to the market to be bought and sold. ***[UOI v/s Delhi Cloth Mills (DCM) (1977)]*** ***[South Bihar Sugar Mills v/s UOI (1978)]***
What about Immovable goods?	No Excise duty can be levied on Immovable property.

1.13 When can goods be called 'Marketable'

In order to levy excise duty, goods need to be 'moveable' and 'marketable' but when can goods be called 'marketable' is not defined anywhere in this act. However, explanation to section 2(d) lays the concept of deemed marketability. However, the term has got its true meaning from various landmark judgments as provided below:

Capable to be bought and sold for a consideration	Explanation to section 2(d) introduces the concept of deemed marketability by providing that "Goods includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable." ***[Deemed Marketability – Explanation to Sec 2(d)]***
Can ordinarily be bought and sold in the market	Article must be something which can ordinarily come to market to be bought or sold.
Actual sale is not necessary ***Even transient items can be goods***	(a) To be marketable actual sale of goods is not necessary. (b) Usage in captive consumption is not determinative of whether the article is not capable of being sold in the market. (c) Even transient items can be goods provided they are capable of being marketed during the said short period of their life. ***[Union Carbide India ltd (1986) v/s UOI]*** ***[C.C.EX v/s Ambalal Sarabhai Enterprises (1989)]***
Mere mention in tariff is not enough	If goods are mentioned in tariff it means they are excisable goods but mere mention in tariff does not mean that they are also marketable. Marketability is an important condition for dutiability and the same has to be proved in each case based on the facts and circumstances. ***[Bhor Industries v/s C.C.EX (1989)]***
Onus is on department	Onus is on the department to produce the evidence of marketability. ***[Cipla ltd v/s UOI (1990)]***
Number of purchasers is not the criteria	Marketability does not depend upon the number of purchasers; even one purchaser is sufficient to be called marketable nor is that the market must be confined to only territorial limits of India. ***[A.P. State Electricity Board v/s CCE (1994)]***

1.14 Certain important concepts

We will now understand the meaning of the certain important terms and understand how they are different from each other in terms of chargeability and treatment. Terms such as 'Excisable' goods, 'Non-excisable' goods, 'Exempted' goods, 'Nil' rated goods, 'Non-dutiable' goods are explained below:

1) 'Excisable Goods' - *Goods that are specified in First & Second schedule to CETA, 1985 and includes salt*

'Excisable goods' means goods specified in First Schedule and the Second Schedule to Central Excise Tariff Act, 1985 (CETA) as being subject to a duty of excise and includes salt. In other words, if any goods are not specified in the first schedule or in the second schedule to CETA except for salt, then such goods cannot be termed as 'Excisable goods'.

2) 'Non-Excisable Goods' - *Goods that are not listed in schedules to CETA or listed in CETA but with no rate of duty mentioned against them (not even 'Nil' rate)*

Goods are considered to be 'Non-excisable goods' if:

(a) The goods in question are not listed in the Schedules to CETA; or

(b) The goods are listed in Schedules to CETA but no rate of duty is being mentioned against them i.e. not even 'Nil' rate is mentioned i.e. the rate column is 'BLANK'.

Therefore, if nil rate is mentioned for any goods in CETA, then they are very much an excisable goods chargeable to excise duty at nil rate.

3) 'Nil Rated Goods' - *They are also excisable goods*

It was held by the apex court that 'Nil' rate of duty is also a rate of duty and goods with nil rate of duty cannot be treated as non-excisable goods. To be non-excisable, the rate column in the tariff must be BLANK (i.e. no rate must have been given against such goods). ***[C.C.EX v/s Vazir Sultan Tobacco Co. Ltd (1996)]***

4) 'Non-dutiable Goods' - *They are also excisable goods but are not liable to duty*

'Non-dutiable goods' are though excisable goods but are not liable to duty due to following reasons:

(a) That the rate of duty is 'Nil' in the tariff schedule; or

(b) That exemption is granted by a notification on such goods; or

(c) On account of any other reason i.e. not manufactured, not moveable or not marketable etc.

5) 'Exempted Goods' - *Goods that are excisable but not liable to duty due to exemption given*

'Exempted goods' are the goods not liable to duty of excise as they are exempted through a general or specific notification issued in this regard.

6) 'Exempted goods' to be chargeable to duty, if excisable

It was held by the apex court that, Goods exempted at the time manufacture shall still be chargeable to duty, if the following conditions satisfy:

1. Goods were excisable at the time of manufacture; and
2. Exemption was withdrawn prior to the date of removal. ***[Wallace Flour Mills Co. Ltd]***

Conceptual Notes:

From the above it can be understood that mere exemption granted by a notification does not mean that the goods become non-excisable because exciseability depends on listing of goods in schedules to CETA and exemption depends on the notifications issued by the department. It is important to note that the excise law have different treatment for 'non-excisable' goods and 'exempted' goods and therefore both cannot be read and understood in the same context as the treatment for non-excisable goods and exempted goods differ as illustrated in the table below: Further, taxable event for levy of excise duty is manufacture but excise duty is collected when the goods are removed from the factory gate. Therefore, the conflict arises, what if the goods were taxable when they were manufactured but were exempted when they are removed or vice-versa, then in such tricky cases, whether excise duty shall be liable to be paid. These complications have led to lot of litigation and the final conclusion based on the various landmark judgments is provided below in the tabulated form for ease of reference:

At the time of manufacture, goods were	At the time of removal from factory	Treatment
Excisable but Exempted by notification	Exemption was withdrawn	Chargeable to duty as they were excisable at the time of manufacture.
Excisable and not Exempted by notification	Goods were exempted by notification	Not chargeable to duty as they were exempted at the time of removal.
Excisable	Goods were not Excisable	Chargeable to duty as they were excisable at the time of manufacture.
Not Excisable	Goods were excisable	Not chargeable to duty as they were not excisable at the time of manufacture.
'Nil' rate of duty	Goods liable @ 10% rate of duty	They are listed with 'Nil' rate in CETA and are considered as excisable goods. It should be charged @ 10% as rate prevalent at the time of removal of goods must be taken into consideration.
Goods were not liable to 'special levy'	Goods were made liable to 'special levy' by way of finance act.	Special levy shall not be charged as it was not applicable at the time of manufacture.

Three Fundamental Principles arise as follows:
Taxability of Goods – At the time of manufacture/production of goods;
Collectability of Duty – At the time of removal of goods;
Rate of Duty – Rate prevalent at the time of removal of goods must be taken.

1.15 Concept of 'Manufacture'

As per charging section, Excise duty shall be levied when the goods are **'Manufactured'** or **'Produced'**. Therefore, it becomes important to understand when manufacture is said to have taken place. If there is no manufacture there cannot be a levy of excise duty. Therefore, the term manufacture has always been a subject matter of a litigation. Although the term 'manufacture' is defined in the act, still a reference to court judgments is required in order to understand and interpret the same more clearly. In case of **UOI v/s Delhi Cloth Mills Co. Ltd (1977),** apex court has pronounced landmark judgment for understanding of the term 'manufacture'. In central excise act, 'Manufacture' is defined u/s Sec 2(f) of the act as follows:

'Manufacture' includes any process:

i. **Incidental or ancillary** to the completion of a manufactured product; or
ii. which is specified in relation to any goods in the **Section or Chapter notes of the First Schedule** to the CETA, 1985 as amounting to manufacture; or ***(Deemed manufacture)***
iii. which, in relation to the goods specified in the Third Schedule, involves **packing or repacking** of such goods in a unit container or **labeling or re-labeling** of containers including the **declaration or alteration of retail sale price** on it or adoption of any other treatment on the goods to render the product marketable to the consumer. ***(Deemed manufacture)***

Note: *Point (ii) & (iii) in the aforesaid definition of manufacture means **"Deemed manufacture"**.*

Landmark judgment of 'Manufacture' in case of *UOI v/s Delhi Cloth Mills Co. Ltd. (1977)*:

A new and different article must emerge having a distinctive name and character	In a landmark judgment issued by apex court manufacture has been described as follows: *"Manufacture implies a change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation.*

or use	*But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use." **[UOI v/s Delhi Cloth Mills Co. Ltd. (1977)]***

1.16 Concept of 'Manufacturer'

The term "Manufacturer" has been defined u/s 2(f) of the act as "the word manufacturer shall be construed accordingly and shall also include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account".

Conceptual Notes:

1) The question of who is manufacturer is very important in excise as the liability to pay excise duty is on manufacturer or producer of the excisable goods. Hence, excise demands, if any are always raised and recovered from the manufacturer. The definition of the manufacturer as prescribed above is inclusive and not exhaustive hence the word manufacture has to be understood in its natural meaning i.e. manufacturer is the person who manufactures excisable goods i.e. he is the person who transforms the goods into a distinct commodity having a separate name, character or use.

2) It is common in industry to supply raw material to a job worker or sub-contractor and get the goods manufactured from him in his factory eg. Automobile manufacturers like Bajaj, Maruthi, Mahindra etc. very often get many parts manufactured from outside on 'Job work' basis. In such cases, they (Maruthi, Bajay etc) will not be treated as a manufacturer even if raw material is supplied by them.

3) Independent sub-contractor will be treated as manufacturer even if manufacture is carried out in the premises of raw material supplier. Further, job-worker doing the job will also be a manufacturer if the transaction between the job-worker and the principal manufacturer is on principal to principal basis.

1.17 Special cases

As the term 'Manufacture' has got its true meaning from various court judgments. It has always been a subject matter of dispute as to certain activities whether they can be termed as 'manufacture' or not. We shall now learn certain special cases which have been a subject matter of dispute in the past:

- Distinction between 'Manufacturing' & 'Processing';
- Whether 'Assembly' amounts to manufacture;
- Whether 'Packing' amounts to manufacture;
- Whether 'Labeling' and 'Branding' amounts to manufacture;
- Relevance of change in tariff heading/sub-heading;
- Dutiability of intermediate products and captive consumption;
- Dutiability of Site related activities and immovable property;
- Dutiability of Waste & Scrap.

1.17.1 Distinction between 'Manufacturing' & 'Processing'

If the duty is to be levied on manufacture, then whether processing can also be termed as manufacture. We shall now understand what makes processing different from manufacture.

1) Manufacture involves 'many' processes, manufacture brings into existence a new and distinct commodity; Process may not bring into existence a new and distinct commodity

Manufacture involves series of processes but Process may not amount to manufacture i.e. if the identity of the commodity remains the same then it is termed as processed and not as manufactured. It is only when a process or series of processes has taken the input material into a new and distinct article commercially only then the manufacture of goods is said to have taken place. At some point manufacturing and processing shall merge and that is called as the process which is incidental or ancillary to the completion of the manufactured product.

Conceptual Notes:

1) The distinction between the manufacture and process has been dealt by the Supreme Court in the case of **Union of India vs J.G. Glass Industries Ltd. 1998 (097) ELT 0005 (S.C)** wherein the apex court observed that whether the process is that of "manufacture" would be based on two-fold test - First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist - Secondly, whether the commodity which was already in existence will serve no purpose or will be of no commercial use but for the said process.

2) **Process of Pickling and oiling is not manufacture:** "Pickling is removing surface oxides from metals by chemical or electro chemical reaction" and pickle means "the chemical removal of surface oxides (scale) and other contaminants such as dirt from metal by immersion in an aqueous acid solution." Therefore it can be said that the process of pickling is only a chemical cleaning process to remove scales and dirt from the metal by immersion in chemical solution and does not result in emergence of any new commercially different commodity. Therefore the process of oiling and pickling as preparatory steps do not amount to manufacture.

3) In sum, the question whether a particular process is a process of manufacture or not, has to be determined having regard to the facts and circumstances of each case and having regard to the well known tests laid down by the Courts in this regard.

1.17.2 Whether 'Assembly' amounts to manufacture

1) 'Assembly' amounts to manufacture if commercially new commodity with different name and character or use emerges

'Assembly' is a process of putting together a number of items or parts of an item to make a product or item. Not all cases of assembly amounts to manufacture. After assembling of various parts if a new commercial commodity with different name, character and use emerges then the same amounts to manufacture.

Conceptual Notes:

1) The assembly may take place before the sale or after the sale of manufactured goods and again at the factory gate of the manufacturer or the customer's site. It may be done by the manufacturer/buyer/intermediary/technician. In all such cases, the questions that arise are:-

(a) Whether such assembly is manufacture?

(b) Do new goods emerge as a result of assembly?

The leading judgment in this context is In **BPL India Ltd. Vs CCE 2002 (143) ELT 3**, the Supreme Court held that assembly of imported kits of VTR with colour monitors imported in disassembled condition amounted to manufacture since the end product had a distinct character and use and the process of assembly was done by technical experts or skilled persons. Further, in case of **Sheth computers v. CCE 2000(121) ELT 738 (CEGAT)**, it was held that assembling of computers from duty paid bought out parts amounts to manufacture.

2) Therefore, the general proposition would be that if the assembly results in new commercial commodity with a distinct name, character and use, then it would amount to manufacture.

1.17.3 Whether 'Packing' amounts to manufacture

1) 'Packing' amounts to manufacture as it is an activity incidental or ancillary to manufacture

As per sec 2(f)(i) **"Manufacture includes activities incidental or ancillary to the completion of the manufactured product."** Therefore, packing comes under the ambit of the definition of 'manufacture' and is considered as an activity incidental to the completion of the manufactured product. Normally, the fully manufactured goods cannot be sold without being packed hence the activity of packing amounts to manufacture, since it is an activity incidental or ancillary to the completion of the manufactured product.

2) 'Repacking' does not amounts to manufacture

Repacking of already packed goods does not amount to manufacture.

3) 'Packing' or 'repacking' amounts to deemed manufacture in certain cases

As per sec 2(f)(ii) & 2(f)(iii) packing or repacking amounts to deemed manufacture in following cases:

a) In relation to certain products as specified in the Section or Chapter Notes of the First Schedule to CETA, 1985; or
b) Packing or repacking in a unit container, in relation to the goods specified in the Third Schedule.

Conceptual Notes:

1) The definition of manufacture as contained in section 2(f) of the Act, covering incidental and ancillary activities there under, would incorporate within its ambit the activity of packing, which is a necessary adjunct to manufacture. Further, goods are normally treated as fully manufactured for the purpose of accounting in the statutory excise records at the stage where they are packed in their normal packing, without which they cannot be delivered in wholesale at the factory gate. In other words the activity of packing of otherwise fully manufactured goods is the process which renders such goods marketable and consequently the activity of packing is part and parcel of manufacture.

2) The position in law however changes when excisable goods which are packed in bulk are charged to duty and are thereafter dispatched to outside godowns wherein they are repacked into small containers. In such a situation, the principle in law is that since the bulk product has already been fully manufactured and has been marketed or dispatched in the factory, the repacking activity would not constitute manufacture in law. There are numerous decisions to this effect both of the Tribunal and of the High Courts.

3) The process packing of re-packing may or may not amounts to manufacture as per the principle of manufacture as evolved by the courts. However, the legal fiction has been created in law and in case the packing or re-packing is done in unit container for products specified in the third schedule to CETA then the same is deemed to be a manufacture.

1.17.4 Whether 'Labeling' and 'Branding' amounts to manufacture

1) 'Labeling' and 'branding' does not amount to manufacture as a new and distinct product does not emerge

'Labeling' and 'branding' of the products does not amount to manufacture as a new and distinct product does not emerge merely by labeling or branding and a fully manufactured product exists even before 'labeling' and 'branding'.

2) 'labeling' and 'branding' in relation to goods specified in third schedule to CETA amounts to Deemed manufacture

However as per section 2(f)(iii), where the process of labeling or re-labeling of containers is in relation to goods specified in Third Schedule to CETA then such process of labeling or re-labeling shall amount to **deemed manufacture**.

Conceptual Notes:

1) The settled position in law is that an unlabelled and a labelled product is normally treated in commercial parlance as the same and consequently the mere labelling of fully manufactured products would not constitute manufacture in law. The Bombay High Court, in **Pioneer Tools and Appliances (P) Ltd. Vs. Union of India (1989) (42) ELT-384** has held that mere affixation of labels would not render the person who undertakes the said activity as a manufacturer since the activity would not constitute manufacture in law.

2) As far as question of branding of goods is concerned there are numerous decisions, which hold that such branding would not amount to manufacture. In most of these cases, the manufacturer was affixing the brand name of the customers on the specified goods and the Department sought to establish that the brand name owner was the manufacturer in law. This was negated by the Supreme Court in a series of three decisions in **Union of India Vs. Cibatul Ltd. (1985) (22) ELT- 302, Joint Secretary to Govt. of India Vs. Food Specialties Ltd. (1985) (22) ELT-324, and in Sidhosons Vs. UOI (1986) (26) ELT-881**. The question whether branding of already manufactured goods was a process of manufacture was not per se considered in these decisions and Court rendered its decision only on whether or not the brand name owner was the manufacturer under excise law or not.

1.17.5 Relevance of change in tariff heading/sub-heading

The question here is that can a change in tariff heading in the CETA would be an indicator to determine whether or not a product is manufactured.

1) Change in tariff heading does not determine manufacturability

Merely because the output product and input product falls under the different tariff heading/sub-heading under the CETA, 1985 it cannot be assumed that the manufacture of the product has taken place. In other words, merely because the output product and input product falls under the same tariff heading/sub-heading under the CETA, 1985 it cannot be assumed that the manufacture of the product has not taken place. In other words, to be termed as manufacture, the activity must either fall within the strictures of the definition of the manufacture as defined in section 2(f) of the act or it must be proved that the new and distinct product having separate name and characteristics or use has emerged. It was held in case of **National Metal works v. CCE2005 (179) ELT 189 (CESTAT)** that Tariff is merely for classification of a product and is no authority on the question of manufacture. That question has to be determined based on the facts of each case of goods.

1.17.6 Dutiability of 'intermediate' products and 'captive consumption'

Captive consumption in the context of excise law means utilisation of goods produced or manufactured within the factory of production. This is normally prevalent in large factories with several departments in diverse manufacturing processes with their departmental and intra-departmental stock transfers. The goods internally consumed to manufacture the final product are termed as intermediate goods. We shall here understand the taxability of such captively consumed goods.

1) Captive consumption means utilization of goods for further processing or self consumption

'Captive consumption' means utilization of intermediate goods produced or manufactured in the same factory for further processing. Generally, in large factories with several departments this is quite common that the output of one department becomes an input of another department to be self consumed in making of a final product.

2) Intermediate goods liable to duty, at each intermediate stage if qualify to be goods

Intermediate product for self consumption shall be liable to excise duty at each stage if they qualify to be 'Goods' (i.e. moveable & marketable) at each such intermediate stage and therefore at every stage of manufacture excise duty is leviable. However, CENVAT credit can be claimed.

3) Intermediate product is exempted, if final product is dutiable

Currently, several exemption notifications are issued by the department whereby levy of duty at the intermediate stage is exempted provided the final product is chargeable to duty. However, if the final product is exempted or chargeable to 'Nil' rate of duty then intermediate product shall not be exempted and duty shall be levied at each intermediate stage.

Conceptual Notes:

1) Therefore, removal of goods emerged in one process for being used in another process (captive consumption) would be a 'clearance' in terms of rule 4 of Central Excise Rules, 2002, and therefore duty is required to be paid even for removal of goods for self consumption. However, since paying duty on all captive consumption will cause inconvenience to manufacturers, exemptions have been given in many cases. Notification No. 67/95 CE 16.03.95 grants exemption from excise duty payable on capital goods and inputs (except light diesel oil, high diesel oil and petrol) manufactured in a factory and used within the factory of production in or in relation to manufacture of final products, if duty is payable on such final products.

1.17.7 Dutiability of 'Site related activities' and immovable property

As it is learnt that excise duty cannot be levied on immovable property, therefore it is of paramount importance to understand when an immoveable property is said to have arise. This is important in case of site related activities where various parts, components are removed from factory and they are fabricated, erected, installed at a customers site. Sometimes the final product is attached to earth and can be termed as immovable. Let us understand the tax treatment in case of site related activities.

1) No levy of duty if output is an immovable property

Generally, various parts, components are removed from the factory and are fabricated, erected etc at the project site. Therefore, if an immovable property comes into existence after such construction, erection, fabrication etc. then duty shall not be levied on such immovable structure. However, if the final product at the project site is a movable property then duty shall be chargeable.

2) How to identify that the goods are Immoveable property

Based on various courts judgments and departmental clarifications issued in this regard following broad principles can help in understanding and ascertaining whether after the performance of the various processes at site the property can be considered as immoveable property:

a) Attached by foundation to earth and cannot be easily dismantled without substantial damage

Where various items that are assembled or erected at site are attached by foundation to earth in such a manner that the same cannot be again easily dismantled without substantial damage to its components and cannot be again reassembled then that item would be considered as Immoveable and will therefore not be excisable. The intention of the party is also a factor that must be taken into consideration to ascertain whether the embedment of machinery in the earth was to be temporary or permanent or was it done only with an intention to avoid duty.

b) Compulsorily dismantling is required to transfer and not just for convenience of transport

If any goods installed at the site is capable of being sold or shifted to other location in its as is condition and without dismantling the same then it cannot be termed as Immoveable property. In other words, if the goods installed at the site has to be dismantled in order to sell it or to transfer it to other location then it qualifies to be an immovable goods. However, If goods could be sold or shifted to other location in its as is condition without dismantling but the same is dismantled only for the transport convenience or ease of shifting then it cannot be argued that the goods are Immoveable property.

Note: Excise duty shall however be levied on all the individual components, parts, items that were removed from the factory and taken to site for manufacturing of an immovable property at the site.

Examples:

a) **Turnkey projects** like steel plants, cement plants, power plants etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their assembly/installation/erection/etc at site will not be considered as excisable goods for imposition of central excise duty.

b) **Huge tanks made of metal for storage of petroleum products in oil refineries or installations** though not embedded in earth but are erected at site, stage by stage, and after completion they cannot be physically moved. On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are, therefore, not moveable and cannot be considered as excisable goods.

c) **Refrigeration/Air conditioning plants** are basically systems comprising compressors, ducting, pipings, insulators, and sometimes cooling towers etc. They are in the nature of systems and not machines as the whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods.

d) **Lifts & escalators** which are installed in buildings and permanently fitted into a civil structure cannot be considered to be excisable goods.

1.17.8 Dutiability of 'Waste' & 'Scrap'

1) 'Waste' & 'Scrap' are chargeable to duty if arising out of a manufacturing process and if they are moveable, marketable and excisable

'Waste & Scrap' are the byproducts or intermediate products that arose out of the final products in the manufacturing process. It shall be chargeable to duty if they are moveable, marketable and listed in tariff. Further as, excise duty is leviable on **manufacture** and therefore waste & scrap is chargeable to duty only if they arise out of the **manufacturing process**, In other words if waste & scrap is generated not due to manufacturing process then they shall not be chargeable to duty.

Conceptual Notes:

1) The long legal battle on the dutiability of waste and scrap was settled by the apex Court by its decision in **Khandelwal Metal & Engineering Works Vs. U.O.I** by holding that notwithstanding that process waste and scrap arose as intermediate products or by-products out of final products, nevertheless such process waste and scrap, if marketable, would be chargeable to duty. The Apex Court held that process waste and scrap was a commercially distinct and identifiable product and has commercial value. Hence, such waste and scrap were chargeable to duty, if covered in the Tariff.

1.17.9 Recent Amendments

1) Manufacture of aluminium roofing panels is exempt subject to certain conditions

CBEC vide recent notification no.17/2015, dated 08.06.2015 hereby exempts every manufacturing unit engaged in the ***manufacture of aluminium roofing panels*** falling under tariff item 7610 90 10, subject to the following conditions:

- Such roofing panels are consumed at the site of manufacture for execution of the project; and

- The manufacturer of such goods has a centralised billing or accounting system in respect of such goods manufactured by different manufacturing units and opts for registering only the premises or office from where such centralised billing or accounting is done.

[Exempted vide Notification no.17/2015]

2) Parts and components of wind operated electricity generators are also eligible for exemption

Doubt:

A large number of references have been received from the trade as well as the field formations to clarify whether exemption given to Wind Operated Electricity Generators under Notification No. 12/2012-Central Excise, dated 17.03.2012 also covers part/components of Wind Operated Electricity Generators (WOEG). References have been received in relation to tower, tower doors, blades and electrical boxes. The matter has been examined and the following clarification has been issued.

Clarification:

a) In the aforesaid notification serial no. 332 read with List 8 exempts Wind operated electricity generator, its component and parts thereof including rotor and wind turbine controller from Central Excise duty.

b) Further, In this regard, attention is invited to the judgement of Honble Supreme Court dated 13th August, 2015 in case of ***M/s Gemini Instratech Vs Commissioner of Central Excise, Nashik****, wherein Honble Apex Court (while deciding the eligibility of wind mill doors and electrical boxes of WOEG for exemption) has held as under:-*

"It is not in dispute that as far as windmill doors or tower doors are concerned, it is a safety device which is used as security for high voltage equipments fitted inside the tower, preventing unauthorized access and preventing entries of reptiles, insects, etc, inside the tower. ***This, according to us, would be sufficient to make it part of electricity generator****. We further find that this was so held by the Commissioner of Central Excise and Customs, Raipur in order–in–original dated 28.02.2005 as well as by the Commissioner (Appeals), Raipur vide his orders dated 10.02.2003. The said orders were accepted by the Revenue as it is recorded by the CESTAT that the Revenue could not produce any evidence to show that those orders were challenged by it.* ***Further, since the tower is held as part of the generator, door thereof has to be necessarily a part of the generator. We, therefore, are of opinion that there is no case of interference made out by the Department.*** *The appeal is accordingly dismissed" "*

c) Further, ***Ministry of New and Renewable Energy*** *had earlier clarified to CBEC on the subject that the following are parts of Wind Operated Electricity Generators.*

i. Tower: which supports the nacelle and rotor assembly of a wind operated electricity generator.
ii. Nacelle: which consists of gear-box, generator, yaw components, flexible couplings, brake hydraulics, brake calipers, sensors, nacelle plate, nacelle cover and other smaller components.
iii. Rotor: consists of blades, hub, nosecone, main shaft, special bearings.
iv. Wind turbine controller, nacelle controller and control cables.

d) In view of the judgement of Honble Supreme Court and clarification received from the administrative ministry, parts/components referred in Para 3 above may be treated as parts and components of wind operated electricity generators eligible for exemption under serial no. 332 of Notification No. 12/2012-Central Excise, dated 17.03.2012.

[Circular No.1008/15/2015-CX dated 20.10.2015]

3) Information Technology Software recorded on media (not covered under MRP) shall be exempt from Excise duty, if service tax is paid

Information Technology Software recorded on media, on which it is not required, under the provisions of the Legal Metrology Act, 2009 or the rules made thereunder or under any other law for the time being in force, to declare on the package of the said media thereof, the retail sale price, shall be exempt from the so much of the excise duty payable under section 4 of the Central Excise Act, as is equivalent to the duty payable on the portion of the value, which is leviable to service tax.
[Notification No.11/2016-CE dated 01.03.2016]

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Chapter 2 - Classification

2.1 Introduction

The classification of goods consists of determining the headings or sub-headings of the Central Excise Tariff under which the said goods would be covered.

Need for classification:

(i) The actual amount of excise duty payable on excisable goods is dependent upon the rate of duty. Since, different goods have different rates of duty, therefore it becomes imperative to classify the goods under the correct head to pay correct amount of duty.

(ii) The classification of goods is also required to be decided for the purposes of determining eligibility to exemptions, most of which are with reference to the Tariff headings or sub headings.

2.2 Harmonized System of Nomenclature (HSN)

1) It is an internationally accepted product coding system formulated under GATT

Central Excise Tariff Act, 1985 (CETA) is based on HSN. HSN is the internationally accepted product coding system formulated under the auspices of the General Agreement on Tariff & Trade (GATT). CETA, 1985 is modeled in accordance with international practices and therefore the classification of a product under this code would be same across the countries. It is done to facilitate common understanding of products across countries.

Conceptual Notes:

As international trade increased, need was felt to have universal standard system of classification of goods to facilitate trade flow and analysis of trade statistics. Hence, Harmonised Commodity Description and Coding system was developed by World Customs Organisation (WCO). This is an international nomenclature standard adopted by 137 countries to ensure uniformity in classification of goods in international trade.

2.2.1 Explanatory notes to HSN

1) These are official notes to clarify scope & extent of each and every heading of HSN

Explanatory notes to HSN are the official notes issued by Customs Co-operation Council, Brussels. They explain and clarify the scope and extent of each and every heading of HSN.

2) It is only for persuasive use and not legally binding

They do not have the legal backing, these notes are only of persuasive value and can be used as an aid to classification when there is an ambiguity as to the scope of the entry.

3) It must be used only in case of ambiguity about the scope of entry

When there is no ambiguity about the scope of the entry, the classification has to be done as per the tariff entry itself and not as per these explanatory notes. In other words, Explanatory notes to HSN must be used only when there is any ambiguity about the scope of entry.

2.3 Schedules to CETA

There are three schedules to Central Excise Tariff act, 1985 i.e. First Schedule, Second Schedule and Third Schedule as specified below:

First Schedule: It specifies the various goods/items on which Basic excise duty is leviable.

Second Schedule: It specifies the various goods/items on which Special excise duty is leviable. However, w.e.f 01/03/2006, all goods are exempted from Special excise duty.

Third Schedule: It specifies certain goods listed by the department in relation to which packing, repacking, labeling, re-labeling, MRP declaration/alteration amounts to deemed manufacture u/s 2(f)(iii) and duty is calculated based on 'Maximum Retail Price'.

Conceptual Notes:
First schedule is the normal schedule where details of the goods liable for basic excise duty are listed. Second schedule is redundant at the moment since, special excise duty is not levied on any goods since, 2006. Certain goods are listed in the third schedule.

Contents of First Schedule:
It consists of 98 Chapters & 20 Sections. This schedule provides the rate of Basic excise duty leviable on various products, it contains the following:
Sections: It has group of chapters representing the very broad classification of goods. Each section is divided into various chapters and sub-chapters. In total there are 20 sections in First schedule of CETA, 1985.

Chapters: Each chapter contains goods of a particular class. The chapters are arranged in such a manner that all goods of a similar kind beginning with the raw material and ending with the finished products come in a sequential order. It is also designed to group all goods relating to the same industry and all goods obtained from the same raw material under one chapter in progressive manner. (It is two digits number.). Currently, there are 98 chapters in First schedule of CETA, 1985.

Chapter Notes: These notes are mentioned at the beginning of each chapter and they have been given legal backing. Therefore, if there is any ambiguity in classifying the goods among various chapters, then chapter notes can be referred to get more clarity and appropriately classifying the goods under the correct chapter.

Headings: Each chapter and sub-chapter is further divided into various heading in such manner that different types of goods belonging to the same class of product are covered under one heading. (It is a four digits number wherein first two digits pertains to the chapter it is classified under).

Sub-Headings: Each heading is further classified into various sub-heading. (It has six digits number wherein first four digits pertains to the heading it is classified under).

Tariff items: It is the specific item under which the goods are classified. Therefore, excisable goods are classified and excise duty is levied by using eight digit classification system which is called as 'Tariff item'. Different rates of excise duty can be provided for different tariff item.

The 'Tariff item' under eight digit system would be interpreted as follows:
First two digits: refers to chapter number of the tariff
Next two digits: refers to heading of the goods in that chapter
Next two digits: refers to sub-heading of the goods in that chapter
Last two digits: refers to sub - sub - heading of the goods in that chapter.

Examples:
1) Digital Cameras are classified under Tariff item 8525 80 10, the break up of the same is as illustrated below:

Section XVI	Machinery and Mechanical Appliances, Electrical Equipments; Parts Thereof; Sound recorders and reproducers, Television Image and sound recorders and reproducers, and Parts and accessories of such articles.
Chapter 85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
Heading 8525	Transmission apparatus for Radio Broadcasting or Television, whether or not incorporation reception apparatus or sound recording or reproducing apparatus; television camera, Digital camera and video camera recorders.
Sub-heading 8525 80	Television cameras, Digital cameras and video camera recorders
Tariff item 8525 80 20	Digital Camera

Note: visit the below link to get a practical understanding of how First schedule to Central Excise Tariff act is conceptually designed covering all the goods in a very logical and sequential manner. Initial chapters cover basic goods and gradually high end goods such as machineries, electronics etc. are covered in the later chapters. **http://www.cbec.gov.in/htdocs-cbec/excise/cxt2015-16/cxt-1516-idx**

2.4 Rules of interpretation & General explanatory notes

In order to ensure that the goods are correctly classified under the right heading of the first schedule to CETA, department has laid down Six Rules of interpretation and Two General explanatory notes. These rules and notes lay down certain principles to ease the classification.

2.4.1 General rule for classification - [Rule 1]

Rule 1 is the general rule and is laid down in order to provide ease of classification, Rule 1 is as under:

1) 'Titles' does not have legal force - to be used only for better interpretation

The Titles of sections, chapters and sub-chapters does not have any legal force and can only have persuasive use for better interpretation.

2) 'Headings' have legal force only when read with section & chapter notes

Terms of headings when read with relative section & chapter notes have a legal force and is relevant for the purpose of classification.

3) 'Rules' not to be used when classification is otherwise possible

One must not resort to rules of interpretation when classification is possible on the basis of description in heading, sub-heading, chapter notes and section notes.

4) Notes of one chapter or section cannot be used for other chapter or section

Notes of one chapter or section cannot be applied for interpreting the entries in other chapters or sections.

2.4.2 Classification of incomplete/unfinished articles - [Rule 2(a)]

What if some goods are in incomplete of unfinished form, then whether it will be classified as work-in-progress or will it be classified as a finished goods for the purpose of classification. This ambiguity is resolved in this rule.

1) Finished/complete article also include same article in unfinished/incomplete form

If any particular heading refers to finished/complete article, then the unfinished/ incomplete form of that article must also be classified under the same heading provided the unfinished/incomplete goods has the essential character of the finished goods.

2) Finished/complete article also include same article in unassembled/dis-assembled form

If any particular heading refers to finished/complete article, then the unassembled/dis-assembled form of that article must also be classified under the same heading provided the unassembled/dis-assembled goods has the essential character of the finished goods.

Examples:

(i) Railway coaches removed without seats would still be classified as railway coaches.

(ii) A car without seats would still be classified as car.

3) Only minor adjustments pending, can be construed as having essential character

It was held that goods requiring only minor adjustments would be construed as having essential character. In other words, those requiring major processes like turning, grinding, broaching, cutting etc cannot be construed as minor adjustments thereby not having the essential character of the finished product.

2.4.3 Classification of mixtures/combinations of a material/substance with other material/substances - [Rule 2(b)]

If particular article consists of some other material or substance, then under which heading such article must be classified. This complexity is resolved in this rule.

1) Material/substance includes mixtures or combinations of that material/substance

Any reference to a material or substance would also refer to a mixtures or combinations of that material or substance. In other words, classification under any material or substance also includes mixture or combination of that material or substance.

2) Partial content of some other material does not affect classification

Any reference to a goods of a given material or substance would also refer to any other goods consisting wholly or partly of such other material or substance. In other words, classification under material/substance also includes other goods consisting wholly or partly of such material/substance.

Examples:

(i) The term coffee will also include coffee mixed with chicory.

(ii) Natural rubber will also cover a mixture of a natural and a synthetic rubber.

2.4.4 Classification if goods are classifiable under two or more headings - [Rule 3]

If after applying rule 2(b), classification is possible under two or more headings then rule 3 must be applied in the following sequential order:

1) Specific heading prevails over general heading - Rule 3(a)

The heading that provides a more specific description should be preferred over the heading that provides a general description.

Relevant Judgment:

Electric shaving machine was classifiable under following two headings:-

Heading No. 8510: Shavers and hair clippers with self contained electric motors; and

Heading No. 8509: Electro-mechanical domestic appliances with self-contained electric motor.

It was held that the said product was classifiable under heading No. 8510 as heading No. 8510 is more specific as compared to heading No. 8509. ***[Nagaraju Bros v. State of Andhra Pradesh 1994 (S.C.)]***

2) Essential character principle - Rule 3(b)

If sub-rule 3(a) cannot solve the ambiguity then sub-rule 3(b) shall be applied. This sub-rule provides that composite goods should be classified under that material or substance that gives it its **essential character**.

Example:
A pencil with an eraser at the back shall be classified as pencil, as the essential character in it is a pencil whereby the attachment of eraser is only for the convenience of the user.

3) Later the better maxim - Rule 3(c)
If both sub-rule 3(a) & sub-rule 3(b) cannot solve the ambiguity then sub-rule 3(c) shall be applied. This sub-rule provides that composite goods shall be classified on the basis of the heading that occurs last in numerical order.

2.4.5 Akin Rule - [Rule 4]

1) Classification under goods most 'akin'
This rule provides that if goods cannot be classified according to the above principles then it shall be classified under the heading appropriate to the goods to which they are **most akin**.
Example:
Product: Plastic films used to filter or remove the glare of the sun light, pasted on car glass windows, window panes etc.
Classification: These goods do not find a specific entry in the tariff schedule. However, heading 3925 30 00 covers Builder's wares of plastic not elsewhere specified - shutters, blinds (including Venetian blinds). Even though the product in question is not a builder's ware, they are most akin to plastic blinds and hence it can be classified under 3925 30 00 heading.

2.4.6 Classification of cases/containers used for packing of goods - [Rule 5]

1) Cases/container to be classified as the article inside such cases/container
Cases/containers which are specially designed or fitted to contain a specific article in it for a long term and presented or given with such article then such cases shall be classified under the classification that is attracted to the article inside the case/container. However, this provision does not apply when such packing material or packing containers are clearly suitable for repetitive use.
Examples:
(i) Camera case should be classified as camera.
(ii) Musical instrument case should be classified as musical instrument.
(iii) Gas cylinders are meant for repetitive use and therefore cannot be classifiable along with gas.

2.4.7 Only sub-headings at the same level are comparable - [Rule 6]

1) Two sub-headings of same heading only comparable
For legal purposes, the classification of the goods in the sub-heading shall not be determined based on the comparison of that sub-heading with another sub-heading of the different heading. In other words, for the purpose of classification comparison of a sub-heading with another sub-heading of two different heading shall not be done. Apart from the above rules, two explanatory notes are prescribed as explained below.

2.4.8 Relevance of one dash ["-"], two dash ["--"], and three dash ["---"] - [Explanatory note 1]

Where description of an article or group of articles is preceded by:-	The said article or group of articles shall be taken to be a sub-classification of:-
One dash ["-"]	The article or group of articles covered by the said heading.
Two dash ["- -"]	The article or group of articles which has one dash ["-"].

Three dash ["- - -"]	The article or group of articles which has one dash ["-"] or two dash ["- -"].

2.4.9 Meaning of abbreviation "%" in relation to rate of duty - [Explanatory note 2]

The abbreviation "%" in the column 4 of the first schedule indicates that the duty on the goods shall be charged on the value of the goods on the basis of the percentage specified.

2.5 'Trade parlance test'

1) Popular/commercial meaning must be used if product not defined in CETA

According to trade parlance test, if a product is not defined in the schedules and section notes and chapter notes of the tariff, then, it should be classified according to its **popular meaning** or **meaning attached to it by those dealing with it** i.e. in its commercial sense. However, if the tariff headings itself uses highly scientific or technical terms then goods should be classified in scientific or technical sense.

Conceptual Notes:

1) While interpretative rules and explanatory notes are mandatory, whereas trade parlance test is recommendatory.

2) Burden to prove classification is on department and once it is discharged the onus falls on assessee.

2.6 Power of Central Government to amend the first and second schedule to CETA, 1985 - [Sec 5 of CETA, 1985]

1) Amendments to CETA can be made based on public interest but rates cannot be changed

Section 5 of CETA, 1985 empowers CG to amend the First schedule and Second schedule of the tariff entry based on the public interest by a notification in the official gazette. But, CG by taking the recourse of this section cannot alter or affect in any manner the rates specified in the first schedule and second schedule. To alter/affect rates specified in the schedule, CG has to take the recourse of section 3 of Central Excise Tariff Act, 1985.

2.7 Recent Departmental Clarification on taxability of re-refined waste oil

ISSUE: *References have been received regarding excisability of re-refined used oil or waste oil. Various units are engaged in re-refining of waste oil or used lubricating oil collected from the transformers, service stations of vehicles etc. The matter has been examined as under:*

Process: *Used Oil contains impurities and contaminants such as moisture, diluents, sediments, metal particles and carbon. In refining units, waste or used oil undergoes various process such as dehydration-for removal of moisture, distillation-for removal of diluents, clay polishing- for removal of carbon by adsorption process, filtration-for removal of the clay and the dissolved carbon to render it usable. The oil so obtained from such waste or used oil is packed and sold as base oil, lubricating oil and transformer oil etc. to the consumers for further use.*

Classification: *"Waste oil" has been defined in note 3 of chapter 27 of First Schedule of Central Excise tariff Act, 1985. Under Central Excise tariff heading 2710, there are three headings or sub-classifications at the single dash (-) level.*

- *The first of the three heading at single dash (-) level deals with petroleum oils and oils obtained from bituminous minerals……….etc. other than those containing bio-diesel and other than waste oil.*
- *Second heading at this level deals with those containing biodiesel other than waste oil and*

- *the third heading is meant for waste oil.*
- *Waste oil is further divided into two sub-classifications at eight digit level, with two dash (--), namely 27109100 and 27109900.*

Waste oil is classifiable in either of them depending upon its composition. Lubricating oil on the other hand is classifiable under CETH 27101980, a heading specifically covering lubricating oil.

It may be noted that used lubricating oil collected from service stations is not fit for use as primary products and will therefore be classified as waste oil whereas processed waste oil, which becomes fit for use as lubricating oil and would qualify as primary product, will be classified as lubricating oil.

Manufacture: *Waste oil after processing may become lubricating oil but this process would not amount to manufacture in view of the judgement of tribunal in case of Collector vs Mineral Oil Corporation [1999(114) ELT 166] upheld by Hon'ble Supreme Court [2002(140) ELT 248(SC)]. However, the issue also needs to be examined in light of chapter note 4 of chapter 27 which was inserted in the Central Excise Tariff by the Finance Act of 2000.*

Chapter note 4 of chapter 27 is a deeming fiction on manufacture and provides that:-
"In relation to the lubricating oils and lubricating preparations of heading 2710, labelling or re-labelling of containers and re-packing from bulk pack to retail packs or the adoption of any other treatment to render the product marketable to the consumers, shall amount to manufacture"

This chapter note applies only to "lubricating oils and lubricating preparations of heading 2710". Other goods falling under CETH 2710 are not covered by the chapter note. The deeming fiction provides that when one of the process listed in the chapter note is carried out on lubricating oil or lubricating preparations, it shall be deemed to be manufacture. These processes are-

i. *labelling or re-labelling of containers,*
ii. *re-packing from bulk pack to retail packs,*
iii. *adoption of any other treatment to render the product marketable to the consumers.*

Thus for a re-refining unit, the test for levy of Central Excise duty is whether the lubricating oil (produced from the waste oil) has undergone any of the process listed in chapter note 4 of chapter 27 as explained above (paragraph 5.2). Where such process has been carried out, it would amount to manufacture and Central Excise duty would be leviable.

Application: *A unit processing waste oil or used oil would need be examined in above light to decide whether the process undertaken by them amounts to manufacture. Where the process amounts to manufacture, Central Excise duty is payable. The issue is interpretational in nature and therefore where a demand is raised pursuant to this circular, it should be raised for normal period of limitations only. SSI benefit, where admissible, should be extended.*
[Circular No. 1024/12/2016–CX dated 11.04.2016]

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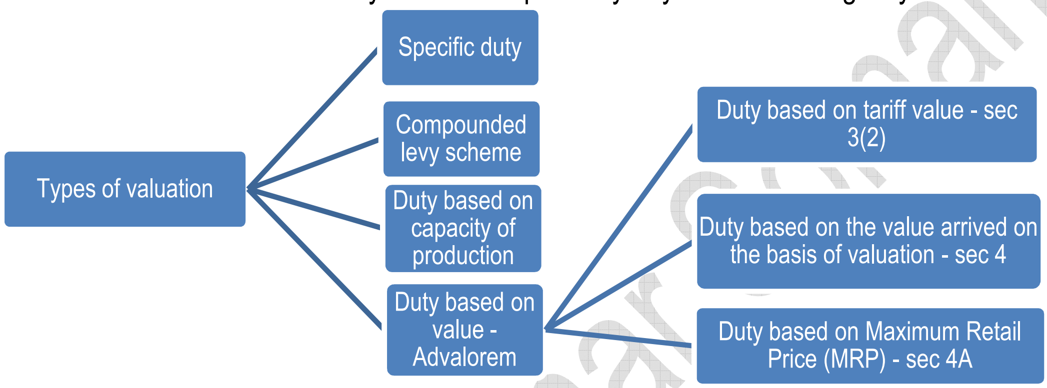
Chapter 3 - Valuation

3.1 Introduction

Valuation is important to understand as duty under central excise is payable based on different criterion. As a first step, an assessee has to establish whether the goods manufactured by him are excisable. After the excitability is decided, the goods have to be correctly classified. The next step is to value the goods so as to compute the duty payable on the excisable goods. Various methods of valuation prescribed under the act are as follows:

3.2 Basis of computing duty

Value can be ascertained and duty can be computed by any of the following ways of valuation:



3.3 Specific Duty

1) Duty payable on length, weight, volume etc.

In some case of goods, duty is payable on the basis of certain unit like length, weight, volume, etc. However, this type of duty needs frequent revision as the duty to be collected does not keep pace with increase in price of goods i.e. inflation. Therefore, more & more tariff entries are designed based on ad valorem duty structure and not on specific duty basis.

Example:

Duty on cigarettes is payable on the basis of length of a cigarette.

3.4 Compounded levy scheme - [Rule 15 of Central Excise rules, 2002]

Generally, duty must be payable on the value at which manufactured goods are removed. However, in case of certain goods central government may require payment of duty on some other factor. For various reasons including safeguarding the interest of revenue or in public interest. This rule empowers Central Government to specify certain goods on which duty payable has to be computed in some other manner.

1) Duty payable on specified factor(s) relevant to the production

Central government may by notification in an official gazette specify in case of some goods where assessee have the option to pay the duty of excise on the basis of specified factors relevant to the production at specified rates. The prescribed duty has to be paid by the manufacturer for the specified period.

Example:

Duty may be payable based on the size of equipment employed, number & types of machines used for manufacture etc.

Amendment Note:

The Finance Act, 2015 has inserted explanation 3 in section 3A to provide that "factor" relevant to production, as mentioned in sub-sections (2) and (3) includes ***"factors"*** relevant to production. This amendment has been made to enable the Central Government to specify more than one factor relevant to the production of goods notified under section 3A.

2) CG to specify procedures in this regard

Central Government is empowered in this regard to specify the procedures for making an application, payment of duty, abatement etc.

3) It eases day-to-day excise formalities

It frees the manufacturer from day-to-day central excise formalities and maintenance of detailed accounts.

Example:

Central Government has notified stainless steel pattas/patties and aluminium circles for the purpose of compounded levy scheme.

3.5 Duty based on capacity of production in respect of notified goods - [Sec 3A]

In respect of certain goods, Central Government may require duty to be paid based on capacity of production. This section empowers Central Government to demand payment of duty on the basis of capacity of production in order to safeguard the interest of revenue.

1) Duty payable on the basis of 'Capacity of Production'

Central government may in order to safeguard the interest of revenue, notify certain goods on which duty shall be payable on the basis of 'capacity of production'. Central Government passes such a notification due to following reasons:

(a) Having regard to the nature of process of manufacture or production of certain excisable goods; or

(b) Extent of evasion of duty; or

(c) Such other factor as may be relevant.

Example:

Following mentioned goods manufactured with the aid of packing machine and packed in pouches have been notified for the purpose of section 3A for payment of duty based on capacity of production:

- ✓ Pan masala containing tobacco commonly known as gutkha,
- ✓ Unmanufactured tobacco bearing a brand name,
- ✓ Chewing tobacco,
- ✓ Jarda scented tobacco.

2) CG to make rules for computing annual capacity & annual production

Where the goods are so notified, CG may, by rules:

- ➢ Provide the manner for determination of annual capacity of production of the factory and then such annual capacity shall be deemed to be the annual production of such goods by such factory; or
- ➢ Specify the factor on the basis of which the annual production shall be calculated;
- ➢ Aforesaid computations must be done by an officer not below the rank of Assistant Commissioner.

3) Proportionate calculation if factory operated only for part of the year

If the factory is in operation only during a part of the year, then annual production thereof shall be calculated proportionately for the part of the year it was in operation.

4) Duty to be exempted if goods not produced for any continuous period of 15 days or more

If the factory does not produce the notified goods during any continuous period of 15 days or more then duty calculated in respect of such period shall be abated/exempted, if the manufacturer fulfills such conditions as may be prescribed.

5) Annual production to be re-determined if the 'factor relevant to the production' is altered

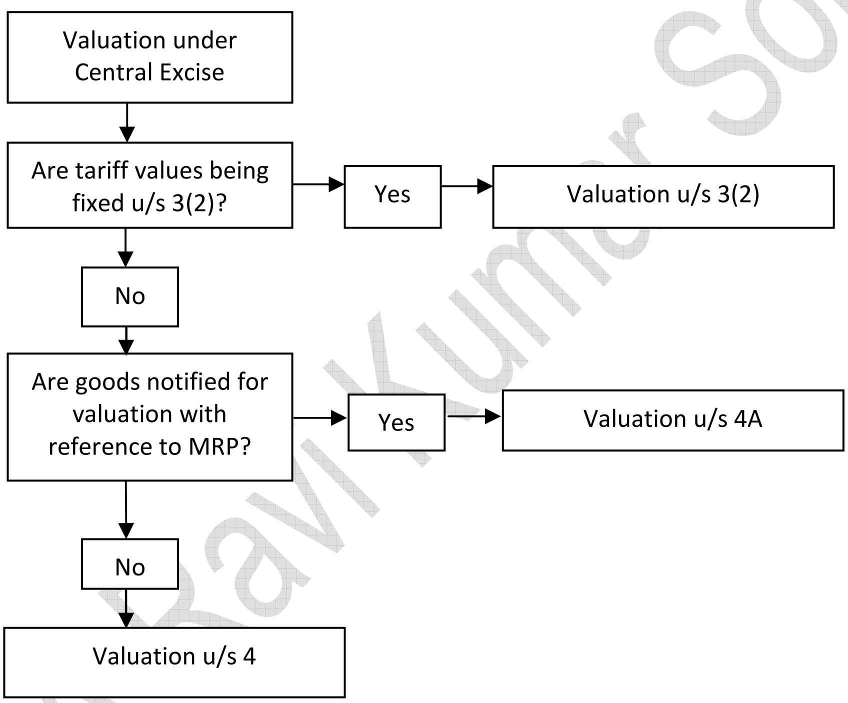
If the factor relevant to the production is altered/modified at anytime during the year, then annual production thereof shall be re-determined having regard to such alteration/modification.

6) Non-applicability in case goods produced/manufactured by a 100% EOU and brought to any other place in India

The provisions of this section shall not apply in case of goods produced or manufactured, by a 100% EOU and brought to any other place in India.

3.6 Duty Payable Ad valorem

Chart showing the scheme of Ad valorem valuation under Central Excise



3.6.1 Duty based on Tariff value - [Sec 3(2)]

In respect of certain goods, Central government itself fixes the value of goods at which duty shall be paid. Such value is called as tariff value. Once the tariff value is fixed for certain goods by central government then manufacturer needs to pay duty at such value only. It need not pay duty on transaction value.

1) Tariff value to be fixed by CG

The CG in case of certain goods fix the value of goods on duty shall be charged. In such a case valuation becomes easy since the value is already fixed by the CG. CG also have the power to alter the values once fixed.

2) Different tariff values may be fixed for different class or description of same excisable goods or for different producers/manufacturers/buyers

CG may fix different tariff values for different classes or description of same excisable goods. It may also fix different tariff values for same class or description of the goods but produced or manufactured by different class of producers or manufacturers or sold to different classes of buyers.

Example:

Central Government has fixed tariff value for jewellery (other than sliver jewellery) under heading 7113 and branded readymade garments under Chapter 61 and 62.

3.6.2 Duty on the basis of value arrived on valuation - [Sec 4]

[Refer below for explanation of section 4 in detail].

3.6.3 Duty on the basis of Maximum Retail Price (MRP) - [Sec 4A]

1) Goods specified in third schedule to CETA to be valued at MRP

In case where the retail price and the wholesale price of goods are at wide variance and the government wants to raise revenues knowing that the manufacturer has shifted much of the overheads away from the manufacturing location. Then CG may notify certain goods in Third Schedule to CETA, 1985 on which duty shall be payable on the retail price of such goods i.e. MRP. *[Details given in the later part of this chapter]*

3.6.4 Valuation - [Sec 4]

With the intention of making the valuation mechanism simple, from 1st July 2000 valuation mechanism based on "normal price" was replaced by a user friendly and commercially acceptable new mechanism based on "transaction value". This section explains what is transaction value? when transaction value needs to be adopted for valuation? If conditions to transaction value is not satisfied then how to value the goods?

1) Value shall be the 'Transaction value' if certain conditions are satisfied

Price for the purpose of computation shall be the 'Transaction value' if the following conditions are satisfied:

(a) The excisable goods must be sold by the assessee;
(b) The excisable goods must be sold by the assessee for delivery at the **time and place of removal**;
(c) The assessee and the buyer of goods must **not be related**;
(d) Price must be the **sole consideration for sale**.

2) Value to be computed as per rules, if above conditions doesn't satisfy

If any of the four conditions as laid down aforesaid is not satisfied then value shall be determined in accordance with the Central Excise (Determination of price of excisable goods) valuation rules, 2000.

3) Value = [(Actual sale price) + (Money value of additional consideration) - (Taxes)] - [Explanation to Sec 4]

Value must be price actually paid to the assessee for the goods sold and money value of any additional consideration, flowing directly or indirectly to the assessee from the buyer but excluding sales tax and other taxes.

3.7 Important Definitions

Before we learn valuation rules, let us understand the meaning of certain important terms as arising out of section 4 pertaining to valuation.

"Assessee"	"Assessee" means the person who is liable to pay the duty of excise under this act and includes his agent. ***[Sec 4(3)(a)]***

"Related Person"	The assessee and the buyer shall be deemed to be related if (i) They are inter-connected undertakings; or (ii) They are relatives as per sec 2 of Companies act, 1956; or (iii) Amongst them the buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor; or (iv) They are so associated that they have interest, directly or indirectly, in the business of each other *(mutuality of business interest - Concept discussed below)*. ***[Sec 4(3)(b)]***
Distributor means distributor who is also a relative	The apex court held that the term 'relative and a distributor of an assessee' does not refer to any distributor but its limited only to a distributor who is also a relative of the assessee, within the meaning of the companies act, 1956. ***[UOI v/s Bombay Tyre International Ltd. (1983)]***
	Price charged by the manufacturer to the distributor can be taken as 'transaction value' if the dealings between them are on principal-to-principal basis. ***[UOI v/s Mahindra & Mahindra Ltd. (1989)]***
"Place of Removal"	"Place of Removal" means (i) A Factory or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; or (ii) A Warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed; or (iii) A Depot, premises of a consignment or any other place or premises from where the excisable goods are sold after their clearance from the factory. ***[Sec 4(3)(c)]***
"Time of Removal"	"Time of Removal" means In respect of excisable goods removed from the place of removal referred to in sub-clause (iii) of Sec 4(3)(c), then time of removal shall be deemed to be the time at which such goods are cleared from the factory. ***[Sec 4(3)(cc)]***
"Transaction value"	"Transaction value" means 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, on in connection with the sale, whether payable at the time of sale or any other time, including, any amount charged for, or to make provision for, advertising or publicity, marketing & selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. ***[Sec 4(3)(d)]***

3.8 Concept of 'Mutuality of business interest'

In the definition of related person as provided u/s 4(3)(b) aforesaid, it is specified that two persons can also be said to be relatives if they have a mutuality of business interest whether directly or indirectly in the business of each other. This term had led to a lot of dispute as there is no further explanation provided in the law clarifying when and how the interest is said to be there in the business of others. This concept is still a disputable one but certain landmark judicial precedents are available in this regard which try to understand and interpret the same better. The same are provided below:

Both the parties must have interest in the business of each other whether direct or indirect, the quality and degree of interest does not matter	The apex court held that in order to attract the **definition of sec 4(3)(b),** for levy of excise duty, the assessee and the person alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different, the interest of the one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect but that does not matter so long each has got some interest, direct or indirect, in the business of each other. ***[UOI v/s Atic Industries Ltd. (1984)]***
Entire sale to a single agent does not by itself prove mutuality of business interest	The apex court held that Sales of entire quantity of excisable products through a single agency, which also took advertising of such products would not, per se make the manufacturer and the agency as the related persons since the mutuality of business interest was not proved. ***[Pepsi foods (p) Ltd v/s CCE (1993)]***
Common sharing of assets does not by itself prove mutuality of business interest	The mere fact of there being a common registered office and common usage of telephone and godown was not sufficient to prove the common ownership between two units so as to make them related persons. ***[Cheryl Laboratories v/s CCE (1994)]***
Mere holding of shares does not prove mutuality of business interest	Mere holding of shares of the subsidiary company could not ipso facto mean that there was mutuality, unless reciprocity of interest was also involved i.e. subsidiary also having interest in the holding company. ***[Godrej Industries Ltd v/s CCE (2004)]***

3.9 Inclusions & Exclusions from Transaction value

Mentioned below are certain inclusions and exclusions in the transaction value based on definition u/s 4(3)(d), various court judgment, departmental circulars and notifications.

Item or Cost	Whether includible
Advertising & Publicity charges	**Yes,** as per the definition of the Transaction value u/s 4(3)(d).
Warranty	**Yes,** as per the definition of the Transaction value u/s 4(3)(d). However, it should be included only if the same is paid by the buyer to the seller.
Marketing & Selling	**Yes,** as per the definition of the Transaction value u/s 4(3)(d).
Storage charges	**Yes,** as per the definition of the Transaction value u/s 4(3)(d).
Outward handling charges	**Yes,** as per the definition of the Transaction value u/s 4(3)(d). However, it is important to note that handling charges incurred only upto the 'place of removal' must be included (i.e. upto factory gate, depot, warehouse). Outward handling charges incurred after 'place of removal' must not be included.
Servicing	**Yes,** as per the definition of the Transaction value u/s 4(3)(d).
Commission	**Yes,** as per the definition of the Transaction value u/s 4(3)(d).
Excise Duty	**No,** as per the definition of the Transaction value u/s 4(3)(d).
Sales Tax & Other Taxes	**No,** as per the definition of the Transaction value u/s 4(3)(d).

Trade Discount or Cash Discount	**No,** *CBEC Circular No. 354/81/2000, dated 30-6-2000* clarifies that discount must not be included i.e. it must be reduced from the price as the duty must be calculated on Net price after allowing discount.
Erection, Installation and Commissioning	**No,** The erection, installation and commissioning charges should not be included in the assessable value, if the final product is not moveable. In other words, it must be included only if the final product is moveable.
Primary & Secondary packing	**Yes,** As both primary & secondary packing are required by reason of or in connection with sale.
Durable or returnable packing	**No,** As they are returned back or reused and are amortized in the cost of the product.
Bought out items/Accessories	**No,** As bought out items/accessories cannot be considered as 'part' of the excisable goods. Further, it is a trading activity and not a manufacturing activity. However, if bought out items/accessories are such that excisable goods cannot function without the same then it shall be includable.
Dharmada Charges	**Yes,** Based on (*CBEC Circular No. 736/79/2003, dated 21-11-2003)*
Design, development & engineering charges	**Yes,** Since it is by reason of or in connection with sale.
Transit Insurance	**No,** As it is part of transportation cost, exclusion is possible only if it is shown separately in the invoice or atleast shown in the transportation cost separately in the invoice. In other words, if it is not shown separately in the invoice and added to the cost of the product then it is includible.
Delayed payment charges	**No,** As transaction value relates to the price paid or payable for the goods and delayed payment charge is nothing but the interest on the price of the goods. However, it must be separately shown in the invoice and should be charged over and above the sale price of the goods.
Interest on delayed payment of receivables	**No,** Interest is nothing but the finance charges and cannot be considered as payment by reason of or in connection with sale.
Interest on notional deposits/advances	**No,** It is should ideally not be included. However, if it can be proved that there exists a nexus between the advance deposits and sale price then it must be included. In other words, it must be included if assessee charges lower prices from those who giving the advances/deposits and higher prices from those who are not giving the advances/deposits.
Value of trademark	**Yes,** It must be included only if the manufacturer himself is the owner of the brand name. However, it should be excluded if the goods are manufactured by someone else and then sold to a dealer who owns a brand name.
Outward freight/transportation cost	**No.** Cost after the **'**place of removal' is excluded.
Pre-delivery inspection charges	**Yes,** Based on (*CBEC Circular No. 936/26/2010, dated 27-10-2010)*
After sale - service charges	**Yes,** Since it is by reason of or in connection with sale.
Consultancy charges	**Yes,** If it is in relation to pre-installation planning, layout design.
Testing charges	**Yes,** If recovered from the buyer in terms of the contract.
Inspection charges	**Yes,** Since it is by reason of or in connection with sale.

Royalty charges	**Yes,** Since it is by reason of or in connection with sale.
Preventive maintenance	**No**
Repairs & maintenance	**No**

3.10 Central Excise (Determination of price of excisable goods) valuation rules, 2000

As explained above if the valuation has to be done on the basis of transaction value under section 4 then the following four conditions has to be fulfilled.

(a) There should be sale of goods;
(b) The goods sold should be for delivery **at the time and place of removal;**
(c) The assessee and the buyer of the goods are not to be **related persons;**
(d) The price should be the **sole consideration for the sale.**

In those cases where any of the above said requirements are not fulfilled, then the assessable value shall be determined on the basis of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000.

3.10.1 Value when Price is not known at the time & place of removal - [Rule 4]

In certain cases price of goods may not be known at the time when goods are removed from a factory or warehouse or a depot. In such a case excise duty shall be paid at what value? This rule clarifies on how to arrive at the value in such a situation.

1) Value to be equal to price at which same class of goods are sold by same manufacturer at the nearest time

When the price of the goods is not known at the time & place of removal of the goods then value in such a case shall be the value of same class of goods sold by the same manufacturer for delivery at any other time nearest to the time of removal of the goods in question.

2) Value to be adjusted based on difference in the date of removal of goods

However, adjustment in value on account of difference in the date of removal of such goods and the excisable goods shall be done as found appropriate by the proper officer.

Example:

'Samples' distributed free or gifts given as a part of marketing strategy or free replacements under warranty are generally valued in accordance with rule - 4 i.e. value will be based on price of identical goods sold by the assessee near about the time of removal of such free samples or replacements as the price will be unknown at the time and place of removal of such goods.

3.10.2 Value when goods are removed from other than 'Place of removal' - [Rule 5]

As we know that the place of removal is nothing but a factory or a depot or a godown etc. This rule seeks to clarify that in case goods are removed from a place other than the place of removal, then whether transportation cost incurred from the 'place of removal' to the place from where the goods are to be actually removed are to be included in the transaction value or not.

1) Cost of transportation incurred only upto 'place of removal' to be included in transaction value

When goods are sold for delivery from a place other than the 'Place of removal' then The 'cost of transportation' incurred only upto the 'Place of removal' must be included in determining the 'transaction value'. i.e. The 'cost of transportation' incurred after the 'Place of removal' and upto the 'Place of delivery' shall be not be included in the 'transaction value'.

Definition:

"Place of Removal" means
(i) **A Factory** or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; or
(ii) **A Warehouse** or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed; or
(iii) **A Depot, premises of a consignment** or any other place or premises from where the excisable goods are sold after their clearance from the factory.

2) 'Cost of Transportation' to be either actual cost (or) averaged freight computed as per principles of costing

'Cost of transportation' includes:
(a) The actual cost of transportation; or
(b) In case where freight is averaged, the cost of transportation calculated in accordance with the generally accepted principles of costing.

Note:

If the transportation vehicle is owned by the manufacturer then cost of transportation must be calculated as per option (b) above i.e. on the basis of averaged freight and assessee in such a case it is required to ascertain the total cost of transportation incurred based on principles of costing and average out the same for each removal. Assessee may be asked to furnish the certificate of the Cost Accountant in this regard.

3) 'Cost of transportation' from the factory gate to any other 'Place of removal' to be included in transaction value

If factory is the place of removal, then the transportation cost incurred upto the factory gate must be included in the transaction value. However, if the place of removal is other than the factory (i.e. a depot or a warehouse or premises of a consignment agent etc.) then the cost of transportation incurred from one place of removal to other place of removal (i.e. from factory gate to warehouse etc) must be included in the 'transaction value'.

4) Cost of return fare not to be included in the transaction value

Cost of 'return fare' must not be included in the transaction value.

3.10.3 Value when Price is not the sole consideration for sale - [Rule 6]

In case where price paid is not the sole consideration for sale but the assessee gets something else whether in monetary or non-monetary form for sale of such goods either from the buyer of goods or from any other person. This rule clarifies on how to arrive at assessable value in such a case.

1) Transaction value to include money value of any additional consideration flowing directly or indirectly from the buyer to the seller

When the goods are sold, but price paid by the buyer is not the sole consideration, then the 'transaction value' in such a case shall be the aggregate of such price paid and the money value of any additional consideration flowing directly or indirectly from the buyer or any third party to the assessee in relation to sale of such goods.

2) Value to be transaction value where price is not the sole consideration and no additional consideration is flowing directly or indirectly from the buyer

Where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.

3) Value of raw material or other components supplied by the buyer free of cost to be included in transaction value

If buyer supplies certain raw material or other components free of cost to the seller in order to facilitate the manufacturing of the goods, then the cost of such material, components supplied by the buyer to the seller shall be treated as the money value of the additional consideration received from the buyer to the seller and the cost of such components etc, must be added in the cost of the goods sold while determining the transaction value of the excisable goods.

4) Notional interest on advance received must not be added to the cost of goods unless proved

Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.

Examples:

1) X, an assessee, sells his goods to Y against full advance payment at Rs.100/- per piece. However, X also sells such goods to Z without any advance payment at the same price of Rs.100/- per piece. No notional interest on the advance received by X is includible in the transaction value.

2) A, an assessee, manufactures and supplies certain goods as design and specification furnished by B at a price of Rs.10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on the advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value.

3) A sells goods to B who supplies some raw materials free of cost to facilitate the manufacture process. The additional consideration represented as free raw materials has to be added in terms of Rule 6.

4) If X, a manufacturer, receives a subsidy from the buyer even if it is under the policy of Government it will be treated as additional consideration. However, if X himself manufactures patterns and clears them with castings and duty is discharged on transaction value rule 6 is not applicable.

5) X, a manufacturer, bills Rs.5 lakhs towards design charges and shows the same separately in the invoice along with the price of the material A. In the given case, the value of the design charges will be included in the assessable value of material A only if such design charges are related to the material A and not merely because it is shown in the invoice along with material A.

3.10.4 Value when excisable goods are sold from depot, premises of a consignment agent or from any other place - [Rule 7]

In cases where the goods are not sold at the factory gate or at the warehouse but they are transferred by the assessee to his depots or consignment agents or any other place for sale, then this rule clarifies on how to arrive at assessable value in such case.

1) Price charged to independent buyer at such other place on the date of removal from factory shall be the assessable value

When the excisable goods are not sold by the assessee at the time and place of removal but are instead transferred to a depot or premises of a consignment agent or to any other place (hereinafter referred to as 'such other place') from were they are to be sold, then the transaction value shall be the

'Normal transaction value' at which the goods are sold to independent buyers from 'such other place' at or about the same time when the goods are removed from the place of removal.

2) Normal transaction value of the nearest time must be considered, if no goods are sold at such other place at or about the same time of removal

If no goods are sold from 'such other place' at or about the same time of removal of goods from the factory, then the 'transaction value' in such a case shall be the 'Normal transaction value' of such goods sold to independent buyers at 'such other place' at or about the time nearest to the time of removal of goods under assessment.

Notes:

1) "Normal transaction value" means the transaction value of the goods sold in the 'greatest aggregate quantity'.

2) Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day', In other words, Time period of a Whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.

Example:

Goods are transferred from Chennai factory to Bangalore branch on 17.3.2015. The normal transaction value at which goods are sold to independent buyer from Bangalore branch on 17.3.2015 shall be taken as transaction value. However, if there is no such sale made on 17.3.2015 at the Bangalore branch, then the transaction value at the nearest time, for instance, value at which goods are sold on 16.3.2015 at the Bangalore branch can be taken as transaction value.

3.10.5 Value when excisable goods are captively consumed - [Rule 8]

1) Value to be 110% of Cost of production or manufacture of goods

When the excisable goods are not sold by the assessee but are used for self-consumption by himself or on his behalf in the production or manufacture of other articles, then the transaction value' in such a case shall be 110% of the cost of production or manufacture of such goods.

Note: Cost of production or manufacture be computed in accordance with the Cost Accounting Standard - 4 (CAS-4), issued by ICWAI. The various components of costs include Direct material cost, Direct labour cost, Direct expenses, Production overheads, Administration overheads, Research & development expenses, Selling cost, Distribution cost.

Conceptual Notes:

Excise duty applies on all excisable goods manufactured, even if they are not sold but are only self consumed by the manufacturer itself. However, if the self consumed manufactured goods are used in further manufacture of any other goods and duty is paid on such further manufactured goods sold to outsiders, then no duty is payable on the self-consumed goods. There is an exemption notification which exempts the duty on self consumed intermediary goods, if the final product is taxable.

3.10.6 Value when excisable goods are sold to a related person - [Rule 9]

In case where goods are sold only through related persons (except interconnected undertakings) then this rule clarifies on how to arrive as assessable value in such a case.

1) Value to be the normal transaction value at which goods are sold by related buyer to an unrelated person

When the excisable goods are sold by an assessee to a buyer who is a related person as per sub-clause (ii), (iii) or (iv) of sec 4(3)(b) (except inter-connected undertaking), then the transaction value in such a case shall be the 'Normal transaction value' at which such goods are sold by such related buyer to an unrelated person.

2) Value to be the 'normal transaction value' at which goods are sold by a related person to an unrelated person or a related retailer
If the related person also sells such goods to another related person then the transaction value shall be the 'Normal transaction value' at which such goods are sold by such second related buyer to an unrelated person. Like that the chain continues until the goods are sold to an unrelated person. However, if the goods are sold to a related person who is a retailer then such value itself can be taken as 'transaction value'.

3) Value to be computed as per rule 8, if such related person captively consumes the goods
If the related person captively consumes the goods then value shall be determined in accordance with the Rule - 8 i.e. (110% of Cost).

Notes:
1) "Normal transaction value" means the transaction value of the goods sold in the 'greatest aggregate quantity'.

2) Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day', In other words, Time period of a whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.

Example:
X sells goods to its brother Y at Rs.1,000. Normal transaction value at which Y sells goods to unrelated buyer is Rs.1,200. Then by application of this rule value in hands of X, would be Rs.1,200. However, if Y also sells goods to a related person (say Z) then by application of this rule value in the hands of X shall be the price at which Z sells the goods to the unrelated person. The chain shall continue until the last stage where the goods are finally sold to a retailer. In such a case value at which such goods are sold to the retailer needs to be adopted even if the retailer is a related person.

3.10.7 Value when excisable goods are sold to an inter-connected undertaking - [Rule 10]

In case where goods are sold to interconnected undertaking then this rule clarifies on how to arrive as assessable value in such a case.
1) Value as per rule 9 to be adopted
If the excisable goods are sold by an assessee to an inter-connected undertaking and if such inter-connected undertaking is:
- Related as per sub clause (ii), (iii) or (iv) of sec 4(3)(b); or
- holding or subsidiary company of the assessee,

then value shall be determined as per Rule 9.

2) In any other case, Value shall be determined as if they are not related persons.

Meaning:
"Inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manners, namely:-
(A) if one owns or controls the other;
(B) where the undertakings are owned by firms, if such firms have one or more common partners;

(C) where the undertakings are owned by bodies corporate,-

(I) if one body corporate manages the other body corporate; or

(II) if one body corporate is a subsidiary of the other body corporate; or

(III) if the bodies corporate are under the same management; or

(IV) if one body corporate exercises control over the other body corporate in any other manner;

(D) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, —

(I) hold, directly or indirectly, not less than fifty per cent. of the shares, whether preference or equity, of the body corporate; or

(II) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;

(E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;

(F) if the undertakings are owned or controlled by the same person or by the same group;

(G) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses.

Explanation 1 — For the purposes of this clause, two bodies corporate shall be deemed to be under the same management, -

i. if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or
ii. if the managing director or manager of one such body corporate is the managing director or manager of the other; or
iii. if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of directors of the other; or
iv. if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or employees of the first mentioned body corporate) one-fourth of the directors of the other; or
v. if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in the other; or
vi. if the same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares in one body corporate, also hold not less than one-fourth of the equity shares in the other; or
vii. if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries); or
viii. if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or
ix. if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II - If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of, or controlled by, the group shall be deemed to be under the same management.

Explanation III - If two or more bodies corporate under the same management hold, in the aggregate, not less than one-fourth equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.

Explanation IV - In determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions in such bodies corporate shall not be taken into account.

Explanation V - For the purposes of this clause, "group" means a group of:

i. two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions), or any combination thereof, which exercises, or is established to be in a position to exercise, control, directly or indirectly, over any body corporate, firm or trust; or
ii. associated persons.

Explanation VI - For the purposes of this clause:
(I) a group of persons who are able, directly or indirectly, to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it;
(II) "associated persons" —
(a) in relation to a director of a body corporate, means —

i. a relative of such director, and includes a firm in which such director or his relative is a partner;
ii. any trust of which any such director or his relative is a trustee;
iii. any company of which such director, whether independently or together with his relatives, constitutes one-fourth of its Board of directors;
iv. any other body corporate, at any general meeting of which not less than one-fourth of the total number of directors of such other body corporate are appointed or controlled by the director of the first mentioned body corporate or his relative, whether acting singly or jointly;

(b) in relation to the partner of a firm, means a relative of such partner and includes any other partner of such firm; and
(c) in relation to the trustee of a trust, means any other trustee of such trust;
(III) where any person is an associated person in relation to another, the latter shall also be deemed to be an associated person in relation to the former.

3.10.8 Value when excisable goods manufactured on job-work basis - [Rule 10A]

This rule seeks to clarify on how to compute assessable value in case where excisable goods are produced or manufactured by a Job worker on behalf of the Principal manufacturer.

When does this rule apply?	When the excisable goods are produced or manufactured by a job-worker, on behalf of a principal manufacturer	
What should be 'value' in such a case?	In case where the goods are sold by the principal manufacturer from the factory of a job-worker?	Value shall be the ***'Transaction value'*** at which the goods are sold.
	In a case where, goods are sold by the principal manufacturer from the place other than factory of a job-worker?	Value shall be the ***'Normal transaction value'*** at which similar goods are sold from such other place at or about the same time.

		If no such goods are sold at or about the same time then, value of goods sold at the time nearest to the time of removal of goods.
Meaning of the term Normal transaction value?	Normal transaction value means the transaction value of the goods sold in the 'greatest aggregate quantity'.	
What is the time period to be taken into account to compute the greatest aggregate quantity?	Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day', In other words, Time period of a Whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.	

3.10.9 Residuary rule - [Rule 11]

This rule applies if value could not be determined under any of the above rules.

When does this rule apply?	When the value of excisable goods cannot be determined under any of the aforesaid rules.
What should be 'value' in such a case?	Value in such case shall be determined using reasonable means consistent with the principles of these rules u/s 4(1).

Example:

Where the assessee does not sell the inputs/capital goods to any independent buyer and the only removal of such input/capital goods, outside the factory, is in the nature of transfer to a sister unit, recourse will have to be taken to the residuary rule 11 of the valuation rules and the value determined using reasonable means consistent with the principles and general provisions of the valuation rules and sub-section (1) of sec.4 of the Act. In that case it would be reasonable to adopt the value shown in the invoice on the basis of which CENVAT credit was taken by the assessee in the first place.

Summary of all the above rules:

Rule 4	Value of goods sold nearest to the time of removal must be considered.
Rule 5	Freight cost to be deducted in case goods are removed from a place other than the place of removal.
Rule 6	If price is not the sole consideration then cost of any consideration additionally flowing must be added.
Rule 7	Value to be the value at which greatest aggregate quantity sold at that depot at the time of removal from the factory must be considered.
Rule 8	Value shall be 110% of the Cost of Production, in case of Captive consumption.
Rule 9	In case of sales to or through a related persons value shall be the price at which related person sells to unrelated buyers or the value sold to related persons who in turn sells in retail.
Rule 10	Sale to interconnected undertakings (one of the related persons) only those related in Section 4(3) (ii), (iii) or (iv) or holding/subsidiary companies would follow valuation under Rule 9.
Rule 10A	If goods are manufactured on job work basis, adopt the value at which the principal manufacturer sells the goods.
Rule 11	When the value of any excisable goods cannot be determined under any of the aforesaid rules, adopt best.

3.11 MRP based valuation - [Section 4A]

The provision relating to duty based on MRP is dealt in section 4A. Section 4A was introduced with effect from 14.5.97 and today covers more than 83 Tariff headings. The Government thought it fit to introduce this section to fight the evil of manufacturers transferring cost of manufacturing unit to their trading companies by creating other company which does only trading of goods and thereby reducing the transaction value by transferring the goods at lower transaction values to the trading company leading to reduction in the excise duty payable by them. As a consequence of this it was decided to tax certain goods on the basis of MRP of that product irrespective of the transaction value or sale price at which they are sold.

3.11.1 Valuation based on retail sale price - [Section 4A]

This section seeks to provide details about which goods shall be valued as per MRP provisions? Since, profit element is also included in the MRP, it clarifies whether and whether any abatement is available on such value? It also provides clarification on how valuation shall be done if more than one MRP is available on the package of the goods or if MRP written on the package is altered after removal of goods etc.

1) Applicable to all goods on which retail sale price is required to be declared as per legal metrology act, 2009

If the statutory requirement under the provisions of legal metrology act, 2009 or under any other law for the time being in force requires that the retail sale price to be declared on the goods, then provisions of section 4A applies to such category of goods. In other words, provisions of section 4A does not apply to those category of goods for which declaration of retail sale price is not required as per legal metrology act, 2009 or under any other law for the time being in force.

2) CG to specify goods on which MRP is to be declared under Legal metrology act, 2009

The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods.

3) Value u/s 4A to be deemed as MRP less abatement, if any

Where the goods specified under sub-section (1) above are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

4) Abatement to be granted having regard to quantum of excise duty and other taxes payable

The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

5) Goods removed without declaring MRP or by declaring incorrect MRP or after removal if MRP is tampered, obliterated or altered then such goods are liable for confiscation

Where any goods specified under sub-section (1) are excisable goods and the manufacturer -

- Removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or
- **Tampers** with, **obliterates** or **alters** the retail sale price declared on the package of such goods after their removal from the place of manufacture,

then, such goods shall be liable for confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner which shall be deemed to be the retail sale price for the purposes of this section.

6) Highest retail sale price must be taken if more than one retail sale price declared - [Explanation 2(a)]

Where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price.

7) Altered retail price to be taken, if retail sale price increased after removal - [Explanation 2(b)]

Where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price.

8) Different areas can have different retail price - [Explanation 2(c)]

Where different retail sale prices are declared on different packages for the sale in different areas, then each such retail sale price declared for each area shall be the retail sale price for the purposes of valuation of the excisable goods.

9) Retail sale price to be the maximum price received and includes all taxes and other costs - [Explanation 1]

For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale.

Provided that in case the provisions of the act, rules or other law as referred to in sub-section (1) require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

Note:

For the purposes of this *explanation*, the expression 'ultimate consumer' shall not include industrial or institutional consumers.

Example:

As retail sale price also includes marketing costs, transportation costs and also profit element, it is obvious on behalf of government to give some abatement so that excise duty is not paid on exorbitant prices. For instance following are the rates of abatement given on various retail products:

- ✓ Biscuits - 30%
- ✓ Toothpaste - 30%
- ✓ Photographic cameras - 30%
- ✓ Pressure cooker - 25%

3.11.2 Central Excise (Determination of retail sale price of excisable goods) Rules, 2008

These rules are introduced to determine the retail sale price of any excisable goods under sub-section (4) of section 4A of the act in certain specific circumstances.

3.11.2.1 Value of goods in certain cases - [Rule 4 & Rule 5]

When does this rule apply? ***a) Goods are removed without declaring MRP;*** ***b) By declaring MRP not as per SWM act, 1976;*** ***c) Obliterates MRP after removal***	Where a manufacturer removes any excisable goods specified under sub-section (1) of section 4A of the Act, - (a) Without declaring the retail sale price on the packages of such goods; or (b) By declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Legal Metrology Act, 2009 or rules made thereunder or any other law for the time being in force; or (c) By declaring the retail sale price but obliterates the same after their removal from the place of manufacture. ***[RULE 4]***	
What shall be the 'value' in such a case? ***[RULE 4]*** ***(i) Value shall be the declared value if identical goods are removed one month before or after such removal*** ***(ii) If not, then value shall be ascertained by conducting the enquiries in the retail market;*** ***(iii) If more than 1 MRP is ascertained by (i) or (ii) above, then higher of such value shall be retail sale price***	(i) If the manufacturer has manufactured and removed identical goods, within a period of 1 month, before or after removal of such goods, by declaring the retail sale price,	Then the said declared retail sale price shall be taken as the retail sale price of such goods.
	(ii) If the retail sale price cannot be ascertained in terms of clause (i) above,	Then the retail sale price of such goods shall be ascertained by conducting enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture.
	(iii) Provided that if more than one retail sale price is ascertained under clause (i) or clause (ii) above.	then the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods.
When does this rule apply? ***[RULE 5]*** ***MRP being altered or tampered after removal of goods***	Where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price.	
What shall be the 'value' in such a case? ***[Rule 5]*** ***Altered & increased MRP should be taken as MRP for all the removals during one month before and after such removal***	(i) If retail sale price declared on the package of goods after their removal from the place of manufacture is altered or tampered, resulting into increase in the retail sale price.	then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of 1 month before and after the date of removal of such goods.
[Rule 5] ***If more than 1 MRP is ascertained, then higher***	(ii) Provided that where the manufacturer alters or tampers the declared retail sale price	then the highest of such retail sale price shall be taken as the retail sale price of all such goods.

of such value shall be retail sale price	resulting into more than 1 retail sale price available on such goods,	

3.11.3 Clarifications issued by the department pertaining to valuation u/s 4A

1) Scored out MRP must be ignored

Once an MRP is scored out, and another MRP printed on the package, it could not be said that the package has two MRPs printed on it, since the MRP scored out could not be considered as an MRP either by the seller or by the consumer. Hence the scored out MRP is to be ignored. The position remains same even if the scored out MRP is visible on the package.

Example:

Many times when a manufacturer wants to give a discount he also wants the customers to specifically know amount of discount that is being offered as a part of its marketing strategy. In such a case, original MRP (assume ~~Rs. 100~~) will be scored and a new MRP (assume Rs. 85) shall be written with a brief write up (say Save Rs. 15). In such a case MRP of Rs. 85 shall be taken for the purpose of valuation u/s 4A.

2) Multipack MRP to be taken, if MRP on individual packs scored out

If the individual items have MRP's printed on them but are scored out, then the MRP printed on the multi-pack will be taken for purposes of valuation under section 4A.

Example:

If Toothpaste is packed in a multi pack along with tooth brush and the MRP's printed on individual items are scored out (i.e. ~~Rs. 125~~) then the price given on multipack must be taken as MRP for the purpose of valuation.

3) MRP of a multipack to be taken, if clearly marked that individual item cannot be sold separately

If individual items are sold as multi-pack having more than one product and have clear markings that they are not to be sold separately or are packed in such a way that they cannot be sold separately, then the MRP indicated on the multi-pack should be considered for payment of duty u/s. 4A.

4) MRP of an aggregate of individual packs to be taken, if the above clear marking not available

If the individual items do not contain any such inscription (that they are not be sold separately) and are capable of being sold separately at the MRP printed on the individual pieces, then the aggregate of the MRP's of the pieces comprising in the multi-pack would be considered for payment of duty on the multi-pack under section 4A.

5) MRP mentioned on the multipack to be taken, if no MRP printed on individual pack of goods supplied free of cost

If an individual item is supplied free of cost in the multi-pack and has no MRP printed on it, then the MRP printed on the multi-pack will be taken for the purpose of valuation u/s 4A.

6) MRP valuation cannot be applied when the transfer in property of goods is not made either by way of a sale, hire-purchase or installments

Issue: Reference has been received in Board regarding assessment of CVD payable on set top boxes (STBs), when imported by a Direct to Home (DTH) broadcasting service provider and where STBs are provided free of cost to the consumers of DTH service. The issue is in such conditions, should the value for the purposes of calculation of CVD be determined on the basis of Retail Sale Price (RSP) in terms of proviso to section 3(2) of the Customs Tariff Act, 1975.

Analysis: The issue stands decided by Hon'ble Tribunal in case of M/s Bharti Telemedia Ltd. Vs Commissioner of Customs (Import), Nhava Sheva reported as [2016 (331) E.L.T. 138 (Tri.Mumbai)] or [2015 TIOL 1863 CESTAT MUM], wherein it has been held that one of the conditions to be met for CVD to be levied on Retail Sale Price is that under the Legal Metrology Act, there should be requirement to declare on the package, the retail sale price (RSP) of the goods. Hon'ble Tribunal in this case in paragraph 7 has inter alia held that".............

"retail package" means the package which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages: Provided that for the purpose of this clause, the expression 'ultimate consumer' shall not include industrial or institutional consumers;

....

"retail sale price" means the maximum price at which the commodity in packaged form may be sold to the consumer and the price shall be printed on the package in the manner given below;

....

The retail sale price is defined above as the maximum price at which retail package may be sold. And retail package means packages which are intended for retail sale to the ultimate consumer. In other words the retail price will be required to be declared on the package only if it is intended for retail sale .... It is seen from the definition that there should be a transfer of property for any consideration or there should be a transfer on the hire purchase system or by any system of payment by any instalments. We find in the present case that there is no transfer of property or hire purchase system involved nor there is a system of payment by instalments. Thus there appears to be no sale in the use of the Set Top Box by the ultimate consumer.

Clarification: After detailed analysis, Hon'ble Tribunal held that in the given circumstances CVD shall not be leviable on the basis of Retail Sale Price. In view of the above, it is clarified the judgement of Hon'ble Tribunal in case of M/s Bharti Telemedia Ltd (supra), may be followed for assessment of CVD on imported STBs, where the circumstances are identical.

Practical Questions & Answers

Question 1

Compute the assessable value and amount of excise duty payable under the Central Excise Act, 1944 and rules made thereunder from the following information:

Particulars	*No. of Units*	*Price at Factory per unit**	*Price at depot per unit**	*Rate of duty ad valorem*
Goods transferred from factory to depot on 8th February	*1,000*	*Rs.200*	*Rs.220*	*12.5%*
Goods actually sold at depot on 18th February	*750*	*Rs.225*	*Rs.250*	*10%*

**Note: Assume it to be the price at which the greatest aggregate quantity of goods are sold.*

Answer:

According to rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, in case where the goods are not sold at factory gate, but they are -transferred by the assessee to his depot, the assessable value for the goods cleared from factory and sold from depot shall be normal transaction value of such goods at the depot at or about the same time at which the goods being valued are removed from the factory.

Assessable Value = 1,000 units × Rs.220 = Rs.2,20,000

Calculation of central excise duty:-

Basic excise duty @ 12.5% (Rs.2,20,000 × 12.5%)	27,500
Total duty payable	**27,500**

Question 2

Robust Engineers Ltd. removed goods from their factory at Delhi on 20.04.2016 for sale from their depot at Mumbai. On that date, the normal transaction value of goods at Delhi factory was Rs.20,000 while the normal transaction value at Mumbai depot was Rs.19,000. The rate of duty was 12.5% ad-valorem. The said goods were sold from Mumbai depot on 15.05.2016. On that date, the normal transaction value at Mumbai depot was Rs.22,000 and rate of duty was 16%. M/s. Robust Engineers Ltd. paid the duty on Rs.20,000 at the rate of 12.5%. The Central Excise Department claimed that central excise duty should be levied @ 16% on the value of Rs.22,000. Examine whether Department's claim is correct.

Answer:

The Department's claim is not correct in the instant case. Rule 7 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000, *inter alia,* provides that where excisable goods are not sold at the factory gate but are transferred to a depot, the assessable value for the goods cleared from factory is the normal transaction value of such goods at the depot at or about the same time at which the goods as being valued are removed from the factory or warehouse.

In the given case, Rs.20,000 represents value on 20.04.2016 (time of removal), but it is not the value prevalent at the depot. Similarly, Rs.22,000 represents depot price, but then it is not the price prevalent on 20.04.2016 (time of removal).

The correct value to be adopted in this case is the depot price of such goods (normal transaction value) on 20.04.2016 i.e., Rs.19,000. Further, the applicable rate of duty shall be the rate of duty in force on the date when such goods are removed from the factory. Hence, the correct rate of duty will be 12.5% and not 16%.

Question 3

The following information is provided in respect of manufacture of a product "X" for the purpose of captive consumption in the same factory. You are required to determine the value for purpose of duty of excise in terms of rule 8 of the Central Excise Valuation Rules, 2000:

Particulars	***Amount***
Cost of direct materials (includes central excise duty Rs.1,545)*	*16,545*
Cost of direct employees	*12,300*
Consumable stores and repairs	*8,400*
Quality control cost	*4,300*
Research & development cost	*2,700*
Administrative cost:	
Production related	*3,000*
Others	*1,500*
Selling and distribution cost	*3,600*
Scrap value realized	*1,500*

**Note: CENVAT credit of the excise duty so paid is available.*

Answer:

As per rule 8 of the Central Excise Valuation Rules, 2000, the value of the excisable goods used for captive consumption is 110% of the cost of production of such goods.

The cost of production is to be determined as per (CAS)-4: Cost of Production for Captive Consumption' issued by ICWAI [CBEC Circular No. 692/8/2003 dated 13.02.2003].

Computation of cost of production as per CAS-4 and value of the excisable goods:-

Particulars	Amount (in Rs.)
Cost of direct materials Rs.16,545	
Less: Central excise duty Rs.1,545 **[Note-1]**	15,000
Cost of direct employees	12,300
Consumable stores and repairs	8,400
Quality control cost	4,300
Research and development cost	2,700
Administrative cost (production related) **[Note-2]**	3,000
Less: Scrap value realized	1,500
Cost of production as per CAS-4	44,200
Value of excisable goods [Rs.44,200 × 110%]	**48,670**

Notes:

1. Since CENVAT credit is available on central excise duty paid on direct materials, it has been deducted from the cost of direct materials in accordance with the Cost Accounting Standard-4.
2. Administrative overheads in relation to activities other than manufacturing activities have not been included in cost of production [CAS-4].
3. Selling and distribution cost have not been considered while computing the cost of production as they are not in relation to production activity [CAS-4].

Question 4

An assessee sold certain goods to PQR Ltd. for Rs. 20,000 (excluding excise duty and other taxes) on 09.09.2016. The buyer, PQR Ltd., is a related person as defined under section 4(3)(b) of the Central Excise Act, 1944. It did not sell the goods, but used it as intermediary product. Cost of production of said goods determined as per CAS-4 was Rs.16,000. Determine the assessable value in given case. What will be the assessable value, if, PQR Ltd. is not related to the assessee?

Answer:

The proviso to rule 9 of the Central Excise Valuation (Determination of Excisable Goods) Rules, 2000 lays down that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value thereof shall be determined in the manner specified in rule 8 of the Valuation Rules which provides that the value will be 110% of the cost of production or manufacture of such goods.

Therefore, when the goods are sold to PQR Ltd., the assessable value shall be 110% of Rs.16,000 (16,000 × 110%) i.e. Rs.17,600.

However, in the instant case, if PQR Ltd. is an unrelated buyer, the assessable value will be the transaction value of the goods i.e. Rs.20,000.

Question 5

Hema Manufacturers gets its product manufactured on job work basis from Meltex Ltd., an independent processor. The details of the transaction are as follows:

Particulars	***Amount (Rs.)***
Cost of material sent to job worker for processing	*5,000*
Processing charges (Rs.1000 processing charges & Rs.500 profit)	*1,500*
Transportation charges for sending the goods to the premises of the Meltex Ltd.	*200*

After processing, goods are sold by Hema Manufacturers at Rs.8,000 from the premises of Meltex Ltd. Ascertain the assessable value of the goods as per section 4 of the Central Excise Act, 1944 read along with relevant rules.

Answer:
The assessable value of goods would be Rs.8,000 in terms of rule 10A of the Central Excise Valuation Rules, 2000 as the goods are cleared by Hema Manufacturers directly from the premises of Meltex Ltd.

Question 6
Machine India Ltd. is engaged in the manufacture of machines. It has supplied one machine to M/s. Z & Co. at a price of Rs.8,50,000 (excluding taxes and duties) on which a cash discount @ 2% is allowed as per terms of contract as M/s. Z & Co. made full payment in advance. Further, following additional expenses have been incurred.

Particulars	*Rs. (in lakhs)*
Expenses pertaining to installation and erection of the machine at M/s Z & Co.'s premises (Machine was permanently affixed to earth)	*30,000*
Packing charges	*12,500*
Design and engineering charges	*4,000*
Cost of material (used in production of machine) supplied free of charge by M/s Z & Co.	*10000*
Pre-delivery inspection charges (charged by the Machine India Ltd.)	*1,000*
Bought out accessories supplied with machine	*8,000*

Determine the total amount of central excise duty payable thereon from the aforesaid information.

Answer:
Computation of central excise duty payable thereon

Particulars	**(In Rs.)**
Price of machine excluding taxes and duties	8,50,000
Installation and erection expenses **[Note 1]**	-
Packing charges **[Note 2]**	12,500
Design and engineering charges **[Note 3]**	4,000
Cost of material (used in production of machine) supplied free of charge by buyer **[Note 4]**	10,000
Pre-delivery inspection charges **[Note 5]**	1,000
Bought out accessories **[Note 6]**	-
Total	**8,77,500**
Less : 2% cash discount on price of machinery= Rs.8,50,000 × 2 % **[Note 7]**	17,000
Assessable value	8,60,500
Excise duty @ 12.5%	1,07,562.50
Excise duty payable **[rounded off]**	**1,07,563**

Notes:
While computing the assessable value:-

1. Installation and erection expenses will not be included [Circular No. 643CX dated 01.07.2002].
2. Amount charged from the buyer in relation to packing, whether primary or secondary, will be included [Circular No. 354/81/2000 TRU dated 30.06.2000].
3. Design and engineering charges will be included as such payment is 'in connection with sale'.
4. Cost of material supplied free of charge by buyer will form part of assessable value as it is an additional consideration flowing from buyer to seller [Explanation 1 to Rule 6 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000].
5. Since pre-delivery inspection charges are charged by the manufacturer, they are includible [Tata Motors Ltd. v. UOI 2012 (286) E.L.T. 161 (Bom.)].

6. Bought out accessories, supplied along with the machinery, will not be included [Shriram Bearing Ltd. v. CCE 1997 (91) ELT 255 (SC)].
7. Cash discount will be allowed as deduction if actually passed on to the buyer and if transaction is on principal to principal basis [Circular No. 643/34/2002 CX dated 01.07.2002].

Question 7

A sold to B a machine at the sale price (excluding taxes and duties) of Rs.2,00,000. Determine the total amount of excise duty payable on the machine using additional details given below:

Particulars	*(In Rs.)*
Design and development charges paid by 'B' on 'A's behalf to a third party 'C'	*20,000*
Warranty charges charged separately by 'A'	*5,000*
Sales tax	*20,000*
Cost of durable and returnable packing (such cost has been amortised and included in the cost of the machine)	*5,000*

Answer:

Computation of total amount of excise duty payable:-

Particulars	**(In Rs.)**
Sale price of the machine excluding taxes and duties	2,00,000
Add: Design and development charges **[Note-3]**	20,000
Add: Warranty charges **[Note-4]**	5,000
Assessable value	**2,25,000**
Excise duty @ 12.5%	28,125
Total excise duty payable on the machine	**28,125**

Notes:

1. Sales tax is not included since the definition of transaction value as per section 4(3)(d) specifically excludes sales tax paid or payable on the goods.
2. Since the cost of durable and returnable packing has been amortised and is included in the cost of the product, it is not required to be added again [Circular No. 643 dated 01.07.2002].
3. Design and development charges are essential for the purpose of manufacture and to make the product marketable. Hence, they have to be included in the assessable value, since the payment is 'in connection with sale'
4. As per the definition of the transaction value under section 4(3)(d) of the Central Excise Act, 1944, warranty charges are includible in the assessable value.

Question 8

How will the assessable value, under the subject transaction, be determined under section 4 of the Central Excise Act, 1944?

Contracted sale price for delivery at buyer's premises	*Rs. 9,00,000*
The contracted sale price includes the following elements of cost:	
(i) Cost of moulds and dies used in production of the goods, supplied by buyer	*Rs. 4,000*
(ii) Cost of primary packing	*Rs. 3,000*
(iii) Cost of packing at buyer's request for safety during transport	*Rs. 7,000*
(iv) Excise duty	*Rs. 1,11,200*
(v) VAT (Sales tax)	*Rs. 37,000*
(vi) Octroi	*Rs. 9,500*
(vii) Freight and insurance charges paid from factory to depot	*Rs. 20,000*
(viii) Actual freight and insurance from depot to buyer's premises	*Rs. 42,300*

Answer:

Computation of assessable value of the excisable goods

Particulars	**(In Rs.)**	**(In Rs.)**
Contracted sale price		9,00,000
Less:		
Excise duty **[Note - 1]**	1,11,200	
VAT **[Note - 1]**	37,000	
Octroi **[Note - 1]**	9,500	
Actual freight from "place of removal" to buyer premises **[Note - 2]**	42,300	
		(2,00,000)
Assessable value		**7,00,000**

Notes: In the given question, for the purpose of determining the assessable value of the excisable goods:-

1. the duty of excise, sales tax and other taxes, if any, actually paid or payable on the excisable goods have to be excluded [Section 4(3)(d) of the Central Excise Act, 1944].
2. the cost of transportation from the place of removal up to the place of delivery of the excisable goods has to be deducted [Rule 5 of the Central Excise Valuation Rules, 2000].
3. the cost of transportation, worth Rs.20,000, from the factory to the place of removal would not be excluded [Explanation 2 to rule 5 of the Valuation Rules].
4. cost of packing, Rs.3,000 and Rs.7,000 would not be deducted. In this regard, it has been clarified that as per section 4 of the Central Excise Act, 1944, packing charges would form part of the assessable value whether packing is ordinary or special, or primary or secondary *[Circular no. 354/81/2000 dated 30/6/2000].*
5. The cost of moulds and dies used in the production of the goods, supplied by buyer, worth Rs. 4,000 would not be deducted [Explanation 1 to rule 6 of the Valuation Rules].

Question 9

Dharma Manufacturers, engaged in the manufacture of machines, sold a machine to Asha Ltd. The cum-duty sale price of the machine (excluding VAT) is Rs.5,80,000. Rate of excise duty is 12.5%. Sale price includes the following charges:

Particulars	***(In Rs.)***
Warranty charges	*28,000*
Secondary packing	*6,000*
Trade discount actually allowed from the aforesaid sale price	*24,000*
Design and engineering charges of machine	*20,000*
Primary packing	*10,000*
Cost of return fare of vehicles	*4,500*
Advertisement and publicity charges borne by Asha Ltd.	*16,000*
Pre-delivery inspection charges (charged by Dharma Manufacturers)	*22,000*
After sales service charges (charged by Dharma Manufacturers)	*18,000*

Determine the assessable value of the machine for purpose of central excise duty.

Answer:

Computation of assessable value of the machine

Particulars	**(In Rs.)**	**(In Rs.)**
Cum-duty sales price of the machine excluding VAT		5,80,000
Less: Excise duty [5,80,000×12.5/112.5] (rounded off)		64,444

Sales price of the machine excluding VAT and excise duty		**5,15,556**
Less: Trade discount **[Note 3]**	24,000	
Cost of return fare of vehicles **[Note 5]**	4,500	28,500
Assessable value		**4,87,056**

Notes:

1. As per the definition of the transaction value under section 4(3)(d) of the Central Excise Act, 1944, warranty charges are includible in the assessable value.
2. Amount charged from the buyer in relation to packing, irrespective of it being primary or secondary, is includible in the assessable value [Circular No. 354 dated 30.06.2000].
3. As the transaction value is the price actually paid or payable, trade discount is allowable as deduction.
4. Design and engineering charges of machine are included in the assessable value as such charges are 'in connection with sale'.
5. Cost of return fare of vehicles is not included in the assessable value [Circular No. 923/13/2010 CX dated 19.05.2010].
6. Advertisement and publicity expenses borne by the buyer are included in the assessable value [Circular No. 643/34/2002 CX dated 01.07.2002].
7. Since the pre-delivery inspection charges and after sales service charges have been charged by the manufacturer, they are included in the assessable value *[Tata Motors Ltd.v. UOI 2012 (286) E.L.T. 161 (Bom.)]*.

Question 10

Compute the assessable value of the goods manufactured by Bharat Enterprises, under section 4 of the Central Excise Act, 1944, with the help of the following particulars:-

Particulars	***Amount (is Rs.)***
Contracted sale price for delivery at buyer's premises	*2,42,000*
The contracted sale price includes the following elements of cost:-	
Cost of containers supplied by the buyer	*15,200*
Loading and handling charges incurred after removal from the factory	*6,000*
Dharmada charges	*2,100*

Answer:

Computation of the assessable value of goods manufactured by Bharat Enterprises:-

Particulars	**Amount (in Rs.)**
Contracted sale price for delivery at buyer's premises	2,42,000
Less: Loading and handling charges incurred after removal from the factory	6,000
Assessable value of the goods	**2,36,000**

Notes:

While computing the assessable value,

1. Cost of containers supplied by the buyer is includible *[Circular No. 643CX. dated 1-7-2002].*
2. Loading and handling charges incurred after removal from the factory are not includible.
3. Dharmada charges are includible *[Circular No. 763/79/2003-CX. dated 21-11-2003].*

Question 11

M/s Ganga Marketing supplies 12 bottles of mineral water in a single package to Speed Airways (airline company). *Maximum retail price was printed on the package. However, individual bottle of 200 ml. each did not carry such maximum retail price (M.R.P) as these were to be distributed to the passengers by the airline company and not intended for resale. M/s Ganga Marketing pays duty of excise* *assessing the goods under section 4 of the Central Excise Act, 1944. The Department has taken a view that the package of 12 bottles is not a wholesale package. The airline company itself is the ultimate consumer. Hence, the package of 12 bottles is a 'retail package' and duty is payable on the basis of MRP under section 4A of the Central Excise Act, 1944. Examine whether the view taken by the Department is correct in law.*

Answer:

No, the stand taken by the Department is not valid in law. Section 4A is attracted only in case of those goods, in relation to which it is required to declare on the package thereof the retail sale price of such goods, under the provisions of the Legal Metrology Act, 2009 or the rules made thereunder or under any other law for the time being in force.

As per Legal Metrology (Packed Commodities) Rules, 2011, retail sale price is required to be declared on the retail package and not on the wholesale package. As per the definition of the wholesale package under rule 2(r) of the said rules, a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in similar quantities is a wholesale package. Thus, the single package of 12 water mineral bottles falls within the definition of the wholesale package. Consequently, the retail sale price is not required to be declared on such wholesale packages as required in case of packages intended for retail sale.

Further, as per section 3(b) of the said rules, the provisions applicable to packages intended for retail sale will not apply to packaged commodities meant for industrial consumers or institutional consumers. Institutional consumer means any institution which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions which buy packaged commodities directly from the manufacturer for use by that institution [Section 2(bc)]. Hence, in the given case, Speed Airways is the institutional consumer and not the ultimate consumer. Consequently, it is reaffirmed that the retail sale price is not required to be declared on the package of 12 water mineral bottles as it is meant for the institutional consumer.

Hence, in the present case, the goods are to be valued under section 4 and not under section 4A of the Central Excise Act, 1944.

Question 12

M/s. Dental Care Ltd. has introduced a new product "CLOVE" toothpaste, notified under section 4A of the Central Excise Act, 1944, with a notified abatement of 30%. Determine the central excise duty payable if rate of duty is 12.5%.

(i) 1,000 pieces having retail sale price (RSP) Rs.70 per piece are sold in retail packages to wholesale dealer at Rs.50 per piece.

(ii) 2,500 pieces having RSP Rs.70 per piece are sold in retail packages, but buyer is charged for 2,400 pieces only at Rs.50 per piece (100 pieces have been given free as quantity discount).

(iii) 50 pieces were given away as free samples, without any RSP on the pack.

(iv) 200 multi-packs were cleared at Rs.90 per pack, each containing two toothpaste tubes and one tooth brush free (without any RSP on it). Each tooth paste tube was having RSP Rs.70, which was scored out and each multi-pack had RSP of Rs.130.

Answer:

Computation of central excise duty payable by M/s. Dental Care Ltd.

Particulars	Amount (in Rs.)	Amount (in Rs.)
Retail sale price of 1,000 pieces (1000 × Rs.70)	70,000	
Less: Abatement @ 30%	21,000	
Assessable value (A) **[Note 1]**		49,000
Retail sale price of 2,500 pieces (2,500 × Rs.70)	1,75,000	
Less: Abatement @ 30%	52,500	
Assessable value (B) **[Note 2]**		1,22,500
Retail sale price of 50 pieces (50 × Rs.70)	3,500	
Less: Abatement @ 30%	1,050	
Assessable value (C) **[Note 3]**		2,450
Retail Sale price of 200 multi packs (200 x Rs.130) **[Note 4]**	26,000	
Less: Abatement @ 30%	7,800	
Assessable value (D)		18,200
Total assessable value (A) + (B) + (C) + (D)		**1, 92,150**
Excise duty @ 12.5%		24,018.75
Total excise duty payable (rounded off)		**24,019**

Notes:

1. The assessable value of products notified under section 4A of the Central Excise Act 1944 is the retail sale price declared on the package less abatement, if any.
2. Provisions of section 4A override the provisions of section 4. Therefore, assessable value will be retail sale price declared on the package less abatement irrespective of the quantity discounts offered to the buyer [Indica Laboratories v. CCE (2007) 213 ELT 20 (CESTAT 3 Member Bench)].
3. Free samples of the products covered under MRP based assessment are valued under rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 by taking into consideration the deemed value under section 4A [Circular No. 915/05/2010-CX dated 19.02.2010].
4. Retail sale price (RSP) of the multi-pack (Rs.130) is considered and product supplied free (toothbrush) in the multi-pack is not assessed separately. Further, since scored out RSP cannot be considered as RSP either by seller or by buyer, the same (Rs.70) is not taken as the RSP for the purpose of valuation of excisable goods.

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Section – B

CUSTOMS

Chapter 8 - Types of Duty

8.1 Levy of 'Basic Customs Duty'

1) Duty to be levied at rates specified in Customs Tariff act, 1975

The duties of customs (i.e. Basic Customs Duty) shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force on goods imported into or exported from India.

2) Rates specified in first & second schedule to Customs Tariff act to be applicable

The duties of customs shall be levied at the rates specified in the First and Second Schedules of the Customs Tariff act, 1975

First Schedule: enlists the goods liable to import duty

Second Schedule: enlists the goods liable to export duty

3) Duty to be levied either at the standard rate or at preferential rate

Standard rate of duty: It is the rate of duty specified in column (4) of the tariff and is normally the applicable rate of duty.

Preferential rate of duty: If goods are imported from the areas notified by the Central Government to be preferential areas, then the rate of duty specified in column (5) of the tariff will be applicable. The Government may by notification under section 25 of the Customs Act prescribe preferential rate of duty in respect of imports from certain preferential areas.

4) Preferential rate of duty applies if certain conditions fulfilled

The importer will have to fulfill the following conditions to make the imported goods eligible for preferential rate of duty:

a) Specific claim for the preferential rate of duty must be made.

b) Goods must have been produced or manufactured in such preferential area.

c) The area should be notified under section 4(3) of the Customs Tariff Act to be a preferential area.

d) The origin of the goods shall be determined in accordance with the rules made under section 4(2) of the Customs Tariff Act.

Note:

'Customs Tariff act, 1975' contains two schedules. The first schedule specifies the nomenclature that is based on the harmonized commodity description and coding system developed by the World Customs Organisation (WCO). The second schedule description of goods chargeable to export duty. The said tariff act is used for determining the classification of the goods. It also contains the rate of duty applicable for each tariff item. Rate of basic customs for imported goods is specified in first schedule, whereas rate of customs duty for exported goods is specified in second schedule. *[The interpretation, design and format of customs tariff act, 1975 is similar to that of Central excise tariff act, 1985. Since, the same is already discussed in detail in chapter 2 of this book under Central Excise, we are not discussing the same again here.]*

8.2 Additional duty of customs - [Sec 3(1)] & [Sec 3(3)]
Special Additional duty of customs - [Sec 3(5)]
Additional duty of Customs on Subsidized articles - [Sec 9]

Apart from Basic customs duty, other duties are also levied in the customs act due to various reasons, details of which are explained in these sections.

Particulars	CVD u/s 3(1)	CVD u/s 3(3)	Special CVD u/s 3(5)	CVD on subsidized articles u/s 9
It is the duty equal to?	1) Duty of excise for the time being in force leviable on a like articles	1) Duty of excise leviable on any raw materials, components and	1) Sales tax, value added tax, local tax or any other charges for the time being leviable	1) Amount of subsidy paid by any country or territory, directly or indirectly

	produced or manufactured in India. 2) If a like article is not so produced or manufactured, duty which would be leviable on the **class/description** of articles to which the imported article belongs. 3) Where such duty is leviable at different rates, the highest duty.	ingredients of the same nature as, or similar to those, used in the production or manufacture of any article imported into India.	on a like article on its sale, purchase or transportation in India. 2) If a like article is not so sold, purchased or transported, taxes which would be leviable on the **class/description** of articles to which the imported article belongs. 3) Where such taxes are leviable at different rates, the highest of such tax.	upon manufacture or production or exportation or transportation of any article imported into India whether or not imported directly from the country of manufacture/production or whether or not imported in the same condition.
It is levied on	Any Imported article	Any Imported article	Any Imported article	Any Imported article
Rate of duty?	**1) In case of Alcoholic liquor for human consumption:** Rate of CVD will be determined by the C.G. by issuing a notification, having regard to the excise duty leviable on like alcoholic liquor in different States. **2) In case of any other goods** Rate of CVD will be the rate of excise duty.	Such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the C.G. in this behalf.	Rate notified by the Central Government. However, such rate must ***not exceed 4%.***	Amount of duty should ***not exceed the amount of subsidy granted.*** *(Refer additional points pertaining to this duty as given below)*

Illustrative computation of assessable value u/s 3(5)

Assessable value for computing CVD u/s 3(5) of the Customs tariff act		
Assessable value for computing special CVD under section 3(5)	Value under section 14(1)/tariff value determined section u/s14(2)	Xxx
	Add: Basic custom duty	Xxx
	Total	Xxx
	Add: CVD under section 3(1) and 3(3)	Xxx
	Total	Xxx
	Add: Education Cess [customs]	Xxx
	Add: Secondary and higher education Cess [customs]	Xxx
	Assessable value	**Xxx**

Illustrative computation of assessable value u/s 3(1) and 3(3)

Assessable value for computing CVD u/s 3(1) & 3(3) of the Customs tariff act		
In case the duty is charged on the like articles produced/manufactured in India	**Assessable value**	
(i) On ad-valorem basis	Value under section 14(1)/tariff value determined section 14(2)	Xxx
	Add: Basic custom duty	Xxx
	Assessable value	**Xxx**
(ii) On the basis of the tariff value fixed under 3(2) of the Central Excise	Such tariff value	
(iii) On the basis of MRP under section 4A [including goods notified under section 3 read with clause (1) of Explanation III of the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955]	Retail sale price on the imported article	Xxx
	Less: Abatement notified by Government for like Article	Xxx
	Assessable value	**Xxx**

Relevant Judgments:

1) CVD u/s 3(1) can be levied only on goods subjected to excise levy

The Supreme Court held that section 3 of the Customs Tariff Act is an independent charging section. It also held that additional duty could be levied only if the article is such that could be manufactured or produced in India. If the article cannot be subjected to excise levy because it is not produced or manufactured, then on the import of like articles, additional duty cannot be levied. ***[Hyderabad Industries Ltd. v. UOI 1999 (108) ELT 321 (SC)]***

2) CVD u/s 3(1) is levied to put importers on same footing with domestic manufacturers

The countervailing duty is imposed so as to place the home producer on an equal footing with the importer of foreign goods. ***[Shroff & Co. v. Municipal Corporation Of Greater Bombay 1988 (38) E.L.T. 243 (S.C)]***

3) Rate of CVD u/s 3(1) changes in tune with the change in rate of excise duty

If an excise exemption notification has been issued reducing the effective rate of excise duty, the rate of CVD would be such reduced rate only. Currently the standard rate of excise duty is 12.5% ***[Motiram Tolaram v. UOI 1999 (112) E.L.T. 749 (S.C.)]***

Conceptual Notes:

1) Following duties shall not be included while computing the assessable value for computation of CVD u/s 3(1), 3(3) and 3(5):-
(a) CVD [Sections 3(1) and (3)];
(b) Special CVD [Section 3(5)];
(c) Safeguard duty [Sections 8B and 8C];
(d) Countervailing duty [Section 9];
(e) Anti-dumping duty [Section 9A].

2) *Notifications Nos. 13/2012 Cus and 14/2012 Cus both dated 17.03.2012* exempt Education Cess and Secondary & Higher Education Cess leviable as CVD on imported goods. Since Education Cess and Secondary & Higher Education Cess leviable on excisable goods have been exempted in general, there will be no corresponding levy as CVD on imported goods. Hence, these notifications have been rescinded vide *Notification No. 9/2015 Cus dated 01.03.2015.* It may be noted that rescinding of the said exemption notifications for education cesses does not imply that the same would become payable on CVD as these cesses have now been exempted on excisable goods in general. Thus, the ultimate position remains same – education cesses were not payable on CVD earlier and will also not be payable on or after March 1, 2015. ***[Notification No. 9/2015 Cus dated 01.03.2015]***

Additional points pertaining to CVD on subsidized articles u/s 9:

a) Validity upto 5 years and can be extended to another 5 years and for further 1 year

Unless revoked, once levied this duty shall be valid for a period upto 5 years and can be extended for another 5 years if government in a review opines that cessation would lead to continuance of subsidization and injury, If review is not completed on time then it can be further extended until the completion of review but not exceeding 1 year.

b) CVD to be levied if imported goods are subsidized

Countervailing duty shall be levied if it is determined that the subsidy relates to export performance or it relates use of domestic goods over imported goods in the export article or it has been conferred on a limited number of persons engaged in manufacturing producing or exporting the article.

c) CVD u/s 9 not to be levied when subsidy given for research activity or disadvantaged region

CVD u/s 9(1) shall not be levied if it is given for:

- Research activities conducted by or on behalf of such persons engaging in manufacture, production, export;
- Assistance to disadvantaged regions within the territory of the exporting country; or
- Assistance to promote adaptation of existing facilities to new environmental requirements.

Illustration - Computation of CVD leviable under section 3(1) & Special CVD under section 3(5)]

If the additional duty is leviable as a percentage of the value of goods, then the following paragraph illustrates the method of computing the additional duty of customs.

Particulars	**Amount in (Rs.)**
Assessable value under section 14	1,000.00
Rate of basic customs duty	10%
Rate of additional custom duty under section 3(1)	12.5%
Assessable value for computing basic customs duty	1,000.00
Basic custom duty @ 10% of Rs.1,000.00	100.00
Total value for computing additional customs duty u/s 3(1)	1,100.00
Additional custom duty u/s 3(1) [12.5% on Rs.1100]	137.50
Total [100+137.50]	237.50
Education cess @ 2%	4.75
Secondary and higher education cess @ 1%	2.375
Total duty payable before additional customs duty u/s 3(5)	244.625
Total Value for computing additional customs duty u/s 3(5) [Rs.1,100+Rs.237.50]	1344.625
Additional customs duty u/s 3(5) [Rs.1,337.50×4%]	53.785
Total duty payable	**298.41**

8.3 Protective duty - [Sec 6] & [Sec 7]
Safeguard duty of customs - [Sec 8(B)]
Transitional product specific Safeguard duty of customs - [Sec 8(C)]
Anti - Dumping Duty - [Sec 9A]

Apart from regular duties some special duties are also levied for various reasons as specified below:

Particulars	**Protective duty u/s 6 & 7**	**Safeguard duty u/s 8B**	**Transitional product specific safeguard duty u/s 8C**	**Anti – Dumping Duty u/s 9A**
When levied?	It is levied by the C.G. upon the recommendation made to it by the Tariff Commission	It is levied if C.G. is satisfied that any article are imported into India in increased quantities and such	It is levied if C.G is satisfied that any article is imported into India in ***increased***	It is levied by C.G. If it is satisfied that any article is exported by an exporter or producer from any

	in order to give ***protection to indigenous industries from glut of cheap imported articles in the market*** making the indigenous (domestic) goods unattractive.	increased importation is ***causing or threatening to cause serious injury*** to domestic industry.	***quantities*** from the **People's Republic of China** and such increased importation is ***causing or threatening to cause market disruption*** to domestic industry.	country or territory to ***India at less than its normal value i.e. at dumped prices.***
Intent?	It is levied to protect the indigenous industries and not to generate revenue.	It is levied to safeguard the interests of domestic industry in India aiming to make it more competitive.	It is levied to safeguard the interests of domestic industry in India aiming to make it more competitive.	It is levied to offset the benefit that importer receives by purchasing goods at dumped prices from outside India.
Amount of duty?	Duty must be as specified by the CG. However, it should not be very stiff so as to discourage imports. It should bridge the gap between demand and supply of those articles in the market.	As decided by C.G.	As decided by C.G.	Not exceeding the "***margin of dumping"*** in relation to such article.
When Exempted?	No such exemption is available, it is levied purely on the recommendation of the tariff commission.	***<u>In case of imports from 1 developing country:</u>*** If the percentage imports of that article from that country to the total imports in India does not exceed 3%. ***<u>In case of imports from more than 1 developing country:</u>*** If the percentage imports of that article from all such countries to the total imports in India does not exceed 9%. In case of imports by 100% EOU or FTZ or SEZ.	N/A	The anti-dumping duty shall not be leviable on articles imported by a 100% EOU or a unit in a Free Trade Zone or Special Economic zone, unless the notification specifically makes it applicable for such units. However if a EOU imports goods and then sells the same as such or use them in the manufacture and sale of the final product within India then it will be liable to this duty.
Provisional duty	N/A	The C.G. is empowered to impose	The C.G.is empowered to	When the ***normal value*** and ***margin of***

		provisional safeguard duty if on the basis of preliminary determination it is of the opinion that the increased imports ***have caused or threatened to cause serious injury to a domestic industry.*** The provisional duty shall be in force for a ***maximum period of 200 days*** from the date of its imposition and if upon final determination, the C.G. is of different opinion then the duty collected shall be refunded.	impose provisional safeguard duty if on the basis of preliminary determination it is of the opinion that the increased imports ***have caused or threatened to cause market disruption to a domestic industry***. The provisional duty shall be in force for a ***maximum period of 200 days*** from the date of its imposition and if upon final determination, the C.G. is of the different opinion then the duty collected shall be refunded.	***dumping*** in relation to any article is still in the process of determination, then the C.G. may impose anti-dumping duty on the basis of provisional estimate. If the provisional duty is higher than the margin finally determined, then the C.G. shall reduce the anti-dumping duty and shall also refund the excess duty collected.
Additional Points	The C.G. may reduce or increase the duty if it is satisfied, after such inquiry as it thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection.	-Refer below-	-Refer below-	-Refer below-

Additional Points pertaining to Safeguard duty u/s 8B & Transitional Safeguard duty u/s 8C

a) Safeguard duty and transitional safeguard duty is ***product specific*** and not country specific i.e. it is applicable only for certain articles in respect of which it is imposed.

b) These duties are in addition to any other duty in respect of such goods levied under this Act or any other law for the time being in force.

c) ***'Market disruption'*** shall be caused whenever imports of a like article or a directly competitive article produced by the domestic industry, increase rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.

Additional Points pertaining to Anti-dumping duty u/s 9A:

a) Anti-dumping duty to be levied if duty evaded by altering the name etc.

Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty has taken place, by either of the following ways:-

- By altering the description or name or composition of article subject to such anti-dumping duty; or
- By import of such article in an unassembled or disassembled form; or
- By changing the country of its origin or export; or

- In any other manner.

Whereby the anti-dumping duty so imposed is rendered ineffective it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be.

b) CG may retrospectively levy Anti-dumping duty but not beyond 90 days if certain conditions satisfy

Central Government may by notification in the Official Gazette levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty but not beyond 90 days from the date of notification, if the following conditions are satisfied:

(a) There is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(b) The injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of the imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied.

Meanings:

1) **'Margin of dumping'** in relation to an article, means the difference between its export price and normal value.

2) **'Dumping'** is defined as an act of selling in quantity at a very low price or practically regardless of the price. Further it also includes selling goods abroad at less than the market price at home. The anti-dumping duty is country specific i.e. it is imposed on imports from a particular country.

c) Anti-dumping duty paid in excess of margin to be refunded u/s 9AA

Where an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty in excess of the actual margin of dumping in relation to such article, then the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, and such importer shall be entitled to refund of such excess duty.

8.4 No levy under Sec 9 or Sec 9A in certain cases - [Sec 9B of Customs Tariff Act]

This section provides that, CVD u/s 9 and anti-dumping u/s 9A shall not be levied in some cases/situations as given below:

1) Both CVD on subsidized articles and anti - dumping duty not to be levied for same situation

No article shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.

2) CVD & ADD not to be levied just because one article is exempted and other is not exempted

CVD on subsidized articles and anti-dumping duty shall not be levied just because such articles are exempt or refunded from duties or taxes borne by like articles when meant for consumption in the country of origin or exportation.

3) CVD & ADD not to be levied on articles imported from "member countries of WTO" and countries having "most favored nation" status

These duties shall not be levied on imports from member country of WTO or from a country with whom the GOI has a most favored nation agreement unless a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

Practical Questions & Answers

Question 1

The assessable value of a unit of an imported product is Rs.100 under section 14 of Customs Act, 1962. 10,000 pieces of such product have been imported. The maximum retail sale price of each piece of the product is Rs.200 each. The goods are assessable under section 4A of the Central Excise Act, 1944, after allowing an abatement of 40%. The excise duty rate is 12.5% ad valorem. Calculate the amount of additional duty of *customs leviable under section 3(1) of the Customs Tariff Act, 1975 assuming basic customs duty @ 10% ad valorem.*

Answer:

As the goods are assessable under section 4A of the Central Excise Act, 1944, additional duty of customs will be payable on the basis of maximum retail sale price printed on the packing; less abatement as permissible [proviso to section 3(2) of the Customs Tariff Act.]

Maximum retail sale price [10,000 pieces x Rs.200]	Rs.20,00,000
Less: Abatement 40%	Rs.8,00,000
Assessable value for charging additional duty of customs leviable under section 3(1)	Rs.12,00,000
Additional duty of customs @ 12.5%	Rs.1,50,000
Additional customs duty payable	**Rs.1,50,000**

Question 2

Miss shobha imported certain goods weighing 1,000 kgs with CIF value US$ 40,000. Exchange rate was 1 US$ = Rs.45 on the date of presentation of bill of entry. Basic customs duty is chargeable @ 10%. There is no excise duty payable on these goods, if manufactured in India. As per Notification issued by the Government of India, anti-dumping duty has been imposed on these goods. The anti-dumping duty will be equal to difference between amount calculated @ US $ 60 per kg and landed value of goods. You are required to compute custom duty and anti - dumping duty payable by Miss Priya.

Note: Goods imported are exempt from additional duty under section 3(5) of Customs Tariff Act.

Answer:

Computation of Basic Customs Duty Payable

Particulars	**Amount (in Rs.)**
Total CIF value in INR = US $ 40,000 x Rs.45	18,00,000
Add: Landing charges @1%	18,000
Assessable value (AV)	18,18,000
Basic customs duty (BCD) @10%	1,81,800
Add: Education cess @ 2%	3,636
Add: Secondary and higher education cess @ 1%	1,818
Landed value of imported goods	19,99,800
Total Customs duty payable	**1,87,254**

Computation of Anti-Dumping Duty Payable

Particulars	**Amount (in Rs.)**
Value of goods in INR as per Notification = 1,000 Kgs x US $ 60 x Rs.45	27,00,000
Less: Landed value of goods	19,99,800
Anti-dumping duty payable	**7,00,200**

Question 3

Compute the customs duty payable for the goods imported based on the following information:

i. *Assessable Value of imported goods is Rs.1,00,000*
ii. *Additional Duty payable u/s 3(1) of the Customs Tariff Act, 1975 is 12.5%*
iii. *Additional Duty payable u/s 3(5) of the Customs Tariff Act, 1975 is 4%*

Make suitable assumptions where required.

Answer:

Computation of Customs Duty Payable

Particulars	**Amount in (Rs.)**
Assessable value under section 14	1,00,000
Basic custom duty @ 10% of Rs.1,00,000	10,000

Total value for computing additional customs duty u/s 3(1)	1,10,000
Additional custom duty u/s 3(1) [12.5% on Rs.1,10,000]	13,750
Total [10,000+13,750]	23,750
Total duty payable before additional customs duty u/s 3(5)	23,750
Total Value for computing additional customs duty u/s 3(5) [Rs.1,10,000+Rs.23,750]	1,33,750
Additional customs duty u/s 3(5) [Rs.1,33,750×4%]	5,350
Total duty payable	**29,100**

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Chapter 9 - Valuation

9.1 Introduction

The manner in which duties of customs are charged on goods imported into India (import duty) or goods exported from India (export duty) is basically either by way of:
(a) A specific duty based on the quantity of the goods For ex: Rs.1000 on per metric tonne of steel; or
(b) Ad valorem, namely expressed as percentage of the value of the goods i.e 40% ad valorem. etc.
The disadvantage with a specific rated levy is that the revenue to the Government remains fixed, unless there is variation in the quantum of total imports and exports. The continuous upward trend in the price of goods has suggested that the Government is losing increase in its revenue by not following ad valorem basis of duties.

9.2 Valuation of Goods - [Sec 14]

Section 14 of the Customs Act, 1962 prescribes the mode of computing the value of imported or export goods for the purpose of payment of customs duty.

1) Value shall be the "Transaction value"

For the purposes of the Customs Tariff Act, 1975, or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods.

2) Transaction value in case of export of goods to be following:

In case of export goods, the transaction value shall be:
- ✓ The **price** actually paid or payable for the goods when sold for export **from** India;
- ✓ for **delivery at the time and place** of exportation;
- ✓ where the buyer and seller of the goods are **not related**; and
- ✓ price is the **sole consideration** for the sale.

However further conditions may be specified in the rules made in this behalf.

3) Transaction value in case of import of goods to be following:

In case of imported goods, the transaction value shall be
- ✓ The **price** actually paid or payable for the goods when sold for export **to** India;
- ✓ for **delivery at the time and place** of importation;
- ✓ where the buyer and seller of the goods are **not related**; and
- ✓ price is the **sole consideration** for the sale.

However, in this case also further conditions may be specified in the rules made in this behalf.

Analysis:

In other words, price agreed to be paid or payable for goods imported or exported to or from India shall be adopted as transaction value for calculation of customs duty, if the following conditions satisfy:
- ➢ Price must be for delivery at the time and place of importation or exportation;
- ➢ The buyer and seller must not be related;
- ➢ Price must be the sole consideration between both the parties.

If any of the above conditions does not satisfy then the 'price' paid or payable cannot be taken as transaction value for valuation of customs duty and the same needs to be determined by way of other means discussed later in this chapter.

4) Certain specific additions to the transaction value

Such transaction value shall also include in addition to the price as aforesaid, any amount paid or payable for costs and services, including:
- ✓ commissions and brokerage,
- ✓ engineering,
- ✓ design work,
- ✓ royalties and license fees,
- ✓ costs of transportation to the place of importation,

- ✓ insurance,
- ✓ loading,
- ✓ unloading, and
- ✓ handling charges.

to the extent and in manner specified in the rules made in this behalf.

5) Exchange rate as on date of filing of bill of entry to be taken - in case of imported goods

For imported goods, the conversion in value shall be done with reference to the rate of exchange prevalent on the date of filing bill of entry under section 46.

6) Exchange rate as on date of filing of bill of entry to be taken - in case of exported goods

For export goods, the conversion in value shall be done with reference to the rate of exchange prevalent on the date of filing shipping bill (vessel or aircraft) or bill of export (vehicle) under section 50.

Relevant judgment:

In case of ***Samar Timber Corporation v. ACC 1995 (79) E.L.T. 549 (Bom.)***, it was held that relevant date in respect of rate of duty payable is the date of presentation of Bill of Entry and not date of re-presentation after correction.

7) Exchange rate notified by CBEC is relevant for valuation of foreign exchange

The rate of exchange is notified by the following three agencies:

- ✓ The Central Board of Excise and Customs (Board),
- ✓ The Reserve Bank of India, and
- ✓ The Foreign Exchange Dealers' Association of India.

However, for the purpose of valuation under customs laws, rate notified by CBEC (Board) shall be taken into account.

Point to Remember: In examination rates of exchange as per RBI or other agencies may be given, however students must remember that for the purpose of payment of customs duty, only the rate of exchange as notified by CBEC (i.e. Central Board of Excise and Customs) must be taken into consideration. Other exchange rates given must be ignored.

9.3 Special provision for classification of sets of articles & accessories - [Sec 19]

When an importer imports multiple articles under a single set and when each such articles are chargeable to different rates of duty, in such a case which rate of duty shall be applied has been explained in this section.

1) Classification in case of set of articles to be as follows:

Except as otherwise provided in any law for the time being in force, where goods consist of a set of articles, duty shall be calculated as follows:

a) Articles liable to duty with reference to **quantity** shall be chargeable to that duty;

b) Articles liable to duty with reference to **value** shall be liable as follows:

All articles in the set liable at the same rate	That single rate shall apply
Articles in the set liable at the different rates	Article liable at highest rate in the set shall apply

c) Articles not liable to duty shall be chargeable to duty at the rate at which articles liable to duty with reference to value are liable under clause (b).

Note: Therefore, even if any particular article in the set is exempt still the same shall be liable to duty at the rate applicable to other article in the set. However, this is applicable only in case where the articles are liable with reference to value, if the articles are liable to duty with reference to quantity then duty shall not be liable on exempt quantity of article imported in the set.

2) Accessories of articles to be chargeable at the rate applicable to the article

Accessories of, and spare parts or maintenance and repairing implements for any article which satisfy the conditions specified in the rules shall be chargeable to duty at the same rate as that of the article;

3) Duty to be chargeable at actual rate if satisfactory evidence produced

If the importer produces evidence to the satisfaction of the proper officer or the evidence is available regarding the value of any of the articles liable to different rates of duty, such article shall be chargeable to duty separately at the rate applicable to it.

Illustration 1: Mr.XYZ imports following set of articles and pays Rs.5,00,000 lumpsum for the entire set without assigning any individual value to each article in the set. Which rate of duty shall apply:

Articles in the set	Rate of Duty (hypothetical)
Television	10%
Set-top box	15%
Remote Control	15%
Music system	Exempt
TV Stand	30%

Answer: Since, no separate value is assigned for each article in the set, therefore duty @ 30% shall be applicable on the entire set value of Rs.5,00,000/-. It is assumed that no satisfactory evidence is produced by the importer regarding the bifurcation of the value of the articles liable at different rates of duty.

Illustration 2: Assuming in the above illustration, the articles in the set are liable to duty with reference to quantity as given below, then what shall be the duty liability:

Articles in the set	Quantity Imported	Specific duty per unit (in Rs.)
Television	100	150
Set-top box	100	180
Remote Control	100	150
Music system	100	Exempt
TV Stand	50	200

Answer: Duty payable shall be Rs.58,000/- i.e. quantity imported multiplied by the specific duty per unit.

Illustration 3: Mr.XYZ imports following set of articles and pays Rs.5,00,000 lumpsum for the entire set without assigning any individual value to each article in the set. Which rate of duty shall apply:

Articles in the set	Rate of Duty (hypothetical)
Television	10%
Remote Control (Accessory of Television)	20%
TV Stand (Accessory of Television)	30%

Answer: In case where set of articles imported include the main article and the accessories of the main article, then the rate of duty as applicable to the main article shall be applied i.e. in the given case duty @ 10% shall be applicable on the entire set value of Rs.5,00,000/-.

9.4 Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

In order to decide the amount of duty that is required to be paid on imported goods, we need to understand how to determine the value of the goods. Can it be the transaction value at which importer has purchased goods from foreign vendor? Or in what circumstances value cannot be transaction value? And if not transaction value then how to arrive at value can be understood from these rules known as Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

9.4.1 Determination of method of valuation - [Rule 3]

This rule says that value shall be the transaction value subject to certain adjustments to be done as per rule 10 and certain conditions needs to be satisfied as provided below:

1) Value shall be transaction value as adjusted in accordance with rule 10

Subject to rule 12, the value of imported goods shall be the transaction value adjusted in accordance with provisions of rule10.

Transaction value as specified above shall be accepted subject to the condition that:

1) There must be no restriction on use	2) Sale price must not be subjected to conditions or considerations which renders value indeterminable	3) Proceeds of subsequent sale must not come back to seller	4) Buyer & seller must not be related
There are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which: i) are imposed or required by law or by the public authorities in India; or ii) limit the geographical area in which the goods may be resold; or iii) do not substantially affect the value of the goods;	The sale price is not subject to some condition or consideration for which a value cannot be determined in respect of the goods being valued;	No part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer shall accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of rule 10 of these rules;	The buyer and seller must not be related, or where the buyer and seller are related, that transaction value is acceptable if: i) The relationship did not influence the price. ii) If importer proves that declared value is close to transaction value or identical value or deductive value of similar goods sold to unrelated buyer in India at or about the same time.

2) Value to be determined by proceeding sequentially from rule 4 to rule 9

If the value cannot be determined under the provisions of sub-rule (1) as explained above, then value shall be determined by proceeding sequentially from rule 4 to rule 9.

9.4.2 Transaction value of 'identical' goods - [Rule 4]

If any of the conditions as specified in rule 3 does not satisfy then value shall be adopted as per this rule. This rule provides that value shall be the transaction value of identical goods.

1) Value to be transaction value of 'identical' goods

Subject to rule 3, the value of imported goods shall be the transaction value of 'identical' goods sold for export to India and imported at or about the same time as the goods being valued. However, such value shall not be adopted for the goods provisionally assessed under section 18 of the Customs Act, 1962.

2) Identical goods sold at the same commercial level to be considered

In applying this rule, the transaction value of identical goods sold at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the value of imported goods.

3) Identical goods sold at different commercial level can be considered subject to adjustments

If there is no sale as referred above then, the transaction value of identical goods sold at a different commercial level or in different quantities or both, shall be used subject to adjustment for difference attributable to commercial level or to the quantity or both. However, such adjustments shall be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustments, whether such adjustment leads to an increase or decrease in the value.

4) Difference in costs referred to in rule 10(2) needs to be adjusted

Where the costs and charges referred to in rule 10(2) of these rules are included in the transaction value of identical goods, then an adjustment shall be made if there is a significant difference in such costs and charges between the goods being valued and the identical goods in question arising from differences in distances and means of transport.

5) Lowest value to be taken if multiple transaction values of identical goods are found

In applying this rule, if more than one transaction value of identical goods is found, the lowest such value shall be used to determine the value of imported goods. ***[Resina Combination v. CC 1999 (Tri)]***

Notes:

"Identical goods" means imported goods –

i. which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;
ii. produced in the country in which the goods being valued were produced; and
iii. produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in the production and sale for export of these imported goods.

9.4.3 Transaction value of 'similar' goods - [Rule 5]

If value could not be computed under rule 3 or 4 due to any reason then value shall be adopted as per this rule. This rule provides that value shall be the transaction value of similar goods.

1) Value to be transaction value of 'similar' goods

Subject to the provisions of rule 3, the value of imported goods shall be the transaction value of 'similar' goods sold for export to India and imported at or about the same time as the goods being valued. Provided that such transaction value shall not be the value of the goods provisionally assessed under section 18 of the Customs Act, 1962.

2) Goods must have been produced in the same country for goods to be called 'similar goods'

Two goods must have been produced in the same country to treat them as similar goods. Goods produced in Japan and those produced in France are not similar goods. ***[Nitisoya Diamond Tools Vs. CC 1994 (74) E.L.T. 49 (Tribunal)]***

Notes:

1) All the rest provisions of clauses (b) and (c) of sub-rule (1), sub-rule (2) and sub-rule (3), of rule 4 as aforesaid shall, mutatis mutandis, also apply in respect of similar goods.

2) **"similar goods"** means imported goods –
(i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;
(ii) produced in the country in which the goods being valued were produced; and
(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person, but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods.

9.4.4 Determination of value where value cannot be determined under rules 3, 4 and 5 - [Rule 6]

If value could not be computed under rule 3 or 4 or due to any reason then value shall be adopted as per this rule i.e. rule 6. This rule does not provide any valuation methodology but it simply says that value should be determined by applying rule 7 or 8.

1) Value to be determined by applying rule 7 or rule 8

If the value of imported goods cannot be determined under the provisions of rules 3, 4 and 5, then value shall be determined under the provisions of rule 7 or, when the value cannot be determined under rule 7 then rule 8 shall be applied. Rule 8 can be used only if value cannot be determined as per rule 7.

2) Rule 8 can be applied before rule 7 with the approval of proper officer

Generally, value as per rule 7 must be taken first, however at the request of the importer, and with the approval of the proper officer, the order of application of rules 7 and 8 can be reversed.

9.4.5 Deductive value - [Rule 7]

If value cannot be determined under any of the above rules, then value needs to be determined on the basis of deductive value as specified in this rule.

1) Value to be the unit price at which imported or identical or similar goods are sold at or about same time in the greatest aggregate quantity to unrelated persons subject to certain deductions

Subject to the provisions of rule 3, if the goods being valued or identical or similar imported goods are sold in India at or about the time, then the value of imported goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the sellers in India, subject to the following deductions:

- ✓ commission paid or agreed to be paid;
- ✓ additions usually made for profits and general expenses in connection with sales in India;
- ✓ costs of transport and insurance and associated costs incurred within India;
- ✓ customs duties and other taxes payable in India by reason of importation or sale of the goods.

2) Value to be the unit price at which imported/identical/similar goods are sold prior to importation but before 90 days, in the greatest aggregate quantity to unrelated persons

If neither the imported goods nor identical nor similar imported goods are sold at or about the same time of importation of the goods being valued, then the value of imported goods shall, be based on the unit price at which the imported goods or identical or similar imported goods are sold in India, at the earliest date after importation but before the expiry of 90 days after such importation.

3) Value to be the unit price at which imported/identical /similar goods are sold in greatest aggregate quantity after further processing to unrelated persons

If neither the imported goods nor identical nor similar imported goods are sold in India in the condition as imported, then, the value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons who are not related to the seller in India. In such determination due allowance shall be made for the value added by processing and the deductions provided for in items (i) to (iii) of sub-rule (1).

Examples:

As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

Sale quantity	Unit price	Number of sales	Total quantity sold at each Price
1 -10 units	100	10 sales of 5 units 5 sales of 3 units	65
11-25 units	95	5 sales of 11 units	55
Over 25 units	90	1 sale of 30 units 1 sale of 50 units	80

As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500, therefore, the unit price in the greatest aggregate quantity is 95.

A third example would be the following situation where various quantities are sold at various prices.

(a) Sales

Sale quantity	40 units	30 units	30 units	15 units	50 units	25 units	35 units	5 units
Unit price	100	100	90	100	95	105	90	100

(b) Totals

Total quantity Sold	65	50	60	25
Unit price	90	95	100	105

In this example, the greatest number of units sold at a particular price is 65, therefore, the unit price in the greatest aggregate quantity is 90.

9.4.6 Computed value - [Rule 8]

If value cannot be determined under any of the above rules, then value needs to be determined on the basis of computed value as specified in this rule.

1) Value to be computed value i.e. sum of costs of material, processing charges, profit & general expenses and costs referred to in rule 10

Subject to the provisions of rule 3, the value of imported goods shall be based on a computed value, which shall consist of the sum of:-

- ✓ the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- ✓ an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind which are made by producers;
- ✓ the cost or value of all other expenses under sub-rule (2) of rule 10.

9.4.7 Residual method - [Rule 9]

If value cannot be determined under any of the above rules, then the last option is that the value needs to be decided based on this rule. It says that reasonable means must be used to determine the value.

1) Value to be determined using reasonable means subject to the maximum of selling price in the ordinary course of business

Subject to the provisions of rule 3, where the value of imported goods cannot be determined under the provisions of any of the earlier rules, then the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and on the basis of data available in India. Provided that the value so determined shall not exceed the price at which such or like goods are ordinarily sold at the time and place of importation in the course of international trade, when the seller or buyer has no interest in the business of other and price is the sole consideration for the sale.

2) Values not to be determined in certain ways

Value under this rule shall not be determined on the following basis:

- ✓ the selling price in India of the goods produced in India;
- ✓ a system which provides for the acceptance for customs purposes of the highest of the two alternative values;
- ✓ price of the goods on the domestic market of the country of exportation;
- ✓ cost of production other than computed values as determined for identical or similar goods in accordance with the provisions of rule 8;
- ✓ price of the goods for the export to a country other than India;
- ✓ minimum customs values;
- ✓ arbitrary or fictitious values.

The residuary method can be considered if valuation is not possible by any other method.

[Sanjay Chandiram v. CC 1995 (77) E.L.T. 241 (S.C.)]

9.4.8 Costs and Services - [Rule 10]

This rule gives out details about whether certain specific costs should be included in the costs while ascertaining the transaction value of the imported goods. The details of each such costs, its includability and conditions thereof are provided below:

a) Cost of commissions, brokerage, packing etc. to be included in the transaction value

The following to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely:-

i. **commissions** and **brokerage**, except buying commissions;
ii. the **cost of containers** which are treated as being one for customs purposes with the goods in question;
iii. the **cost of packing** whether for labour or materials.

b) Cost of materials, components, spares, consumables and know-how to be included in the transaction value when supplied by the buyer free of charge

The value of the following goods and services when supplied directly or indirectly by buyer free of charge or at reduced cost for use or in connection with production and sale for export of imported goods to the extent that such value has not been included in the price actually paid or payable namely:-

- ✓ materials, components, parts and similar items incorporated in the imported goods;
- ✓ tools, dies, moulds and similar items used in the production of the Imported goods;
- ✓ materials consumed in the production of the imported goods;
- ✓ engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods.

c) Cost of royalties and license fees to be included in the transaction value

Royalties and license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

Notes:

i) Costs of royalties and license fees to be added even if incurred after the importation of goods

The above charges shall be added to the price, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

ii) Royalties include patents, trademarks and copyrights but does not include the rights to reproduce the imported goods

The royalties and license fees includes among other things, payments in respect to patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

iii) Rights to distribute or resell imported goods not to be included in transaction value , if they are not a condition for the sale

Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are **not a condition of the sale** for export to the country of importation of the imported goods.

d) Value of subsequent resale whether directly or indirectly shall be includible

The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller shall be included in the transaction value;

e) All other payments made by the buyer to any other person as a condition of sale shall be included in the transaction value

All other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

Note:

i) Above costs to be added even if incurred after the importation of goods

The above charges shall be added to the price, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

Some other inclusions in the transaction value:

For the purposes of section 14(1) of the act and these rules, the value of the imported goods shall be the value of such goods for delivery at the time and place of importation and shall include the following:

a) Cost of Transportation

i. ***Cost of transportation upto the place of importation is includible***

Wherever ascertainable, the actual cost of transportation of the imported goods up to the place of importation shall be includible in the transaction value.

ii. ***Cost of transportation to be 20% of FOB value, if the same is not ascertainable***

Where the cost of transportation is not ascertainable, such cost shall be taken on adhoc basis as 20% of FOB value of the goods.

iii. ***If goods are imported by air then cost of transportation in any case shall not exceed 20% of FOB value even if the cost is ascertainable***

In case of goods imported by air, the cost of transportation even if it is ascertainable, shall not exceed 20% of FOB value of the goods.

iv. **Ship Demurrage charges, lighterage and barge charges shall be included**

The cost of transport of the imported goods includes the ship demurrage charges on charted vessels, lighterage or barge charges.

b) Loading, unloading and handling charges

i. ***Loading, unloading and handling charges equal to 1% of the CIF value shall be included***

The cost of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation shall be includible in the transaction value. In all cases it can be assumed that the cost of loading, unloading and handling charges shall be equal to 1% of the CIF value [i.e. FOB value of the goods + the cost of transport + the cost of insurance] referred to in clause (c);

c) Insurance costs

i. ***Cost of insurance is includible***

Wherever ascertainable, the actual cost of insurance of the imported goods shall be includible in the transaction value,

ii. ***Cost of insurance to be 1.125% of FOB value, if the same is not ascertainable***

Where the cost of insurance is not ascertainable, such cost shall be equal to 1.125% of FOB value of the goods imported.

Summary of key inclusions/exclusions from the value

<table>
<tr><th>Nature of expenditure</th><th colspan="4">Treatment</th></tr>
<tr><td colspan="5">Mandatory Additions – to be included even if not given in the question</td></tr>
<tr><td rowspan="4">Cost of Transportation</td><td rowspan="3">Cost upto goods reaching India</td><td rowspan="2">If cost is ascertainable</td><td>By Air</td><td>Restricted to 20% of FOB or Actual Cost (whichever is less)</td></tr>
<tr><td>By Water or Land</td><td>Actual Cost. (It may be also more than 20% of FOB).</td></tr>
<tr><td>If cost is not ascertainable or not given in question</td><td>By Air, water or land</td><td>20% of the FOB (Cost can be assumed at 20% of FOB)</td></tr>
<tr><td>Cost after goods reaching India</td><td colspan="3">Not to be included in the value.</td></tr>
<tr><td colspan="5">Note:
a) Ship Demurrage charges, Lighterage or barge charges are always included in the cost of transportation for the above calculation.
b) Transport cost from port to Inland container depot or Container Freight station shall not be included in the cost of transportation</td></tr>
<tr><td rowspan="3">Insurance</td><td rowspan="2">Cost upto goods reaching India</td><td colspan="2">If cost is ascertainable</td><td>Actual Cost of Insurance</td></tr>
<tr><td colspan="2">If cost is not ascertainable or not given in question</td><td>1.125% of the FOB value</td></tr>
<tr><td>Cost after goods reaching</td><td colspan="3">Not to be included in the value.</td></tr>
</table>

	India	
Loading & Unloading charges and Handling charges	Fixed @ 1% of the CIF Value (irrespective of whatever cost incurred) **Note:** a) It must be added, even if it is not given in the question. b) CIF value = [FOB value + Transportation + Insurance]	
Note: a) All the above charges i.e. Transportation, Insurance & Loading are the mandatory inclusions. They need to be included even if not given in the question. b) If CIF value is given in question, then cost of transportation and cost of insurance needs to be back calculated using the following formula: [Cost of transportation = CIF value x 20/120] & [Cost of insurance = CIF value x 1.125/101.125]		

Optional additions only if given in the question	
Commission/Brokerage	**Included in the value,** if payable in India in Indian currency or abroad in foreign currency. But if it is a **buying commission**, then it is **not be included.** **Note:** a) **'Buying commission'** refers to the fees paid by an importer to his agent for service of representing him abroad in purchase of goods being valued. b) If question is silent regarding the type of commission, then must not be considered as Buying commission
Packing Charges	**Included in the value.**
Royalty & License fees	**Included in the value,** only if buyer is required to pay as a condition of the sale of goods being valued. **Note:** a) It includes payments in respect of patents, trademarks and copyrights. b) Charges for **right to reproduce** the imported goods in the country of importation **shall not be added.** c) Payments made by the buyer for the **right to distribute or resell** the imported goods **shall not be added**, if such payments are not a condition for the sale. d) Where royalty, license fee or any other payment for a process is includible in the value, then such charges shall be included even if said process if subjected to after the importation of such goods in India.
Materials, Tools, Moulds, Dies supplied from India	a) **Not to be included,** If supplied free of cost; b) **Concessional value to be included**, if supplied at the concessional cost.
Design/ Development/ Art work	a) **Included in the value,** if done abroad; b) **Not to be included,** if done in India.
Container	a) **Included in the value**, if the container is not returnable; b) **Not to be included**, if the container is returnable.
Payment by importer on behalf of the supplier	**Included in the value.**
Subsequent sale proceeds	**Included in the value.**
Note: As a general rule, expenses will be added if they are incurred at the time of importation of the goods. But if expenses are incurred after the arrival of goods in India, then the same need not be	

included/added.

Technical terms relating to value in the course of import or export

Ex-Factory Price	It is the price of the goods as comes out of the factory. It includes cost of production and manufacturer's margin of profit.
F.A.S (Free Along Side)	It is the cost at which the export goods are delivered alongside the ship, ready for shipment. It includes ex-factory +local freight + local taxes.
F.O.B. (Free on Board)	Technically there is not much of a difference between FAS and FOB cost. FOB means the stage at which the goods are placed on board the conveyance carrying the vessel. It can be said to include FAS + loading charges + export duty cess.
C.I.F. (Cost Insurance Freight)	It is the cost at which the goods are delivered at the Indian port. It covers cost of goods. Sometimes there is referred as CFC also.

Format for Computation of Total Value and Customs Duty

Particulars	**Total Value**	**Customs Duty**
FOB Price /Value	XXXX	
Add: Freight - Not given 20% of FOB value - If by Air Then F ≤ 20% of FOB value	XX	
Add: Insurance - If by Air Then I ≤ 1.125% of FOB value	XX	
Add: Other expenses upto Indian Port	XX	
CIF /GIF	XXXX	
Add: Landing charges 1% of CIF [Whether given in question or not]	XX	
Assessable Value	**XXXX**	
Add : BCD Standard Rate/Ref Rate	XX	XX
Add : CVD u /s 3(1) – on [AV+BCD]	XX	XX
Add : EC 2% - ON BCD + CVD u/s 3 (1) SHEC 1% - ON BCD+CVD u/s 3 (1)	XXXX XX	XX
Add : CVD u/s 3(5) but maximum to 4% on :- AVCD+CVD+CED	XX	XX
Total value before other duties	XX	XX
Add: Protective duty u/s 6 of CTA1 1975	XX	XX
Add: Safeguard duty u/s 8B of CTA 1975	XX	XX
Add: Anti subsidy duty u/s 9 of CTA, 1975	XX	XX
Add: NCCD [national calamity contingent duty	XX	XX
Total value before ADD	**XXXX**	**XX**
Add: Anti dumping duty u/s 9A	XX	XX
Total value /Total custom duty	**XXXX**	**XX**

9.4.9 Declaration by the importer - [Rule 11]

This is a procedural rule, which says that proper documents and full and accurate details must be maintained by the importer. Department can anytime when required ask for any information based on which the importer has adopted value for paying customs duty.

1) Full & accurate details relating to the value of the imported goods needs to be furnished

The importer or his agent shall furnish –

- ✓ a declaration disclosing full and accurate details relating to the value of imported goods; and
- ✓ any other statement, information or document including an invoice of the manufacturer or producer of the imported goods and in case where the goods are imported from or through a person other than the manufacturer or producer then such document as considered necessary by the proper officer for determination of the value of imported goods under these rules.

2) Proper officer has right to question truth or accuracy of any statement, information submitted

Nothing contained in these rules shall be construed as restricting or calling into question the right of the proper officer of customs to satisfy himself as to the truth or accuracy of any statement, information, document or declaration presented for valuation purposes.

3) Confiscation, penalty and prosecution applies in case of wrong declaration

The provisions of the Customs Act, 1962 relating to confiscation, penalty and prosecution shall apply to cases where wrong declaration, information, statement or documents are furnished under these rules.

9.4.10 Rejection of Declared value - [Rule 12]

This rule gives rights to department to reject the value declared by importer provided the department gives reasonable grounds based on which such value adopted by importer is being rejected.

1) Transaction value under rule 3(1) cannot be applied if the proper officer has reasonable doubt on truth or accuracy of value declared

When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the transaction value of such imported goods cannot be determined under the provisions of sub-rule (1) of rule 3.

2) Grounds for doubting truth or accuracy to be intimated to importer on being requested

At the request of an importer, the proper officer, shall intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).

9.5 Customs valuation (Determination of Value of Export Goods) Rules, 2007

Generally, export of goods is exempt from customs duty. However, in respect of certain goods as notified from time to time government levies customs duty on exports if it is of the opinion that such goods are in scarce in home country for self consumption or in case of any other reason as deem reasonable. In order to decide the amount of duty that is required to be paid on goods exported, we need to understand how to determine the value of the goods. Can the value be the transaction value at which exporter has sold goods to foreign customer? Or in what circumstances value cannot be transaction value? And if not transaction value then how to arrive at value can be understood from these rules i.e. Customs Valuation (Determination of value of Export Goods) Rules, 2007.

9.5.1 Determination of the method of valuation - [Rule 3]

This rule provides that value shall be transaction value at which goods are sold by exporter to foreign customer. It also says that such value can be adopted even *if buyer and seller are related*.

1) Value to be transaction value even if buyer and seller are related provided relationship has not influenced price

Subject to rule 8, the value of export goods shall be the transaction value. The transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price.

2) Value to be determined by proceeding sequentially through rules 4 to 6

If the value cannot be determined under the provisions of sub-rule (1) and sub-rule (2), the value shall be determined by proceeding sequentially through rules 4 to 6.

9.5.2 Determination of export value by comparison - [Rule 4]

If value cannot be determined by applying rule 3 because of any reason, then this rule specifies that value of like kind or quality of goods shall be adopted.

1) Value shall be the transaction value of like goods exported at or about the same time to other buyers in the same or any other destination country

Value of the export goods shall be based on the transaction value of goods of like kind or quality exported at or about same time to other buyers in same destination country of importation or in its absence another destination country and adjusted in accordance with provisions of sub-rule (2).

2) Proper officer can do certain reasonable adjustments from the above value

In determining the value of export goods under sub-rule (1), the proper officer shall make such adjustments as appear to him reasonable, taking into consideration the relevant factors, including-

- ✓ difference in the dates of exportation,
- ✓ difference in commercial levels and quantity levels,
- ✓ difference in composition, quality and design between the goods to be assessed and the goods with which they are being compared,
- ✓ difference in domestic freight and insurance charges depending on the place of exportation.

9.5.3 Computed value method - [Rule 5]

If value cannot be determined by applying rule 3 or 4 the value shall be determined as per this rule on the basis of computed value.

1) Value to be computed value i.e. sum of costs of material, processing charges, profit & general expenses

If the value cannot be determined under rule 4, it shall be calculated based on a computed value, which shall include the following:-

- ✓ cost of production, manufacture or processing of export goods, charges, if any, for the design or brand;
- ✓ an amount towards profit.

9.5.4 Residual Method - [Rule 6]

If value cannot be determined under any of the above rules, then the last option is that the value needs to be decided based on this rule. This rule says that reasonable means must be used to determine the value of the goods.

1) Value to be determined using reasonable means

Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

9.5.5 Declaration by the Exporter - [Rule 7]

Same as rule 11 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

9.5.6 Rejection of the Declared value - [Rule 8]

Same as rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

Practical Questions & Answers

Question 1

A consignment of 800 metric tonnes of edible oil of Malaysian origin was imported by a charitable organization in India for free distribution to below poverty line citizens in a backward area under the scheme designed by the Food and Agricultural Organization. This being a special transaction, a nominal price of US$ 10 per metric tonne was charged for the consignment to cover the freight and insurance charges. The Customs House found out that *at or about the time of importation of this gift consignment there were following imports of edible oil of Malaysian origin:*

Quantity imported in metric tonnes	*Unit price in US $ (CIF)*
20	*260*
100	*220*
500	*200*
900	*175*
400	*180*
780	*160*

The rate of exchange on the relevant date was 1 US $ = Rs. 60.00 and the rate of basic customs duty was 10% ad valorem. There is no countervailing duty or special additional duty. Calculate the amount of duty leviable on the consignment under the Customs Act, 1962 with appropriate assumptions and explanations, where required

Answer:

Determination of transaction value of the subject goods:-

In the instant case, while determining the transaction value of the goods, following factors need consideration:-

1. In the given case, US $10 per metric tonne has been paid only towards freight and insurance charges and no amount has been paid or payable towards the cost of goods. Thus, there is no transaction value for the subject goods. Consequently, we have to look for transaction value of identical goods under rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Customs Valuation (DVIG) Rules, 2007].
2. Rule 4(1)(a) of the aforementioned rules provides that subject to the provisions of rule 3, the value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued. In the six imports given during the relevant time, the goods are identical in description and of the same country of origin.
3. Further, rule 4(1)(b) of the said rules requires that the comparable import should be at the same commercial level and in substantially same quantity as the goods being valued. Since, nothing is known about the level of the transactions of the comparable consignments, it is assumed to be at the same commercial level.
4. As far as the quantities are concerned, the consignments of 20 and 100 metric tonnes cannot be considered to be of substantially the same quantity. Hence, remaining 4 consignments are left for our consideration.
5. However, the unit prices in these 4 consignments are different. Rule 4(3) of Customs Valuation (DVIG) Rules, 2007 stipulates that in applying rule 4 of the said rules, if more than one transaction value of identical goods is found, the lowest of such value shall be used to determine the value of imported goods. Accordingly, the unit price of the consignment under valuation would be US $ 160 per metric tonne.

Computation of Amount of Duty Payable

Particulars	**Amount**
CIF value of 800 metric tonnes = 800 x 160 = US $ 1,28,000 At the exchange rate of $1 = Rs. 60 CIF Value (in Rupees)	Rs. 76,80,000
Add: Landing Charges at 1% [As per rule 10(2) of customs valuation (DVIG) Rules, 2007 Landing charges @ 1% are to be compulsorily added to CIF value to arrive at the assessable value]	76,800
Total	**77,56,800**
10% of Ad Valorem duty on Rs. 77,56,800	7,75,680
Add: Education cess @ 2% (rounded off)	15,514
Add: Secondary and higher education cess @ 1% (rounded off)	7,757
Total custom duty payable	**7,98,951**

Question 2

A material was imported by air at CIF price of 5,000 US$. Freight paid was 1,500 US$ and insurance cost was 500 US$. The banker realized the payment from importer at the exchange rate of Rs. 61 per dollar. Central Board of Excise and Customs notified the exchange rate as Rs. 60 per US$. Find the value of the material for the purpose of levying duty.

Answer:

Computation of assessable value

Particulars	**Amount in (US $)**
CIF value	5,000
Less: Freight	1,500
Less: Insurance	500
Therefore, FOB value	3,000
Assessable value for Customs purpose	
FOB value	**3,000**
Add: Freight (20% of FOB value) **[Note 1]**	600
Add: Insurance (actual)	500
CIF for customs purpose	4,100
Add: 1% for landing charges **[Note 2]**	41
Value for customs purpose	4,141
Exchange rate as per CBEC **[Note 3]**	Rs.60 per US $
Assessable value	**Rs.2,48,460**

Notes:

1. If the goods are imported by air, the freight cannot exceed 20% of FOB price [Second proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
2. Even if there is no information regarding landing charges, still they are charged @ 1% of CIF value [Clause (ii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
3. Rate of exchange determined by CBEC is considered [clause (a) of the explanation to section 14 of the Customs Act, 1962].

***Question* 3**

M/s. Foreign Trade International Ltd. have imported one machine from England. They have given the following particulars.

F.O.B. value of machine	*8,000 UK Pounds*
Freight paid (air)	*2,500 UK Pounds*
Design and development charges paid in UK	*500 UK Pounds*
Commission payable to local agent @ 2% of F.O.B., in Indian Rupees	
Date of bill of entry	*24.10.2015 (Rate BCD 10%; Exchange rate as notified by CBEC Rs.100 per UK Pound)*
Date of entry inward	*20.10.2015 (Rate of BCD 20%; Exchange rate as notified by CBEC Rs. 98 per UK Pound)*
Additional duty leviable under section 3(1) of the Customs Tariff Act, 1975 is 12.5%	
Additional duty leviable under section 3(5) of the Customs Tariff Act, 1975 is as applicable	
Insurance charges have been actually paid but details are not available.	

Compute the assessable value of the machine and the customs duty payable by M/s. Foreign Trade International Ltd.

Answer:

Computation of assessable value and duty thereon

Particular	Amount
FOB value	8000 UK pounds
Add: Design and development charges	500 UK pounds
Add: Air freight (8,000 x 20%) **(Note-1)**	1600 UK pounds
Add: Insurance 1.125% of FOB **(Note-2)**	90 UK pounds
Total	**10,190 UK pounds**
Total in Rupees @ Rs. 100 per pound **(Note-3)**	**10,19,000**
Add: Local agency commission (2% of 8000 UK pounds) = 160 UK pounds × Rs. 100	16,000
C.I.F value	10,35,000
Add: Landing charges @ 1% of CIF value **(Note 4)**	10,350
Assessable value	**10,45,350**
Add: Basic custom duty @10% **(Note-5)**	1,04,535
Total	**11,49,885**
Add: Additional duty leviable under section 3(1) @12.5%	Rs. 1,43,735.63
Add: Education cess (3% of custom duty) = 3% of (Rs.1,04,535 + Rs. 1,43,735.63) = Rs. 2,48,270.63	7,448.12
Total for additional duty leviable under section 3(5)	Rs.13,01,068.75
Additional duty u/s 3(5) payable @ 4% (Note 6)	52,042.75
Total duty (Rs.1,04,535 + Rs. 1,43,735.63 + Rs.7,448.12 + Rs.52,042.75)	3,07,761.5
Total duty payable (Rounded off)	**Rs. 3,07,762**

Notes:

1. If the goods are imported by air, the freight cannot exceed 20% of FOB price [Second proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
2. Where the insurance charges are not ascertainable, such cost is taken as 1.125% of FOB value of the goods [Clause (iii) of the first proviso to Rule 10(2) of the Customs (Determination of value of Imported Goods) Rules, 2007.
3. The rate of exchange notified by the CBEC on the date of presentation of bill of entry has been considered [Section 14 of the Customs Act, 1962].
4. Even if there is no information regarding landing charges, still they are charged @ 1% of CIF value [Clause (ii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
5. Section 15 of the Customs Act, 1962 provides that rate of duty shall be:- the rate in force on the date of presentation of bill of entry or the rate in force on the date of entry inward whichever is later.
6. Additional duty leviable under section 3(5) of the Customs Tariff Act, 1975 is charged @ 4% of the value of the imported article.

Question 4

Compute the duty payable under the Customs Act, 1962 for an imported equipment based on the following information:

i. *Assessable value of the imported equipment US $ 10,100*
ii. *Date of bill of entry is 25.4.2015. Basic customs duty on this date is 10% and exchange rate notified by the Central Board of Excise and Customs is US $ 1 = Rs. 65.*

iii. *Date of entry inwards is 21.4.2015. Basic customs duty on this date is 20% and exchange rate notified by the Central Board of Excise and Customs is US $ 1 = Rs. 60.*
iv. *Additional duty payable under section 3(1) of the Customs Tariff Act, 1975: 12.5%*
v. *Additional duty under section 3(5) of the Customs Tariff Act, 1975: 4%.*
vi. *Educational cess @ 2% and secondary and higher educational cess @ 1%.*

Make suitable assumptions where required and show the relevant workings and round off your answer to the nearest rupee.

Answer:

Computation of Custom duty payable

Particulars	Amount in Rs.
Assessable value (10,100 x 65)	6,56,500
Add: Basic custom duty @ 10%	65,650
Total	**7,22,150**
Add : Additional duty u/s section 3(1) @ 12.5%	90,268.75
Total	**8,12,418.75**
Add : Education Cesses (65,650+90,268.75) x 3%	4,677.56
Total	**8,18,054.80**
Additional duty u/s 3(5) @ 4%	32,722.19
Total custom duty payable (65,650+90,268.75+4,677.56+32,722.19)	1,93,318.5
Custom duty payable (rounded off to nearest rupee)	**1,93,319**

Notes:

1. Rate of exchange notified by CBEC as prevalent on the date of filing of bill of entry would be the applicable rate [Proviso to section 14(1) of Customs Act,1962]
2. Rate of duty would be the rate as prevalent on the date of filing of bill of entry or entry inwards whichever is later. [Proviso to section 15 of the Customs Act, 1962].

Question 5

Assessable value of an item imported is Rs.1,00,000. Basic customs duty is 10%, additional duty of custom leviable under section 3(1) of the Customs Tariff Act is 12.5%, and education cesses are 3% on duty. Additional duty of customs leviable under section 3(5) of the Customs Tariff Act is exempt. Compute the amount of total customs duty payable. Also, state the amount of CENVAT credit available to the importer and how it can be utilised by him.

Answer:

Computation of customs duty payable

Particulars	Amount in Rs.
Assessable Value	1,00,000
Basic customs duty @ 10%	10,000
Sub-Total	1,10,000
Additional duty u/s 3(1) of the Customs Tariff Act @ 12.5% of Rs. 1,10,000 i.e. (Rs. 13,750)	13,750
Education cesses 3% on Rs. 23,750 [(2) + (4)]	712.5
Total customs duty payable [(2) + (4) + (5)]	**24,462.5**

CENVAT credit of additional duty of customs under section 3(1) of the Cutoms Tariff Act, 1975 [CVD] of Rs.13,750 will be available to the importer. The CVD of Rs.13,750 will be available as CENVAT credit for payment of excise duty or service tax as provided in CENVAT Credit Rules, 2004. Education cesses of Rs.712.5 paid on imported goods will not be available as CENVAT credit.

Question 6

XYZ Industries Ltd., has imported certain equipment from Japan at an FOB value of 2,00,000 Yen (Japanese). The other expenses incurred by M/s. XYZ Industries in this connection are as follows:

Freight from Japan to Indian Port	*20,000 Yen*
Insurance paid to insurer in India	*Rs. 10,000*
Designing charges paid to Consultancy firm in Japan	*30,000 Yen*
M/s. XYZ Industries had expended Rs.1,00,000 in India for certain development activities with respect to the imported equipment	
XYZ Industries had incurred road transport cost from Mumbai port to their factory in Karnataka	*Rs. 30,000*
The Central Board of Excise and Customs had notified for purpose of section 14 of the Customs Act, 1962 exchange rate of 1 Yen =Rs. 0.63. The inter Bank rate was 1 Yen = Rs.0.65	
M/s XYZ Industries had effected payment to the Bank based on exchange rate 1 Yen = Rs.0.66	
The commission payable to the agent in India was 5% of FOB value of the equipment in Indian Rupees.	

Arrive at the assessable value for purposes of customs duty under the Customs Act, 1962.

Answer:

Computation of assessable value

Particulars	**Amount**
FOB value	2,00,000.00 Yen
Add: Ocean freight	20,000.00 Yen
Add: Designing charges paid in Japan	30,000.00 Yen
Total	2,50,000.00 Yen
Total value in Indian rupees 2,50,000 × 0.63 **[Note 1]**	Rs. 1,57,500
Add: Insurance **[Note 2]**	Rs. 10,000.00
Add: Agent's commission at 5% of FOB value (5% of 2,00,000 Yen x 0.63)	Rs. 6,300.00
Total CIF price	Rs. 1,73,800
Add: Landing charges @ 1% (1% of 1,73,800) **[Note 3]**	Rs. 1,738
Assessable value for the purposes of customs duty	Rs. 1,75,538
Assessable value (Rounded off)	Rs. 1,75,538.00

Notes:

1. The rate of exchange notified by the CBEC has been considered [Clause (a) of the explanation to section 14 of the Customs Act, 1962].
2. Insurance has been assumed to be in respect of the cost of the equipment till the place of importation and is thus, includible [Rule 10(2)(c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
3. Landing charges have been considered as per clause (ii) of the proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007
4. Rule 10(1)(b)(iv) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 inter alia provides that value of development work undertaken elsewhere than in India is includible in the value of the imported goods. Thus, development charges paid for work done in India have not been included for the purposes of arriving at the assessable value.
5. As per rule 10(2)(a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, Cost of transport of the imported goods up to the place of importation is includible for the purpose of

valuation. Thus, transport cost from Mumbai port (place of importation) to the factory in Karnataka has not been considered for the purpose of customs valuation.

Question 7

From the following particulars, calculate assessable value and total customs duty payable:

- *i. Date of presentation of bill of entry: 20.6.2014 [Rate of BCD 20%; Exchange Rate: Rs. 61.60 and rate notified by CBEC Rs.62].*
- *ii. Date of arrival of goods in India: 30.6.2014 [Rate of BCD 10%; Exchange Rate: Rs. 61.80 and rate notified by CBEC Rs.63.00].*
- *iii. Rate of additional duty of customs leviable under section 3(1) of the Customs Tariff Act: 12.5%.*
- *iv. CIF value 2,000 US Dollars; Air freight 500 US Dollars, Insurance cost 100 US Dollars [Landing charges no ascertainable].*
- *v. Education Cess 2% & Secondary & Higher Education Cess 1%*
- *vi. Assume there is no additional duty of customs leviable under section 3(5) of the Customs Tariff Act.*

Answer:

Computation of assessable value and customs duty payable

Particulars		Amount
CIF value		2000 US Dollars
Less : Freight	500	
Insurance	100	600 US Dollars
FOB Value		1400 US Dollars
Add: Air Freight **[Note1]**	280	
Insurance (actual amount)	100	380 US Dollars
		1780 US Dollars
Value @ Rs.62.00 **[Note 2]**		1,10,360.00
Add: 1% for landing charges **[Note 3]**		1,103.60
Assessable Value		**1,11,463.60**
Basic Custom Duty @ 10% **(a) [Note 4]**		11,146.36
		1,22,609.96
Additional Custom Duty under section 3(1) **(b) (12.5% on** Rs.**1,22,609.96)**		15,326.245
Total of Basic Duty + Additional Duty **(c) = (a + b)**		
Primary Education Cess @ 2% & SAH Education Cess @1% on Rs. 26,472.605 (d)		794.18
Total Duty (c + d)		**27,266.785**

Notes:

1. If the goods are imported by air, the freight cannot exceed 20% of FOB price [Second proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
2. Rate of exchange notified by CBEC on the date of presentation of bill of entry would be the applicable rate. [Proviso to Section 14(1) of the Customs Act, 1962].
3. Even if there is no information regarding landing charges, still they are charged @ 1% of CIF value [Claus (ii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
4. Rate of duty would be the rate as prevalent on the date of filing of bill of entry or arrival of aircraft, whichever is later [proviso to section 15 of the Customs Act, 1962].

Question 8

From the particulars given below, find out the assessable value of the imported goods under the Customs Act 1962:

Particulars	*US $*
Cost of the machine at the factory of the exporter	*10,000*
Transport charges from the factory of exporter to the port for shipment	*500*
Handling charges paid for loading the machine in the ship	*50*
Buying commission paid by the importer	*50*
Freight charges from exporting country to India	*1,000*
Exchange rate to be considered: 1$ = Rs. 60	

Answer:

Computation of assessable value of the imported goods

Particulars	**US $**
Cost of the machine at the factory	10,000
Transport charges upto port	500
Handling charges at the port	50
F.O.B.	10,550
Freight charges upto India	1,000
Insurance charges @ 1.125% of F.O.B. **[Note 1]**	118.69
C.I.F.	11,668.69
C.I.F. in Indian rupees @ Rs. 60/- per $	Rs. 7,00,121.40
Add: Landing charges @ 1% of CIF **[Note 1]**	Rs. 7,001.21
Assessable Value	**Rs. 7,07,122.61**

Notes:

1. Insurance charges and landing charges have been included @ 1.125% of FOB value of goods and 1% of CIF value of goods respectively [First proviso to rule 10(2) of the Customs Valuation (Determination of Value o Imported Goods) Rules, 2007].
2. Buying commission is not included in the assessable value [Rule 10(1)(a)(i) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

Question 9

Jagat Corporation Limited imported some goods from US. The details of the transaction are as follows:

Authority	*Rate of exchange*
CBEC	*1 US $=Rs. 62*
RBI	*1 US $=Rs. 61*
CIF value of the goods is $ 1,50,000	
Rate of basic custom duty is 10%	
Rate of education cess is 2%	
Rate of secondary and higher education cess is 1%	

If similar goods were manufactured in India, excise duty payable as per Tariff is 12.5%. Additional duty of customs leviable under section 3(5) of the Customs Tariff Act is exempt. Calculate assessable value and total duty payable thereon.

Answer:

Computation of assessable value and total custom duty payable

Particulars	Amount
CIF Value	$ 1,50,000
Add: Landing charges @ 1% of CIF value **(Note - 1)**	$ 1, 500
	$1,51,500
Assessable value (in Rs.) =$1,51,500 × Rs.62 **(Note - 2)**	Rs.93,93,000
Add: Basic custom duty @ 10% (Rs.93,93,000 × 10%)	Rs. 9,39,300
	Rs.1,03,32,300
Add: Countervailing duty (Rs.1,03,32,300 × 12.5%)	Rs.12,91,537.5
	Rs.1,16,23,837.5
Education cess [(Rs.9,39,300 + Rs. 12,91,537.5) × 2%]	Rs. 44,616.75
Secondary and Higher Education Cess [(Rs.9,39,300 + Rs. 12,91,537.5) x 1%]	Rs. 22,308.375
Total custom duty payable (Rs.9,39,300 + Rs.12,91,537.5 + Rs.44,616.75 +22,308.375)	**Rs. 22,97,762.625**

Notes:

1. Landing charges at the rate of 1% of the CIF value of the imported goods, shall be added, whether ascertainable or not [First proviso to rule 10(2) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
2. The applicable exchange rate is the rate notified by CBEC. [Explanation to section 14(1) of the customs Act, 1962].

Question 10

BSA & Company Ltd. has imported a machine from U.K. From the following particulars furnished by it, arrive at the assessable value for the purpose of customs duty payable

Particulars	***Amount***
F.O.B cost of the machine	*10000 U.K. Pounds*
Freight (air)	*3000U.K. Pounds*
Engineering and design charges paid to a firm in U.K.	*500U.K. Pounds*
License fee relating to imported goods payable by the buyer as a condition of sale	*20% of F.O.B. cost*
Materials and components supplied in UK by the buyer free of cost valued at Rs. 20,000	
Insurance paid to the insurer in India	*Rs. 6,000*
Buying commission paid by the buyer to his agent in U.K.	*100 U.K. Pounds*

Other particulars:

i. *Inter-bank exchange rate as arrived by the authorized dealer: Rs.98 per U.K. Pound.*
ii. *CBEC had notified for purpose of section 14 of the Customs Act, 1962, exchange rate of Rs.100 per U.K. Pound.*
iii. *Importer paid Rs.5,000 towards demurrage charges for delay in clearing the machine from the Airport.*

(Make suitable assumptions wherever required and show workings with explanations)

Answer:

Computation of assessable value of machine imported by BSA & Co.

Particulars	Amount (£)
FOB cost of the machine	10,000
Add: Engineering and design charges paid in UK **[Note 1]**	500

Add: Licence fee relating to imported goods payable by the buyer as a condition of sale (20% of FOB) **[Note 2]**	2,000
	12,500
Value in Indian currency [£14,500 x Rs.100] **[Note 2]**	12,50,000
Add: Materials and components supplied by the buyer free of cost **[Note 1]**	20,000
Add: Freight **[Note 3]**	2,54,000
Add: Insurance paid to the insurer in India **[Note 1]**	6,000
CIF value	15,30,000
Add: Landing charges @ 1% **[Note 1]**	15,300
Assessable value (rounded off)	**15,45,300**

Notes:

1. Engineering and design charges paid in UK, licence fee relating to imported goods payable by the buyer as a condition of sale, materials and components supplied by the buyer free o cost and actual insurance charges paid are all includible in the assessable value. [Rule 10 of the Customs (Determination of Value of Imported Goods) Rules, 2007].
2. As per Explanation to section 14(1) of the Customs Act, 1962, assessable value should be calculated with reference to the rate of exchange notified by the CBEC.
3. If the goods are imported by air, the freight cannot exceed 20% of FOB price [Second proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
4. Landing charges @ 1% of the CIF value are includible in the assessable value, whether actually incurred or not. [Clause (ii) of first proviso to rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
5. Buying commission is not included in the assessable value. [Rule 10(1)(a) of the Customs (Determination of Value of Imported Goods) Rules, 2007].
6. Only ship demurrage charges on chartered vessels are included in the cost of transport of the imported goods. Thus, demurrage charges for delay in clearing the machine from The Airport will not be includible in the assessable value. [Explanation to Rule 10(2) of the Customs (Determination of Value of Imported Goods) Rules, 2007].

Question 11

Compute export duty from the following data:

i. FOB price of goods: US $ 1,00,000.
ii. Shipping bill presented electronically on 26-04-2015.
iii. Proper officer passed order permitting clearance and loading of goods for export (Let Export Order) on 04-05-2015.
iv. Rate of exchange and rate of export duty are as under:

	Rate of Exchange	*Rate of Export Duty*
On 26-04-2015	*1 US $ = Rs. 55*	*10%*
On 04-05-2015	*1 US $ = Rs. 56*	*8%*

v. Rate of exchange is notified for export by Central Board of Excise and Customs. (Make suitable assumptions wherever required and show the workings.)

Answer:

Computation of export duty

Particulars	**Amount (US $)**
FOB price of goods **[Note 1]**	1,00,000
	Amount (Rs.)
Value in Indian currency (US $ 1,00,000 x Rs. 55) **[Note 2]**	55,00,000
Export duty @ 8% [Note 3]	**4,40,000**

Notes:

1. As per section 14(1) of the Customs Act, 1962, assessable value of the export goods is the transaction value of such goods which is the price actually paid or payable for the goods when sold for export from India for delivery at the time and place of exportation.
2. As per third proviso to section 14(1) of the Customs Act, 1962, assessable value has to be calculated with reference to the rate of exchange notified by the CBEC on the date of presentation of shipping bill of export.
3. As per section 16(1)(a) of the Customs Act, 1962, in case of goods entered for export, the rate of duty prevalent on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation, is considered.

Question 12

Mother Mary Hospital and Research Centre imported a machine from Delta Scientific Equipments, Chicago for in house research. The price of the machine was settled at US $5,000. The machine was shipped on 10.04.2015. Meanwhile, the Hospital Authorities negotiated for a reduction in the price. As a result, Delta Scientific Equipments agreed to reduce the price by $ 850 and sent the revised price of $ 4,150 under a telex dated 15.04.2015. The machine arrived in India on 18.04.2015. The Commissioner of Customs has decided to take the original price as the transaction value of the goods on the ground that the price is reduced only after the goods have been shipped. Do you agree to the stand taken by the Commissioner? Give reasons in support of your answer.

Answer:

No, the Commissioner's approach is not correct in law. As per section 14 of the Customs Act, the transaction value of the goods is the price actually paid or payable for the goods at the time and place of importation. Further, the Supreme Court in the case *Garden Silk Mills v. UOI* has held that importation gets complete only when the goods become part of mass of goods within the country. Therefore, since in the instant case the price of the goods was reduced while they are in transit, it could not be contended that the price was revised after importation took place. Hence, the goods should be valued as per the reduced price, which was the price actually paid at the time of importation.

Question 13

A' had imported goods from Finland. Due to deep draught at the port, such goods were not taken to the jetty in the port but were unloaded at the outer anchorage. The charges incurred for such unloading and transport of the goods from outer anchorage to the jetty in barges (small boats) were Rs.*1,35,000. 'A' claims that such charges form part of the loading and unloading charges and should be deemed to be included in the addition of 1% of the CIF value of such goods, made under rule 10(2)(b) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Discuss the tenability of 'A's' claim.*

Answer:

Rule 10(2)(a) stipulates that for the purposes of section 14(1) of the Customs Act, 1962 and Valuation rules, value of imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include the cost of transport of the imported goods to the place of importation. The 'place of importation', as observed by the Supreme Court in the case of *Garden Silk Mills Ltd Versus UOI 1993 (113) E.L.T. 358 (S.C)* means the place where the imported goods reach the landmass of India in the customs area of the port, airport or land customs station, or if they are consumed before reaching the landmass of India, the place of consumption.

Further, 'Explanation' to rule 10(2) clarifies that the cost of transport of the imported goods includes, *inter alia*, barge charges. This Explanation is to take care of cases of imports by time chartered vessels or bulk carriers discharging goods on high seas needing additional expenditure for delivery of the goods at the 'place of importation' mentioned in rule 10(2)(a) above.

Therefore, in cases where the big mother vessels cannot enter the harbour for any reason and goods are brought to the docks by smaller vessels like barges, the cost incurred by the importer for bringing the goods to the landmass or place of consumption, such as barge charges will also be included in the cost of transportation. Therefore, 'A's claim is not tenable in law.

Question 14

M/s IES Ltd. (assessee) imported certain goods at US $ 20 per unit from an exporter who was holding 30% equity in the share capital of the importer company. Subsequently, the assessee entered into an agreement with the same exporter to import the said goods in bulk at US $ 14 per unit. When imports at the reduced price were effected pursuant to this agreement, the Department rejected the transaction value stating that the price was influenced by the relationship and completed the assessment on the basis of transaction value of the earlier imports i.e., at US $20 per unit under rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007. State briefly, whether the Department's action is sustainable in law, with reference to decided cases, if any.

Answer:

No, the Department's action is not sustainable in law. Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, *inter alia,* provides that persons shall be deemed to be "related" if one of them directly or indirectly controls the other. The word "control" has not been defined under the said rules. As per common parlance, control is established when one enterprise holds at least 51% of the equity shareholding of the other company. However, in the instant case, the exporter company held only 30% of shareholding of the assessee. Thus, exporter company did not exercise control over the assessee. So, the two parties cannot be said to be related.

The fact that assessee had made bulk imports could be a reason for reduction of import price. The burden to prove under-valuation lies on the Revenue and in absence of any evidence from the Department to prove under-valuation, the price declared by the assessee is acceptable. In the light of foregoing discussion, it can be inferred that Department's action is not sustainable in law.

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Section – C

SERVICE TAX

Chapter 17 - Place of Provision of Service

17.1 Background & Introduction

Service tax is a destination based consumption tax that is to say a service should be taxed in the jurisdiction of its consumption. However, as service is very intangible element which cannot be seen or touched but can be only felt therefore it is not easy to determine the jurisdiction of consumption of services. There could be a case where services are provided by a person located at one location, actually performed at another location while being delivered to a person located at a third location, and occasionally actually consumed at one another location or over a larger geographical territory, falling in more than one taxable jurisdiction, therefore in such a situation it is pertinent to determine the place where the service is provided and which country shall bear the burden of tax.

Upto June 30, 2012, the provisions relating to import and export of services were contained in the separate set of rules namely:

- Taxation of Services (Provided from Outside India and Received in India) Rules, 2006; and
- Export of Services, Rules, 2005.

These erstwhile rules used to handle the subject of place of provision of services in case of import & export of services.

However, with effect from July 1, 2012 'Place of Provision of Service Rules' has been introduced to determine whether a service is an import of service i.e. when any taxable service is provided or agreed to be provided by any person who is located in the non-taxable territory and received by any person located in the taxable territory or whether a service is an export of service. Further, a service would be considered as an export of service in case the conditions specified by rule 6A of the Service Tax Rules, 1994 are fulfilled.

Place of Provision of Service Rules specifies the manner to determine the taxing jurisdiction for a service. These rules would determine the place where a service shall be deemed to be provided, in terms of section 66C read with section 94(hhh) of Chapter V of the Finance Act, 1994. Thus, if a service is provided in the taxable territory as per the said rules, it shall be chargeable to service tax, otherwise it shall not be chargeable to service tax. These rules have been notified vide *Notification No. 28/2012-S.T. dated 20.06.2012*.

Rules to be applicable for cross border transactions, or transaction with SEZ or Jammu & Kashmir

These rules does not hold much of relevance in case of any services that are provided, consumed, delivered or performed within the taxable territory. Therefore, the application of Place of Provision of Service rules holds its importance primarily for the following transactions:

- Cross Border Transactions;
- Transactions with suppliers or customers in the State of Jammu and Kashmir;
- Moreover, service providers operating within India from multiple locations, without having centralized registration would find these rules useful in determining the precise taxable jurisdiction applicable to their operations for their internal books and records purpose;
- Services that are wholly consumed within a SEZ, to avail the outright exemption.

17.2 Power of Central Government to Frame Rules - [Sec 66C]

1) Central Government is empowered to make rules for determining the place of provision of service

Section 66C empowers the Central Government to frame rules having regard to the nature and description of various services, to determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. Any rule made hereunder shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

17.3 Place of Provision of Services Rules, 2012

In order to understand the place where the service is provided, we have to refer to the place of provision of service rules, 2012. These are the set of 14 rules which determines the place of provision of service in each different situations and circumstances.

17.3.1 Order of application of rules - [Rule 14]

We shall begin our understanding of these rules from the very last rule i.e. Rule 14 as this rule gives out the order of application.

1) Later rule prevails over earlier rule

As per rule 14 of these rules, in cases where the provision of a service is, prima facie, determinable in terms of more than one rule, then in such a case the rule that occurs later among the list of rules that merit equal consideration shall be preferred over the rule that occurs earlier. Hence, in case where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable, then later rule would prevail over the earlier rule.

17.3.2 Main Rule - [Rule 3]

This is the main rule which is also termed as 'general rule' i.e. if the place of provision of service (POPS) cannot be determined under any other rule then it shall be determined by applying this rule.

1) POPS to be the location of service receiver and if not determinable then it shall be location of Service Provider

As per this rule the place of provision of a service shall be the location of service receiver. However, in case the location of the service receiver is not available in the ordinary course of business, then the place of provision of service shall be the location of the service provider.

Conceptual Notes:

Service Tax is a **destination based consumption tax**, therefore it means that as a concept tax shall be paid to the jurisdiction in which the services are consumed and not in the jurisdiction were the services are provided. Therefore, this rule specify that the location of the service receiver shall be the place of provision of service. Only in some exceptional cases, where the location of the service receiver is not available in the ordinary course of his business only then the location of service provider shall be considered as the place of provision of service. For instance, if the service is provided to an individual customer who comes to the premises of the service provider for availing the service and the provider has to, more often than not, rely on the declared location of the customer. In such cases, since the location of service recipient is not determinable, the place of provision will be the location of the service provider.

Implication of this rule:

By applying this rule if we notice that the location of receiver of a service is in the taxable territory, then such service will be deemed to be provided in the taxable territory and service tax will be payable. To the contrary, where by application of this rule we notice that the location of receiver of a service is outside the taxable territory, then no service tax will be payable on the said service.

What is Location of Service Receiver/Service Provider?

The bigger question that arises now is in order to determine the location of service receiver or the location of the service provider which location shall we take into consideration? Is it the location of the head quarters of the business unit or location of its branch or the location of residence of MD or location for which registration of service tax is obtained? In order to clear the ambiguity the law has specifically defined the term 'location of service provider' and 'location of service receiver'.

Location of Service Provider/Service Receiver - [Rule 2(h) & Rule 2(i)]

Location of Service Provider/Service Receiver shall be determined by applying the following steps sequentially:

A) If the Service Provider/Service Receiver is registered under service tax:

Where the service provider/service receiver has obtained a single registration, whether centralized or otherwise, then the location of service provider/receiver shall be premises for which such registration has been obtained.

B) If the Service Provider/Service Receiver is not registered under service tax:

i. The location of Service Provider/Service Receiver shall be the location of its **Business Establishment**.
ii. Where the services are provided from or used at a place other than the business establishment, that is to say, a fixed establishment elsewhere, then the location of such Service Provider/Service Receiver shall be the location of its **Fixed Establishment**.
iii. Where services are provided from or used at more than one establishment, whether business or fixed, then the location of service provider/receiver shall be the location of the **establishment most directly concerned** with the provision or use of the service.
iv. In the absence of any such above places, the location of service provider/receiver shall be the **usual place of residence**.

Meaning of the terms used:

1) Business establishment: It is the place where the essential decisions concerning the general management of the business are adopted, and where the functions of its central administration are carried out. This could be head office, or a factory, or a workshop, or shop/ retail outlet. However, a service provider or receiver can have only one business establishment. For instance, head office of M/s ABC Enterprises is in India, and its branches are in Malaysia, Singapore and London. The business establishment of M/s ABC Enterprises is in India.

2) Fixed establishment: It is a place (other than the business establishment) where there is a permanent and adequate human and technical resources to provide the services that are to be supplied by it, or to enable it to receive and use the services supplied to it for its own needs. It may be noted that in case the staff is temporarily available by way of a short visit to a place, such place cannot be termed as fixed establishment. For instance, George Telecoms of USA sets up an office with staff in India to provide services to Indian customers. Fixed establishment of George Telecoms is in India.

3) Establishment most directly concerned: Whether the establishment is most directly concerned with the provision/use of the service depends on the facts and supporting documentation, specific to each case. For instance, Shubham Ltd. is incorporated in India. However, it provides its services entirely from London. In the instant case, the location of Shubham Ltd. is London, being the place where the establishment most directly concerned with the supply is located.

4) Usual Place of Residence:

In case of	Usual place of residence
(i) A body corporate	Place where it is incorporated or otherwise legally constituted.
(ii)Telecommunication services	Billing address of service receiver.
(iii) An Individual	Place (country, state etc) where the individual spends most of his time for the period in question. Hence, an individual cannot have more than one usual place of residence.

Determination of POPS

Location of Service receiver	Location of Service provider	Location of Service recipient	Services performed	POPS	Service Tax payable
Known	Hyderabad	UK	Mumbai	UK	No
Known	Hyderabad	USA	Canada	USA	No
Not Known	Bengaluru	Mumbai	New Delhi	Bengaluru	Yes
Not Known	Bengaluru	Mumbai	UK	Bengaluru	Yes
Not Known	Bengaluru	Canada	Chennai	Bengaluru	Yes
Not Known	Bengaluru	USA	USA	Bengaluru	Yes
Known	Australia	UK	Chandigarh	UK	No
Known	USA	UK	Canada	UK	Outside the scope of ST

17.3.3 Place of provision of performance based services - [Rule 4]

This rule covers certain performance based services where physical possession of the goods or physical presence of the service recipient is mandatory to perform the services. What are those services and what shall be the place of provision of service in case of such kind of services is explained in this rule.

A) Performance based service in relation to goods:

1) POPS to be the place where the service is actually performed – physical possession of goods is mandatory

In case of any service provided in relation of goods where such goods are required to be made physically available by the recipient of service to the provider of service or to a person acting on behalf of the provider of service, in order to provide the service then the place of provision of service shall be the place where such service is actually performed.

Conceptual Notes:

The nature of services covered here are those which are related to goods, and such goods are to be made available to the service provider or person acting on behalf of the service provider to provide the service. In other words, only those services would be covered under this rule, where the service cannot be provided if the goods are not brought to the physical possession or control of the service provider. Below given are example of certain services which can be categorised under this rule wherein service cannot be provided unless goods come in the possession of the service provider.

Examples:

- ✓ Repair or reconditioning or other work on goods;
- ✓ Storage and warehousing services;
- ✓ Courier service;
- ✓ Goods Transport agency service;
- ✓ Cargo handling service (loading, unloading, packing or unpacking of cargo);
- ✓ Technical testing/inspection/certification/ analysis of goods;
- ✓ Dry cleaning services.

2) POPS to be the place where goods are situated even if above services are provided through electronic means – physical possession of goods is by electronic means

If the above nature of services are provided from a remote location by way of electronic means, the place of provision shall be the location where goods are situated at the time of provision of service.

Example:

Info systems solutions a call center situated in New Delhi provides computer repair services to XYZ Corp situated in USA by virtually gaining administration access of the computer system. In this case, place of provision of service shall be USA i.e. the place where the goods (computer) on which service is provided is situated.

3) This rule shall not apply in case imported goods are re-exported after repairs

This rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory other than that which is required for such repair.

It is important to note that such exclusion would not apply to goods that arrive in the taxable territory in the usual course of business and are subject to repair while such goods remain in the taxable territory. For application of this rule imported goods must have to be re-exported after the repairs.

Examples:

1) M/s ABC ltd receives certain goods sold earlier to its customers in USA for repairs of the same. It does the repairing and re-export the goods for which it charges $5000/-. What is the place of provision of service in this case?

Answer: Since, goods are repaired and re-exported, even though the service is in the nature of performance based service, still rule 4 shall not be applicable as it is specifically mentioned in this rule that it shall not apply in case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory. Since, goods are re-exported after repairs, rule 4 shall not apply and rule 3 shall be applicable i.e. place of provision of service shall be the location of service receiver which is outside the taxable territory and therefore no service tax shall be leviable on this transaction.

2) M/s XYZ ltd receives certain goods sold earlier to its customers in USA for repairs of the same. It does the repairing and send the goods to its other subsidiary company in India for which it charges Rs.3,00,000/-. What is the place of provision of service in this case?

Answer: Since, goods repaired are not re-exported, and the service is in the nature of performance based service, rule 4 shall be applicable as it is specifically mentioned in this rule that, this rule shall not apply only in case of a service provided in respect of goods that are temporarily imported into India for repairs are exported after the repairs without being put to any use in the taxable territory. Since, in the given case goods are not re-exported and are cleared within the taxable territory and therefore rule

4 shall be applicable and place of provision of service shall be the location where the service is performed i.e. in the taxable territory and therefore service tax shall be leviable on this transaction.

B) Performance based service in relation to services:

1) POPS to be the place where service is actually performed - physical presence of service receiver is mandatory

Services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service shall be the place where the service is actually performed.

Conceptual Notes:

The nature of services covered here are the services which are rendered in person and in the physical presence of the service receiver. The place of provision of such services shall be the location where the services are actually performed. Though these are generally rendered at the service provider's premises, they could also be provided at the customer's premises, or occasionally while the receiver is on the move. In other words, these services cannot be performed if the service receiver or person acting on behalf of service receiver is not physically available. Below given are example of certain services which can be categorised under this rule wherein service cannot be provided unless service receiver is physically available.

Examples:

- ✓ Cosmetic or plastic surgery
- ✓ Personal security service
- ✓ Health and fitness services
- ✓ Photography service (to individuals)
- ✓ Internet cafe service
- ✓ Classroom teaching

It shall also include the service actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver, in terms of the contractual arrangement between the provider and the receiver.

For example, a film producer contracts with a make-up expert for make-up of the lead actors of his film. In the given case, the film producer is the receiver of the service, but the service is rendered to the actors, who are receiving the make-up service on behalf of the film producer.

Determination of POPS

Location of Service provider	Location of Service recipient	Services performed	POPS	Service Tax payable
Hyderabad	UK	Hyderabad	Hyderabad	Yes
Hyderabad	USA	Canada	Canada	No
USA	Mumbai	Mumbai	Mumbai	Yes
USA	Mumbai	USA	USA	No
Bengaluru	Chennai	Bengaluru	Chennai (as per rule 8)	Yes
Bengaluru	Chennai	USA	Chennai (as per rule 8)	Yes

Australia	UK	Chandigarh	Chandigarh	Yes
USA	UK	UK	UK	Outside the scope of ST

17.3.4 Place of provision of services relating to Immovable Property - [Rule 5]

This rule cover those services that are relating an immovable property. It explains what kind of services are said to be related to immovable property and how the service shall be connected to the immovable property. Should there be a direct connection of the service with the immovable property or the indirect connection is also sufficient to be covered in this rule. It specifies what shall be the place of provision of service in such a case.

1) POPS to be the place where immovable property is located

The place of provision of services provided directly in relation to an immovable property including:

- ➢ Services provided in this regard by experts and estate agents,
- ➢ Provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever name called
- ➢ Grant of rights to use immovable property services for carrying out or co-ordination of construction work, including architects or interior decorators

shall be the place where the immovable property is located or intended to be located.

Conceptual Notes:

This rule applies if the service is directly in relation to immovable property located in taxable territory. The immovable property must be clearly identifiable to be the one from where, or in respect of which, a service is being provided. In other words, there needs to be a very close link or association between the service and the immovable property. This rule does not apply if a provision of service has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.

Examples of services directly related to land:

- ✓ Renting of immovable property;
- ✓ The surveying (such as seismic, geological or geomagnetic) of land or seabed;
- ✓ Legal services such as dealing with applications for planning permission;
- ✓ The supply of hotel accommodation or warehouse space.

Examples of services not directly related to land

- ✓ Advice or information relating to land prices or property markets because they do not relate to specific sites;
- ✓ Services of an agent who arranges finance for the purchase of a property;
- ✓ Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.

Determination of POPS

Location of Service provider	Location of Service recipient	Location of immovable property	POPS	Service Tax payable
Hyderabad	UK	Hyderabad	Hyderabad	Yes
Hyderabad	USA	Canada	Canada	No
USA	Mumbai	Mumbai	Mumbai	Yes
USA	Mumbai	USA	USA	No

Bengaluru	Chennai	Bengaluru	Chennai (as per rule 8)	Yes
Bengaluru	Chennai	USA	Chennai (as per rule 8)	Yes
Australia	UK	Chandigarh	Chandigarh	Yes
USA	UK	UK	UK	Outside the scope of ST

17.3.5 Place of provision of services relating to Events - [Rule 6]

This rule covers the services that are relating to an admission or organisation of any events and also ancillary services relating to admission into an event. It specifies what shall be the place of provision of service in case of events based services.

1) POPS to be the place where the event is held

The place of provision of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place where the event is actually held.

Examples:

- ✓ A well-known singer from USA intends to organize a concert in Delhi and Mumbai. Any service provided by an event manager, or the right to entry will be taxable in India since the event is held in India.
- ✓ Provision of sound engineering for an artistic event is a prerequisite for staging of that event and should be regarded as a service ancillary to its organization.
- ✓ A service of hiring a specific equipment to enjoy the event at the venue (against a charge that is not included in the price of entry ticket) is an example of a service that is ancillary to admission.
- ✓ A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event.

17.3.6 Place of provision of service provided at more than one location - [Rule 7]

Service as specified in rule 4, 5 & 6 shall be covered under that specific rule if it is provided in one location only, but if the services specified in rule 4, 5 & 6 are provided in more than one locations then instead of those rules, rule 7 must be applied. This rule specifies what shall be the place of provision of services, if such services are provided in more than the one location.

1) POPS to be the location in the taxable territory where greatest proportion of service is provided

Where any service referred to in rules 4, 5, or 6 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided.

Analysis:

This rule is applicable if the following conditions satisfy:

- ➢ Service is in the nature of either of the one as specified in rule 4 or 5 or 6; and
- ➢ Such service is provided at more than one location.

Note: It is important to note that this rule is applicable only for the services covered under rule 4, 5 or 6 and it is not applicable for services covered under other rules.

Example:
An Indian firm provides a 'technical inspection and certification service' for a newly developed product of an overseas firm (for a newly launched motorbike which has to meet emission standards in different States or countries). The testing is carried out in Maharashtra (20%), Kerala (25%), and Colombo (55%). Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, which in this case is Kerala.

17.3.7 Place of provision of service where provider and receiver are located in taxable territory - [Rule 8]

This rule is very important and it overrides all the above rules, i.e. irrespective of the above rules, it specifies what shall be the place of provision of service, if the location of service provider and the location of service receiver both are situated in the taxable territory.

1) POPS to be the location of the recipient of service if both provider and receiver are located in the taxable territory

In case the location of the provider of service as well as that of the recipient of service is in the taxable territory then Place of provision of a service in such case shall be the location of the recipient of service.

Analysis:
This rule is applicable in a situation where on application of one of the earlier rules i.e. rule 4 to 6, the place of provision of service provided in the taxable territory may be determinable to be outside the taxable territory. However, both service provider and the service receiver are located in the taxable territory. In this case, the place of provision of service is the location of the service receiver, i.e. the place of provision will be deemed to be in the taxable territory, notwithstanding the earlier rules.

Examples:
1) A machinery of Bahara India Ltd of Bangalore develops a technical problem in London. Bharat Machineries of Delhi deputes some engineers to undertake repairs at the site in London. But for this rule, rule 4(1) would apply in this case, and the place of provision would be London i.e. outside the taxable territory. However, by application of rule 7, since the service provider, as well as the receiver are located in the taxable territory, the place of provision of this service will be within the taxable territory.

2) An architect based in Mumbai provides his service to an Indian Hotel Chain (which has business establishment in New Delhi) for its newly acquired property in Dubai. If Rule 5 (Property rule) were to be applied, the place of provision would be the location of the property i.e. Dubai (outside the taxable territory). With this result, the service would not be taxable in India. whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India. By application of Rule 14, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.

17.3.8 Place of provision of specified services - [Rule 9]

There are certain services where tax must be levied at the location of service provider and the not at the location of service receiver. Since, if tax is levied on such services at the location of service receiver then certain anomalies exists and would be prone to tax evasion. Therefore, government has selected certain services where location service provider is taxed as against the general rule of taxing the location of service receiver. The list of such services is given in this rule.

1) POPS to be location of Service provider in case of certain specified services

The place of provision of the specified services shall be the location of the service provider. Specified services are as follows:-

a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;
b) Online information and database access or retrieval services;
c) Intermediary services;
d) Service consisting of hiring of all means of transport upto a period of one month other than,-
    i. aircrafts, and
    ii. vessels except yachts.

Analysis:

1) Banking services provided to persons other than account holders will be covered under the main rule - 3.

2) As per rule 2(l), "online information and database access or retrieval services" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network. These services must be delivered over the internet or an electronic network which relies on the internet or similar network for their provision. They should be completely automated, and require minimal human intervention.

3) As per rule 2(f), 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the main 'service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.

4) In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

i. An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price.
ii. The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging.
iii. The service provided by the intermediary on behalf of the principal is clearly identifiable.

5) Service consisting of hiring of all means of transport other than aircrafts and vessels (except yacht), upto a period of one month: Following will constitute means of transport:-

i. Land vehicles such as motorcars, buses, trucks;
ii. Vehicles designed specifically for the transport of sick or injured persons;
iii. Mechanically or electronically propelled invalid carriages;
iv. Trailers, semi-trailers and railway wagons.

6) Hiring of vessels or aircraft, whether for upto one month or more, will be covered by the general rule 3, i.e., the location of the service receiver. Hiring of yachts would, however, be governed by rule 9(d) i.e., in case of hiring of yachts upto one month, the place of provision of service would be the location of service provider.

Examples:

1) Example of services provided by a banking company/financial institution etc. to account holders in the normal course of business:-

- ✓ Services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc.
- ✓ Transfer of money including telegraphic transfer, mail transfer, electronic transfer etc.

2) Examples of 'Online information and database access or retrieval services' are:-
- ✓ Web-based services providing access or download of digital content;
- ✓ Digitized content of books and other electronic publications;
- ✓ Online news, flight information and weather reports.

3) Services provided by the following persons will qualify as 'intermediary services':-
- ✓ Travel Agent (any mode of travel);
- ✓ Tour Operator;
- ✓ Commission agent (for service *or goods*);
- ✓ Recovery Agent.

4) The following are not 'means of transport' for the purpose of clause (d) of this rule:-

i. Aircrafts;
ii. Vessels;
iii. Racing cars;
iv. Containers used to store or carry goods while being transported;
v. Dredgers, or the like.

Service consisting of hiring of: -		**Place of Provision of Service**	
		Location of Service Provider	**Location of Service Provider**
(i)	Aircraft up to a period of 20 days		✓
(ii)	Aircraft up to a period of 90 days		✓
(iii)	Vessel up to a period of 20 days		✓
(iv)	Vessel up to a period of 90 days		✓
(v)	Yachts up to a period of 20 days	✓	
(vi)	Yachts up to a period of 90 days		✓
(vii)	Trucks up to a period of 20 days	✓	
(viii)	Trucks up to a period of 90 days		✓

17.3.8.1 Clarification regarding levy of service tax on activities involved in relation to inward remittances from abroad to beneficiaries in India through MTSOs

The remittances of money from overseas through the Money Transfer Service Operator (MTSO) route is the transaction involving intermediary and involves the following sequence of transactions, in order to avoid multiple views and treatment given to this transaction, a clarification has been issued as under:
Step 1: Remitter located outside India (say 'A') approaches a MTSO/bank (say B) located outside India for remitting the money to a beneficiary in India; 'B' charges a fee from 'A'.

Step 2: 'B' avails the services of an Indian entity (agent) (say 'C') for delivery of money to the ultimate recipient of money in India (say 'E'); 'C' is paid a commission/fee by 'B'.

Step 3: 'C' may avail service of a sub-agent (D). 'D' charges fee/commission from 'C'.

Step 4: 'C' or 'D', as the case may be, delivers the money to 'E' and may charge a fee from 'E'

Circular No. 180/06/2014 ST dated 14.10.2014 has clarified the following issues in this regard:

Issues	Clarification
Whether service tax is payable on remittance received in India from abroad?	No service tax is payable *per se* on the amount of foreign currency remitted to India from overseas. As the remittance comprises money, it does not in itself constitute any service in terms of the definition of 'service' [Section 65B(44)].
Whether the service of an agent or the representation service provided by an Indian entity/ bank to a foreign MTSO in relation to money transfer falls in the category of intermediary service?	Yes. The Indian bank or other entity acting as an agent to MTSO in relation to money transfer, facilitates in the delivery of the remittance to the beneficiary in India. In performing this service, the Indian Bank/entity facilitates the provision of money transfer service by the MTSO to a beneficiary in India. For their service, agent receives commission or fee. Hence, the agent falls in the category of intermediary as defined in rule 2(f) of the Place of Provision of Service Rules, 2012.
Whether service tax is leviable on the service provided, as mentioned in point 2 above, by an intermediary/ agent located in India (in taxable territory) to MTSOs located outside India?	Service provided by an intermediary is covered by rule 9(c) of the Place of Provision of Service Rules, 2012. As per this rule, the place of provision of service is the location of service provider. Hence, service provided by an agent, located in India (in taxable territory), to MTSO is liable to service tax. The value of intermediary service provided by the agent to MTSO is the commission or fee or any similar amount, by whatever name called, received by it from MTSO and service tax is payable on such commission or fee.
Whether service tax would apply on the amount charged separately, if any, by the Indian bank/entity/agent/sub-agent from the person who receives remittance in the taxable territory, for the service provided by such Indian bank/entity/agent/sub-agent.	Yes. As the service is provided by Indian bank/entity/agent/sub-agent to a person located in taxable territory, the place of provision is in the taxable territory. Therefore, service tax is payable on amount charged separately, if any.
Whether service tax would apply on the services provided by way of currency conversion by a bank /entity located in India (in the taxable territory) to the recipient of remittance in India?	Any activity of money changing comprises an independent taxable activity. Therefore, service tax applies on currency conversion in such cases in terms of the Service Tax (Determination of Value) Rules. Service provider has an option to pay service tax at prescribed rates in terms of Rule 6(7B) of the Service Tax Rules 1994.
Whether services provided by sub-agents to such Indian Bank/entity located in the taxable territory in relation to money transfer is leviable to service tax?	Sub-agents also fall in the category of intermediary. Therefore, service tax is payable on commission received by sub-agents from Indian bank/entity.

17.3.9 Place of provision of Goods Transportation services - [Rule 10]

Special rule is made for determining the place of provision of services in case of services of transportation of goods, since in case of transport industry a vehicle, aircraft or vessel has to cross multiple jurisdictions and it shall be difficult to evaluate the place of provision of service for the said industry based on the above rules. Therefore, this rule specifies what shall be the place of provision of service in case of services of transportation of goods.

1) POPS to be the place of destination of goods in case of transport of goods other than by road

In case of place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods.

2) POPS to be the location of the person liable to pay tax in case of transport of goods by road

The place of provision of services of goods transportation agency shall be the location of the person liable to pay tax.

Analysis:

This first limb of the rule covers the service of transportation of goods, by way of air, vessel, rail. However, it does not cover the transportation of goods by courier or mail since courier or mail services are already covered under rule 4 i.e. performance based services. This second limb of the rule gives out separate place of provision of service in case for transportation of goods through road i.e. Goods Transportation Agency.

Note: "Goods transport agency" means any person who provides service in relation to transport of goods **by road** and issues consignment note, by whatever name called.

Examples:

1) A consignment of polished diamonds is consigned from Mumbai to New Jersey. The place of provision of goods transportation service will be New Jersey (outside India, hence not liable to service tax). Conversely, if a consignment of glassware is consigned from New York to Chennai, the place of provision will be Chennai.

2) Person liable to pay tax shall mean the person liable to pay service tax under section 68 of the Act or under rule 2(1)(d) of the Service Tax Rules, 1994 [Rule 2(m)]. For instance, a goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurugram (Haryana), to the premises of a dealer in Bhopal, Madhya Pradesh. XYZ is a registered assessee and is also the person liable to pay freight and hence person liable to pay tax, in this case. Here, the place of provision of the service of transportation of goods will be the location of XYZ i.e. Haryana.

17.3.10 Place of provision of Passenger Transportation services - [Rule 11]

Special rule is made for determining the place of provision of services in case of services of transportation of passengers, since as in case of transportation of goods, even in case of transport industry of passengers a vehicle, aircraft or vessel has to cross multiple jurisdictions and it shall be difficult to evaluate the place of provision of service for the said industry based on the above rules. Therefore, this rule specifies what shall be the place of provision of service in case of services of transportation of passengers.

1) POPS to be the place where the passenger embarks on the conveyance for a continuous journey

The place of provision in respect of a passenger transportation service shall be the place where the passenger embarks on the conveyance for a continuous journey.

Analysis:

1) This rule covers all types of passenger transport by means of road, rail, air or sea.

2) A **"continuous journey"** means a journey for which:-

(i) a single ticket has been issued for the entire journey; or

(ii) more than one ticket or invoice has been issued for the journey, by one service provider, or by an agent on behalf of more than one service providers, at the same time, and there is no scheduled stopover between any of the legs of the journey [Rule 2(d)].

3) **'Stopover'** means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time. All stopovers do not cause a break in continuous journey. Only such stopovers will be relevant for which one or more separate tickets are issued.

4) **'Leg of journey'** means a part of the journey that begins where passengers embark or disembark the conveyance, or where it is stopped to allow for its servicing or refuelling, and ends where it is next stopped for any of those purposes [Rule 2(g)].

Examples:

1) A travel on Delhi-London-New York-London-Delhi on a single ticket with a halt at London on either side, or even both, will be covered by the definition of continuous journey. However if a separate ticket is issued, say New York-Boston-New York, the same will be outside the scope of a continuous journey.

2) Determine place of provision of service in the following cases:

Journey	Place of provision	Taxability
Mumbai – Delhi	Mumbai	Yes, Place of embark of journey is Mumbai.
Mumbai - Delhi - Jaipur	Mumbai	Yes, Place of embark of journey is Mumbai for continuous journey.
Mumbai - Delhi - London - Delhi – London	Mumbai	Yes, Place of embark of journey is Mumbai for continuous journey.
Delhi - Jammu - Delhi	Delhi	Yes, Place of embark of journey is Delhi for continuous journey.
Jammu - Delhi - Jammu	Jammu	No, Place of embark of journey is Jammu for continuous journey.
Delhi – London	Delhi	Yes, Place of embark of journey is Delhi.
London – Delhi	London	No, Place of embark of journey is London.
London - Delhi - Australia	London	No, Place of embark of journey is London for continuous journey.

17.3.11 Place of provision service provided on board a conveyance - [Rule 12]

Now a days lot of services are provided to passengers on board a conveyance. Since the conveyance carrying the passengers & crew members shall cross multiple jurisdictions and it shall be difficult to evaluate the place of provision of service therefore this special rule is made for determining the place of provision of services in case of services provided to passengers & crew members on board a conveyance.

1) POPS to be the first scheduled point of departure of conveyance for the journey

Place of provision of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

Analysis:

This rule covers the service which has been provided on a conveyance (aircraft, vessel, rail, or roadways bus) during the course of a passenger transport operation. The place of provision in such a case would be the first scheduled point of departure of that conveyance for the journey. Such services must be provided against a specific charge, and not supplied as part of the fare.

Example:
For instance, a video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory, hence not liable to tax). If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).

17.3.12 Powers to notify description of services or circumstances for certain purposes - [Rule 13]

1) POPS to be the place of effective use and enjoyment of a service
In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service.

Analysis:
The rule is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent with these rules leading to double taxation. Due to the cross border nature of many services, it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory. This rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business.

17.4 Summary of the rules

Below is the tabulated summary of place of provision of service rules, 2012

Rule No.	Particulars
Rule 3	General Rule - location where service is received, If not available then location of service provider.
Rule 4	Performance based services - Location where services are actually performed
Rule 5	Immovable property – Place where such immovable property is located
Rule 6	Events related - Place where the event is actually held
Rule 7	Services under rule 4, 5 or 6 provided in Multiple locations - Location in the taxable territory where the greatest proportion of the service is provided
Rule 8	Both service provider and service receiver located in taxable territory - Location of service receiver
Rule 9	Certain specified services – Location of service provider
Rule 10	Goods Transportation by road - Location of person liable to pay tax Transportation by other modes except mail or courier - Destination of goods
Rule 11	Passenger transportation service - place where the passenger embarks on the conveyance for a continuous journey
Rule 12	Services consumed on board a conveyance during the course of a passenger transport operation - The first scheduled point of departure of that conveyance

17.5 Export of Services - [Rule 6A of Service Tax Rules, 1994]

The provision of any service provided or agreed to be provided shall be treated as 'export of service' only if the following conditions satisfy:

a) The service provider is located in the taxable territory;
b) The service receiver is located outside India;
c) The service is not a service specified in the negative list (Section 66D) of the Act;
d) The place of provision of the service is outside India;
e) The payment for such service has been received by the service provider in ***convertible foreign exchange****; and*
f) The service provider and service receiver are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

Note: It is important to note that even if all the above conditions satisfy except for the fact that the payment is received in Indian currency and not in the convertible foreign exchange, then such service cannot be termed as export of service.

17.6 Rebate of input/input services - [Notification No.39/2012]

Central Government empowered to grant rebate on inputs/input services used in providing exported service, subject to such safeguards, conditions and limitations, as may be specified, by the Central Government. In exercise of this power, the Central Government has issued *Notification No. 39/2012-ST dated 20.06.2012* providing the safeguards, conditions and limitations for claiming rebate on inputs and input services. *Further, Swachh Bharat cess paid on such input services can also be claimed as rebate.* ***[Notification No. 03/2016-ST dt. 03-02-2016]***

Conditions and limitations:

1) Service has to qualify as export of services in terms of Rule 6A of Service Tax Rules, 1994.
2) Inputs or input services on which rebate has been claimed has been paid to the supplier/service provider respectively. If the exporter himself is liable to pay for any input services he should have paid the service tax and cess to the Central Government.
3) No CENVAT credit has been availed of on inputs and input services on which rebate has been claimed.
4) In case any of the aforesaid conditions is not fulfilled, rebate paid, if any, shall be recoverable with interest in accordance with the provisions of section 73 and section 75 of the Finance Act, 1994.
5) Amount of rebate claimed is not less than **Rs.1,000/-**.

Practical Question & Answers

Question 1

XY & Co., an architectural firm based in Delhi, provides professional services to an Indian Hotel Chain (which has business establishment in Mumbai having centralised registration) in respect of its newly acquired land in London. The Hotel Chain intends to construct a Hotel on that land in London. XY & Co. has designed the site plan and lay out of the proposed Hotel building. State whether the service would be taxable in India on the basis of Place of Provision of Service Rules, 2012 (PoPS Rules).

Answer:

As per rule 5 of the PoPS Rules, in case of a service that is 'directly in relation to immovable property', the place of provision is where the immovable property is located, irrespective of where the provider or receiver is located. Thus, on application of rule 5 in the instant case, place of provision of service is London and consequently, the service would not be taxable in India.

However, as per rule 8 of the PoPS Rules, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, the place of provision of service would be the location of the recipient of service.

Since in the given case, both the service provider and the service receiver are located in taxable territory, on application of rule 8 in the instant case, the place of provision would be the location of the service receiver i.e. Mumbai and consequently, the service would be taxable in India.

As per rule 14 of the PoPS Rules, if the place of provision of service is determinable in terms of more than one rule, the same is determined as per the rule that occurs later. Therefore, the place of provision in this case will be Mumbai and the service will be taxable in India (as per rule 8).

Question 2

Determine the place of provision of services as well as their taxability in each of the following cases:

i. *Mr. A, the owner of an immovable property located in New Delhi gives the said property to Mr. B of London on rent, for commercial purposes. Mr. B pays the rent in UK pounds.*
ii. *Mr. Rahul, a Delhi based interior decorator, provides his professional services in respect of an immovable property which is located in San Diego, U.S.A.*
iii. *A U.S.A. based company possessing specialization in mineral exploration has been awarded a contract for mineral exploration in respect of specific sites in Canada by Mumbai based Mr. Ram Kapoor.*
iv. *ABC Ltd. agrees to provide services connected with oil exploration [by virtue of single agreement for consolidated consideration] to XYZ Ltd. in respect of specific sites located in Assam, Gujarat and Maharashtra. The proportion of services provided by ABC Ltd. in above States worked out to be 25%, 60% and 15%. ABC Ltd. does not have a centralized registration.*
v. *Rohit, a consulting engineer provides his professional consultancy services to a U.K. based company in respect of its three immovable properties located in U.K., USA and Dubai.*
vi. *ABC Testings Ltd., an Indian firm provides 'technical inspection and certification service' in respect of a newly developed product of an overseas firm (for a newly launched car which has to meet emission standards in different Countries). The overseas firm has provided its newly developed product to ABC Testings Ltd. for the purpose of testing. The testing is carried out in Gujarat (10%), Kerala (30%), and Canada (60%).*

Answer:

(i) As per rule 5 of the PoPS Rules, in case of a service that is 'directly in relation to immovable property', the place of provision is where the immovable property is located, irrespective of where the provider or receiver is located.
Since in the given case, the immovable property in question is located in New Delhi, the place of provision of service is New Delhi and resultantly, the service would be taxable in India. The fact that payment is made in foreign currency does not have any bearing on deciding the taxability of a service.

(ii) Since in the given case, the immovable property in question is located in San Diego, the place of provision of service is San Diego, U.S.A. and resultantly, the service would not be taxable in India.

(iii) In this case, since specific sites in respect of which mineral exploration is to be carried out are located in Canada, the place of provision of services as per rule 5 of the PoPS Rules will be Canada which does not fall within the ambit of 'taxable territory' and resultantly, these services will not be taxable in India. The fact that service providing company is located in USA and service recipient is located in Mumbai (India) is not significant.

(iv) Although all the locations given in this case fall within the taxable territory, PoPS Rules are still applicable as these rules are also useful for those service providers who operate from multiple locations within India without having centralised registration for the purpose of determining the precise taxable jurisdiction applicable to their operations. Where any immovable property related service referred to in rule 5 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided [Rule 7 of the PoPS Rules]. Therefore, in the present case, ABC Ltd. is liable to pay service tax and the place of provision of services would be Gujarat because greatest proportion of taxable service [i.e. 60%] is provided there.

(v) Since in this case, consulting engineer's services provided by Rohit are in respect of locations which fall within non-taxable territory, place of provision of the services provided is U.K., USA and Dubai for the respective services and hence, no service tax is chargeable by Mr. Rohit

(vi) Where any performance based service referred to in rule 4 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided [Rule 7 of the PoPS Rules]. In the given case, notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, which in this case is Kerala. Thus, testing services provided in this case will be taxable in India

Question 3

Based on the Place of Provision of Service Rules, 2012, determine the place of provision of service as well as their taxability in each of the following independent cases:
(1) A Mumbai based builder provides construction services to Gujarat based company in respect of construction of its new building in Afghanistan.
(2) A UK based company has been awarded mineral exploration contract in respect of specific sites in Zimbabwe by a Chennai based corporation.

Answer:

(1) In this situation, if rule 5 of the Place of Provision of Service Rules, 2012 [PoPS Rules] is applied, then place of provision of service would be location of property which is Afghanistan. Since Afghanistan falls within non-taxable territory, the foregoing construction services will not be taxable.
However, if rule 8 of the PoPS Rules is applied, the place of provision of service will be the location of the service receiver i.e., Gujarat [which falls within the taxable territory] and resultantly, construction services will be taxable.
As per rule 14 of the PoPS Rules, if the place of provision of service is determinable in terms of more than one rule, the same is determined as per the rule that occurs later. Therefore, the place of provision in this case will be Gujarat and the service will be taxable (as per rule 8).

(2) In this case, since specific sites in respect of which mineral exploration is to be carried out are located in Zimbabwe, the place of provision of service as per rule 5 of the PoPS Rules will be Zimbabwe which does not fall within the ambit of 'taxable territory' and resultantly these services will not be taxable. The fact that service providing company is located in UK and service recipient is located in Chennai (India) is not significant.

Question 4

With reference to the position of service tax law as applicable on or after 01.10.2015, what would be the place of provision of service in the following independent cases?

(i) PQ Trade Links of Hyderabad are appointed as commission agent by a foreign company for sale of its goods to Indian customers. In lieu of their services, PQ Trade Links receive a fixed percentage of commission from the concerned foreign company.
(ii) ST Fabricators of Mysore has temporarily imported certain goods from its customer located in Egypt for repairs. The said goods have been re-exported to Egypt after carrying out the necessary repairs without being put to any use in Mysore.

Answer:

(i) As per rule 9(c) of Place of Provision of Services Rules, 2012 (POPS Rules), place of provision of intermediary services is the location of service provider. With effect from 01.10.2014, definition of term "intermediary" as provided under rule 2(f) of POPS Rules has been substituted to include the intermediary of goods in its scope. The substituted definition provides that "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the main 'service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.

Accordingly, commission agent of goods will be covered under rule 9(c) of POPS Rules. Thus, the place of provision of services provided or agreed to be provided by PQ Trade Links (as commission agent of goods) to foreign company will be the location of service provider i.e., Hyderabad.

(ii) Rule 4(a) of POPS Rules provides that the place of provision of services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service in order to provide the service, is the location where the services are actually performed.

However, with effect from 01.10.2014, second proviso to rule 4(a) has been substituted to lay down that clause (a) of rule 4 will not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair. Consequently, such a case will be covered under rule 3 of POPS Rules (general rule) and the place of provision of service will be the location of service receiver.

In the given case, goods have been temporarily imported by ST Fabricators and have been re-exported after the repairs without being put to any use in Mysore (taxable territory). Therefore, place of provision of repair services carried out by ST Fabricators will be determined by rule 3 of POPS Rules. Consequently, the place of provision of service will be the location of service receiver i.e. Egypt.

Question 5

Determine the place of provision of services as well as their taxability in each of the following cases with brief reasons:
(a) XY Ltd. agrees to provide 'technical inspection and certification service' in respect of a newly developed product of an overseas firm (for a newly launched motorbike which has to meet emission standards in different states or countries). The overseas firm has provided its newly developed product to XY Ltd. for the purpose of testing. The testing is carried out in Delhi (15%), Assam (35%) and Sweden (50%).
(b) A movie on demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi Flight.

Answer:

(a) Where any performance based service as referred to in rule 4 of Place of Provision of Service Rules, 2012 (PoPS Rules) is provided at more than one location, including a location in the taxable territory, its place of provision is the location in the taxable territory where the greatest proportion of the service is provided [Rule 7 of the PoPS Rules].

Thus, the place of provision of technical inspection certification service, being a performance based service, is the place in the taxable territory where the greatest proportion of service is provided, i.e. Assam. Hence, such services will be taxable in India.

(b) The place of provision of passenger transportation service provided on board a conveyance is the first scheduled point of departure of flight for the journey [Rule 12 of PoPS Rules].
Thus, in the given case, the place of provision of service is Bangkok. Since Bangkok is outside the taxable territory, such service is not taxable in India.

Question 6

ABC Fabricators has its factory located in Gujarat. It has temporarily imported certain goods from its customer located in China and re-exported them to China after carrying out the necessary repairs without putting them to any use in Gujarat. Examine what would be the place of provision of service in the given case with reference to the Place of Provision of Service Rules, 2012. Will your answer be different if the repaired goods are re-exported after being put to use in Gujarat for some time?

Answer:

In respect of goods that are required to be made physically available by the recipient of service to the provider of service in order to provide the service, place of provision of service is the location where the service is actually performed [Clause (a) of rule 4 of Place of Provision of Service Rules, 2012 (hereinafter referred as PoPS Rules)].
However, the said clause is not applicable in case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair. In such a case, place of provision of service would be determined by the general rule 3 of PoPS Rules, i.e. the location of service receiver.
In the given case, since goods have been temporarily imported by ABC Fabricators and have been re-exported after the repairs without being put to any use in Gujarat (taxable territory), place of provision of repair services carried out by ABC Fabricators will be determined by rule 3 of PoPS Rules. Consequently, the place of provision of service will be the location of service receiver, viz. China. However, if repaired goods are re-exported after being put to use, the place of provision of service will be determined according to rule 4(a) of PoPs Rules, if the use to which such goods are put to is not required for such repair.
Therefore in such a case, the place of provision of service will be the location where the service is actually performed, which in the given case is Gujarat. However, if the use is of such nature which is necessary for carrying out the repairs, the place of provision of service will again be determined as per rule 3 of PoPS Rules.

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Chapter 19 - Service Tax Procedures

19.1 Introduction

We have already understood the concept of service, negative list of services, declared services, principles of interpretation of specified description of services or bundled services, point of taxation, place of provision of service, valuation, exemptions and abatements in respect of various taxable services. In this chapter, discussion is focused on procedures to be followed for complying with the provisions of the law and the very important concept of reverse charge under service tax.

19.2 Registration - [Section 69 & rule 4 of the Service Tax Rules, 1994]

A. Who should Register

1) Every person liable to pay must register

Every person liable to pay service tax is required to register himself by making an application to the Superintendent of Central Excise [Section 69(1)].

2) Other persons notified to register

Central Government may also notify such other person or class of persons who will be required to obtain registration [Section 69(2)]. The following persons/class of persons have been notified under section 69(2):-

i. an input service distributor; and
ii. any provider of taxable service whose aggregate value of taxable service in a financial year exceeds Rs.9,00,000/-.

B. Application for registration

The procedure for registration has been laid down under rule 4 of the Service Tax Rules, 1994. It prescribes the time, manner and form for registration.

1) Application in form ST-1 to be submitted within 30 days of levy or commencement of business (whichever is later)

Application for registration is to be made by every person liable for paying the service tax in Form ST-1 to the concerned Superintendent of Central Excise having jurisdiction:

i. within 30 days from the date on which service tax is levied; or
ii. within 30 days from the date of commencement of business (whichever is later).

2) Application by input service distributor within 30 days of commencement of business

The input service distributor shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of the commencement of business.

3) Application within 30 days from value exceeding Rs.9,00,000/-

The provider of taxable service whose aggregate value of taxable service in a financial year exceeds Rs.9,00,000/- shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of exceeding the aggregate value of taxable service of Rs.9,00,000/-.

4) "Aggregate value" means sum total of first consecutive payments

"Aggregate value of taxable service" means the *sum total of first consecutive payments* received during a financial year towards the gross amount, as prescribed under section 67, charged by the service provider towards taxable services but does not include payments received towards such gross amount which are exempt from the whole of service tax under any notification other than *Notification No. 6/2005-ST dated 01.03.2005***.

5) All services and all premises to be considered for computing 'aggregate value'

Where a provider of taxable service provides one or more taxable services from one or more premises, the aggregate value of all such taxable services and from all such premises and not separately for each services or each premises shall be taken into account for computation of aggregate value of taxable service.

6) Documents required for registration

A self attested copy of the following documents will have to be submitted by registered post/ speed post to the concerned Division, within 7 days of filing the Form ST-1 online, for the purposes of verification:

a) Copy of the PAN Card of the proprietor or the legal entity registered;
b) Photograph and proof of identity of the person filling the application;
c) Document to establish possession of the premises to be registered such as proof of ownership, lease or rent agreement, allotment letter from Government, No Objection Certificate from the legal owner;
d) Details of the main Bank Account;
e) Memorandum/Articles of Association/List of Directors;
f) Authorisation by the Board of Directors/Partners/Proprietor for the person filing the application;
g) Business transaction numbers obtained from other Government departments or agencies such as Customs Registration No. (BIN No), Import Export Code (IEC) number, State Sales Tax Number (VAT), Central Sales Tax Number, Company Index Number (CIN) which have been issued prior to the filing of the service tax registration application Verification of premises, if there arises any need for the same, will have to be authorised by an officer not below the rank of Additional/Joint Commissioner.

7) Revocation of registration certificate:

The registration certificate may be revoked by the Deputy/Assistant Commissioner in any of the following situations, after giving the assessee an opportunity to represent against the proposed revocation and taking into consideration the reply received, if any:

- The premises are found to be non-existent or not in possession of the assessee;
- No documents are received within 15 days of the date of filing the registration application;
- The documents are found to be incomplete or incorrect in any respect.

C. Grant of registration certificate

1) Registration certificate to be granted with 7 days in form ST-2

The Superintendent of Central Excise shall after due verification of the application form (Form ST-1), or an intimation of change in any information or details under sub-rule (5A), as the case may be, grant a certificate of registration in Form ST-2 within 7 days from the date of receipt of the application or intimation.

Note: The time limit of seven days within which the registration is to be granted by the Superintendent of Central Excise/Service Tax would be reckoned from the date the application for registration is complete in all respects.

2) Deemed registration after 7 days

If the registration certificate is not granted within the said period, the registration applied for shall be deemed to have been granted.

Note: This may not be a solution for non-granting of the certificate since the registration number is required for payment of service tax, filing of returns, etc. [Sub-rule (5)].

F - Single Premises Registration within 2 days

Order No. 1/15 ST dated 28.02.2015, effective from 01.03.2015 has been issued, prescribing documentation, time limits and procedure for registration. It has also been prescribed that henceforth registration for single premises will be granted within 2 days of filing the application.

E - Centralised registration - when to apply?

1) Centralised registration to be obtained if service provided/received from more than one premises

Where a person, liable for paying service tax on a taxable service:

i. provides such service from more than one premises or offices; or
ii. receives such service in more than one premises or offices; or
iii. is having more than one premises or offices, which are engaged in relation to such service in any other manner, making such person liable for paying service tax.

2) Centralised billing or centralised accounting mandatory

Where an assessee providing taxable service from more than one premises or offices, who does not have any centralized billing systems or centralized accounting systems, as the case may be, shall make separate applications for registration in respect of each of such premises or offices to the jurisdictional Superintendent of Central Excise [Sub-rule (3A)].

In other words, application for centralised registration can be obtained only if the assessee has centralised billing system or centralised accounting system in respect of such service, and such centralised billing or centralised accounting systems are located in one or more premises.

3) Centralised registration is optional

Centralised registration is optional and the assessee can also apply for single registration for all the premises.

Note: It is always beneficial to go for centralised registration as it reduces the compliance of applying for multiple registrations, filing multiple returns etc.

4) Jurisdictional Principal commissioner or commissioner to grant the registration certificate

Registration shall be granted by the Principal commissioner or Commissioner of Central Excise having jurisdiction over the premises/offices for which centralized registration is sought (i.e., the premises from where centralized billing/accounting is done) [Sub rule (3)].

F. Other points

1) Change in details to be intimated within 30 days

Change in any information or details furnished by an assessee at the time of obtaining registration or any additional information or detail intended to be furnished should be intimated in Form ST-1 in writing by the assessee to the jurisdictional Assistant/Deputy Commissioner of Central Excise. Such intimation should be made within a period of 30 days of such change [Sub-rule (5A)].

2) Fresh registration certificate to be obtained in case of transfer of business

When a registered assessee transfers his business to another person, the transferee shall obtain a fresh certificate of registration [Sub-rule (6)].

3) Registration certificate to be surrendered if services not provided

Every registered assessee who ceases to provide taxable service shall surrender his registration certificate immediately to the Superintendent of Central Excise [Sub-rule (7)].

4) Compliance to be ensured after registration
On receipt of the certificate under sub-rule (7), the Superintendent of Central Excise shall ensure that the assessee has paid all monies due to the Central Government under the provisions of the Act/Rules/Notifications and thereupon cancel the registration certificate [Sub-rule (8)].

19.3 Issue of invoice, bill or challan or consignment note - [Rule 4A, 4B & 4C of the Service Tax Rules, 1994]

Rule 4A merits importance as the credit on invoices which are not in accordance with rule 4A can be denied.

1) Invoice/Bill/challan to be issued by service provider and input service distributor
As per rule 4A, every person providing taxable service shall issue an invoice or a bill, or a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided. The invoice, bill or challan shall be serially numbered.

Further, every input service distributor who distributes the credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorised by him, for each of the recipient of the credit distributed.

2) Contents of Invoice/Bill/Challan
a) For taxable service provided
The invoice, bill or challan shall be serially numbered and shall contain the following details, namely:

i. Name, address and the registration number of such person;
ii. Name and address of the person receiving taxable service;
iii. Description of service provided or agreed to be provided;
iv. Value of the taxable service provided or a agreed to be provided; and
v. Service tax payable thereon.

b) For distribution of input service
Invoice issued by the input service distributor shall be serially numbered and shall contain the following details, namely:

i. Name, address and registration number of the person providing input services and the serial number and date of invoice, bill, or as the case may be, challan;
ii. Name and address of the said input services distributor;
iii. Name and address of the recipient of the credit distributed;
iv. Amount of the credit distributed.

3) Address, serial number not required in case of Banking company, NBFC etc.
A banking company or a financial institution including non-banking financial company providing services to any person enjoys the relaxation that invoice may not be serially numbered and may not contain the address of the service receiver.

4) Invoice of Goods Transport agency shall contain consignment number, weight etc.
In case the service provider is a goods transport agency, an invoice, a bill or, a challan shall include any document, by whatever name called, which shall contain the details of the consignment note number and date, gross weight of the consignment and other required information.

5) Ticket issued to be a valid invoice in case of passenger transport service
In case of transport of passengers [by any mode of transport], the ticket (in any form, including electronic form, whatever may be the name) would be deemed to be the invoice/bill/challan for the

purposes of the rule. The ticket would be a valid invoice/bill/challan even if it does not contain registration number of the service provider or address of the service receiver.

For instance, in case of air-travel, the airlines or the agent may not issue a separate invoice to the passenger but may issue the ticket showing the price of such ticket as well. In such a case, the ticket issued by the airlines would be a valid invoice.

6) Invoice not required where payment upto Rs.1,000/- received in excess of the invoiced amount

Wherever the provider of taxable service receives an amount Rs.1,000/- in excess of the amount indicated in the invoice and the provider of taxable service has opted to determine the point of taxation based on the option as given in the Point of Taxation Rules, 2011 (i.e. in case of a 'continuous supply of services'), no invoice is required to be issued to such extent of the excess received, if below Rs.1,000/-.

7) Reminder letters to pay renewal premium is not an invoice

Life insurance companies issue reminder notices/letters to the policy holders to pay renewal premiums. Such reminder notices only solicit furtherance of service which if accepted by policy holder by payment of premium results in a service. No tax point arises on account of such reminders. Thus, reminder letters/notices for insurance policies not being invoices would not invite levy of service tax *[Circular No. 166/1/2013 ST dated 01.01.2013].*

8) Invoice to be issued within 30 days of completion of service or receipt of money (whichever is earlier)

Invoice has to be issued within 30 days from the date of:-

i. completion of taxable service; or
ii. receipt of any payment towards the value of such taxable service (whichever is earlier).

9) Invoice to be issued within 30 days of 'completion of event' or receipt of money in case of 'continuous supply of services'

In case of continuous supply of service, every person providing such taxable service shall issue an invoice, bill or challan, as the case may be, within 30 days of the each event specified in the contract, which requires the service receiver to make any payment to service provider, is completed.

10) Time-limit of 45 days applies instead of 30 days for Banking company or NBFC etc.

The time-limit for issuance of invoice, bill or challan, as the case may be, shall be 45 days in case where the service provider is:

i. A banking company;
ii. A financial institution including a non-banking financial company;

providing service to any person.

11) Invoice/bill/challan can be authenticated by digital signature

Any invoice, bill or challan issued under rule 4A or consignment note issued under rule 4B may be authenticated by means of a digital signature. The Board may, by notification, specify the conditions, safeguards and procedure to be followed by any person issuing digitally signed invoices. ***[Inserted vide Union budget 2015]***

19.4 Issue of Consignment Note

1) Goods transport agency shall issue a consignment note

As per rule 4B any goods transport agency, which provides service in relation to transport of goods by road in a goods carriage, shall issue a consignment note to the recipient of service.

2) Consignment note must be serially numbered and contain details of consignment

"Consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered. and shall contain the following:

i. Name of the consignor and consignee,
ii. Registration number of the goods carriage in which the goods are transported,
iii. Details of the goods transported,
iv. Details of the place of origin and destination,
v. Person liable for paying service tax whether consignor, consignee or the goods transport agency.

3) Consignment note not required if transport of goods is wholly exempted

Where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.

4) Consignment Note can be authenticated by digital signature

Any consignment note issued under rule 4B may be authenticated by means of a digital signature. The Board may, by notification, specify the conditions, safeguards and procedure to be followed by any person issuing digitally signed invoices. ***[Inserted vide Union budget 2015]***

19.5 Records and access to registered premises - [Rule 5 & Rule 5A]

1) Records maintained under various laws are acceptable

The records (including computerised data) as maintained by an assessee in accordance with various laws in force from time to time shall be acceptable. It implies that the nature of records to be maintained and the form in which the records are to be maintained are left at the judgment of the assessee [Sub-rule (1)].

2) List of records maintained to be furnished with first return

Every assessee shall furnish to the Superintendent of Central Excise, at the time of filing of return for the first time, a list in duplicate, of-

(i) all the records prepared or maintained by the assessee for accounting of transactions in regard to-

a) providing of any service;
b) receipt or procurement of input services and payment for such input services;
c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;
d) other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in normal course of business. [Sub-rule (2)]

3) Records to be preserved for 5 years

All the records maintained by an assessee in this regard shall be preserved at least for a period of 5 years immediately after the financial year to which such records pertain [Sub-rule (3)].

4) Authorised officers shall have access to any registered premises

An officer authorised by the Principal commissioner or Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue [Sub-rule (1) of rule 5A].

5) Records, trial balance etc. to be made available on demand

Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Principal commissioner or Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be,-

i. the records as mentioned in sub-rule (2) of rule 5;
ii. trial balance or its equivalent; and
iii. the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961, for the scrutiny of the officer or audit party, as the case may be. [Sub-rule (2)]

6) Records can be preserved in electronic form and can be authenticated by digital signature

Records under this rule may be preserved in electronic form and every page of the record so preserved shall be authenticated by means of a digital signature. The Board may, by notification, specify the conditions, safeguards and procedure to be followed by an assessee preserving digitally signed records. ***[Inserted vide Union budget 2015]***

19.6 Payment of Service Tax - [Rule 6(1) & Rule 6(2)]

1) Due date for payment of tax

Category of assessee	Month	Due date
Assessees other than individual or proprietary firm or partnership firm	a) All months except March	a) E-payment – 6th of the following month. b) Other case – 5th of the following month.
	b) For the month of March	By 31st March
a) One Person Company with aggregate value of taxable services from one or more premises less than Rs.50 lakhs in the previous financial year or b) Individual or c) proprietary firm or d) partnership firm	a) All Quarters except March	a) E-payment – 6th of the following quarter. b) Other case – 5th of the following quarter.
	b) For the Quarter ending March	By 31st March

Amendment Note:

Earlier, the benefit of quarterly payment of taxes was available only to Individuals, proprietorship firms and partnership firms. However, now the said benefit if also extended to One Person Companies vide Notification No.19/2016-ST.

2) E-payment of service tax is mandatory unless allowed by AC/DC

Every assessee shall electronically pay the service tax payable by him, through internet banking Provided that the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction, may for reasons to be recorded in writing, allow the assessee to deposit the service tax by any mode other than internet banking.

Conceptual Notes:

- Where the tax is paid by e-payment, then the same should be paid by 8 PM on the due date. If the same is paid later than 8 PM on the due date, then it shall be deemed to have been paid on the next date.
- The duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.
- If the assessee deposits the duty by cheque, the ***date of presentation of the cheque*** in the bank shall be deemed to be the date on which the duty has been paid subject to realization of that cheque.
- Service tax is to be paid on the value of taxable services which is charged by an assessee. Any income tax deducted at source is included in the charged amount. Therefore, service tax is to be paid on the amount of income tax deducted at source also.

19.6.1 Payment of service tax in advance - [Rule 6(1A)]

1) Option to pay service tax in advance

The assessee has been provided a facility to make advance payment of service tax on his own and adjust the amount so paid against the service tax which he is liable to pay for the subsequent period.

2) Details to be intimated to jurisdictional superintendent and in returns

Assessee needs to intimate:

- the details of the amount of service tax paid in advance, to the Jurisdictional Superintendent of Central Excise within a period of 15 days from the date of such payment.
- the details of the advance payment made, and its adjustment, if any in the subsequent return to be filed under section 70 [Sub-rule (1A) of rule 6].

19.6.2 Adjustment of tax paid in excess - [Rule 6(3)]

1) Excess service tax paid due to deficient provision of re-negotiation can be adjusted anytime

As per rule 6(3), where an assessee:

- Issues an invoice for service to be provided; or
- Receives any payment for service to be provided; or
- renegotiates the amount of invoice due to any terms contained in a contract

and later such service is not so provided by him either wholly or partially for any reason or such service is provided in deficient then the assessee may take the credit of such excess service tax paid by him.

2) Adjustment possible only if amount refunded or credit note issued

The said credit of the excess service tax paid can be taken only if the assessee:

- has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or
- has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.

3) Adjustment not possible if the same is due to clerical mistake

Rule 6(3) does not allow adjustment of excess payment of service tax per se, say due to clerical mistake etc. In such cases the assessee has to follow the procedure laid down in section 11B of Central Excise Act to claim the refund of excess tax paid.

19.6.3 Adjustment of excess service tax paid - [Rule 6(4A) & 6(4B)]

1) Excess tax paid can be adjusted in subsequent month or quarter

Where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be.

2) Adjustment not possible if payment made due to incorrect interpretation of law etc.

However, self-adjustment of excess credit shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification.

19.6.4 Adjustment of excess amount paid as service tax in case of renting of immovable property service - [Rule 6(4C)]

1) Property taxes paid can be claimed as deduction

In case of renting of immovable property service, a deduction of property taxes paid in respect of the immovable property is allowed from the gross amount charged for renting of the said immovable property.

2) Deduction can be availed upto one year, if not availed earlier

Where any amount towards service tax liability is paid in excess on account of non-availment of such deduction, then the same may be adjusted against the service tax liability within 1 year from the date of payment of such property tax.

3) Details to be intimated to jurisdictional superintendent within 15 days

The details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of 15 days from the date of such adjustment.

19.6.5 Provisional payment of service tax - [Rule 6(4), (5) & (6)]

1) Request for provisional assessment to be made if unable to estimate tax liability

In case the assessee is unable to correctly estimate, at the time of the deposit, the actual amount of service tax for any month or quarter, he may make a written request to Assistant/Deputy Commissioner of Central Excise for making payment of service tax on provisional basis.

2) AC/DC may allow payment of tax on provisional basis

The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, on receipt of such request, may allow payment of service tax on provisional basis on such value of taxable service as may be specified by him and the provisions of the Central Excise (No. 2) Rules, 2001, relating to provisional assessment except so far as they relate to execution of bond, shall, so far as may be, apply to such assessment.

3) Details of tax paid and payable to be submitted in form ST-3A

Where an assessee under sub-rule (4) requests for a provisional assessment he shall file a statement giving details of the difference between the service tax deposited and the service tax liable to be paid for each month in a memorandum in Form ST-3A accompanying the quarterly or half - yearly return, as the case may be.

4) AC/DC to complete assessment after calling for documents/records

Where the assessee submits a memorandum in Form ST-3A under sub-rule (5), it shall be lawful for the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, to complete the assessment, wherever he deems it necessary, after calling such further documents or records as he may consider necessary and proper in the circumstances of the case.

19.7 Special provisions for payment of service tax

In case of certain business sectors, special rates are prescribed for payment of service tax i.e. in the case of air travel agent, life insurance business, purchase/sale of foreign currency, marketing/ promotion of lottery etc. In all these instances the calculation of service tax liability can be calculated as per the normal rate or as per the special rate as per the option of the assessee.

19.7.1 Air Travel Agent - [Rule 6(7)]

Person liable for paying the service tax in relation to the services provided by an air travel agent, shall have the option to pay following amounts instead of paying service tax at the rate of 14%:

Domestic bookings of passage for travel by air	**0.7%** of the basic fare
International bookings of passage for travel by Air	**1.4%** of the basic fare

Points to be noted:

1) Option once exercised cannot be withdrawn during remaining financial year

The option once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances.

2) Meaning of basic fare: For the purposes of this sub-rule, the expression "basic fare" means that part of the air fare on which commission is normally paid to the air travel agent by the airline.

3) Since, rate of service tax is increased from 12.36% to 14%, consequential amendment has been made in this sub-rule to increase the percentages from 0.6% & 1.2% to 0.7% & 1.4%.

4) Further, Swachh Bharat Cess in case of this service shall be calculated as per the below formula: {Service Tax liability under rule 6(7)] X 0.5%/14%.

19.7.2 Insurer Carrying on Life Insurance Business - [Rule 6(7A)]

An insurer carrying on life insurance business shall have the option to pay tax:

(i) On the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service;

(ii) Where amount of the gross premium allocated for investment or savings on behalf of policy holder is not intimated to the policy holder at the time of providing of service equivalent to the following rates instead of paying service tax at the rate of 14%:-

First year	**3.5%** of the gross amount of premium charged
Subsequent Year	**1.75%** of the gross amount of premium charged

(iii) In case of a single premium annuity policies, tax shall be 1.4%.of the single premium charged from the policy holder. ***[Inserted vide Notification No.19/2016-ST]***

Notes:

1) Such option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance.

2) Since, rate of service tax is increased from 12.36% to 14%, consequential amendment has been made in this sub-rule to increase the percentages from 1.5% & 3% to 1.75% & 3.5%.

3) Further, Swachh Bharat Cess in case of this service shall be calculated as per the below formula: {Service Tax liability under rule 6(7A)] X 0.5%/14%.

19.7.3 Sale/purchase of foreign currency including money changing - [Rule 6(7B)]

Person liable to pay service tax in relation to purchase or sale of foreign currency, including money changing, has an option to pay an amount at the following rates instead of paying service tax at the rate of 14%:-

Upto Rs.1,00,000	**0.14%** of the gross amount of currency exchanged; or **Rs.35** (whichever is higher)
Exceeding Rs.1,00,000 and upto Rs.10,00,000	**Rs.140 + 0.07%** of the (gross amount of currency exchanged - Rs.1,00,000)
Exceeding Rs.10,00,000	**Rs.770 + 0.014%** of the (gross amount of currency exchanged- Rs.10,00,000); or **Rs.7,000/-** (whichever is lower)

Points to be noted:

1) Option once exercised cannot be withdrawn during remaining financial year

The person providing the service shall exercise such option for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

2) Since, rate of service tax is increased from 12.36% to 14%, consequential amendment has been made in this sub-rule to increase the amount from Rs.30/- & 120/- & Rs.660 to Rs.35 & Rs.140/- & Rs.770/-.

3) Further, Swachh Bharat Cess in case of this service shall be calculated as per the below formula: {Service Tax liability under rule 6(7B)] X 0.5%/14%.

19.7.4 Services of promotion, marketing or organizing/assisting in organizing lottery - [Rule 6(7C)]

An optional mode of payment of service tax has been provided for the taxable service of promotion, marketing or organising/assisting in organising lottery in the following manner instead of paying service tax at the rate of 14%:-

Particulars	New Rate
Where the guaranteed lottery prize payout is > 80%	**Rs.8,200/-** on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.
Where the guaranteed lottery prize payout is < 80%	**Rs.12,800/-** on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.

Points to be noted:

1) In case of online lottery, the aggregate face value of lottery tickets will be the aggregate value of tickets sold.

2) The distributor/selling agent will have to exercise such option within a period of one month of the beginning of each financial year. The new service provider can exercise such option within one month of providing the service.

3) The option once exercised cannot be withdrawn during the remaining part of the financial year.

4) Since, rate of service tax is increased from 12.36% to 14%, consequential amendment has been made in this sub-rule to increase the amount from Rs.7,000/- & 11,000/- to Rs.8,200 & Rs.12,800/-.

4) Further, Swachh Bharat Cess in case of this service shall be calculated as per the below formula: {Service Tax liability under rule 6(7C)] X 0.5%/14%.

19.7.5 Swachh Bharaat cess shall be proportionately paid - [Rule 6(7D)]

1) Swachh Bharat cess to be calculated as per the proportionate formulae - Recent Amendment

Any person liable for paying service tax under sub-rule (7), (7A), (7B) or (7C) of rule 6, shall have the option to pay 'Swachh Bharat cess' calculated as per the below formula towards discharge of its SBC liability for the service taxable under sub-rule (7), (7A), (7B) or (7C) of rule 6.

Formulae: {[Total Service Tax liability X 0.5] / 14}

[Amendment vide Notification no.25/2015-ST, dated 12.11.2015]

19.8 Service Tax Returns - [Section 70, Rule 7, 7B & 7C]

Various provisions pertaining to filing of service tax returns are as under:

<table>
<tr><td>Form of return</td><td colspan="2">Return/revised return has to be furnished in Form ST-3</td></tr>
<tr><td>Periodicity</td><td colspan="2">Half-yearly (April to September) & (October to March)</td></tr>
<tr><td>Due Date</td><td colspan="2">April to September - to be filed by October 25th
October to March - to be filed by April 25th</td></tr>
<tr><td rowspan="4">Penalty for delay in filing</td><td>Period of Delay</td><td>Late fee</td></tr>
<tr><td>First 15 days from due date</td><td>Rs.500/-</td></tr>
<tr><td>More than 15 days but less than 30 days</td><td>Rs.1,000/-</td></tr>
<tr><td>Beyond 30 days</td><td>Rs.1,000/- plus Rs.100/- for every day from the 31st day till the date of furnishing the said return but upto a maximum of Rs.20,000/-</td></tr>
<tr><td>Revised return</td><td colspan="2">To be submitted in Form ST-3, to correct a mistake or omission, within a period of 90 days from the date of submission of the original return.</td></tr>
<tr><td>Contents of Return</td><td colspan="2">General details, like
✓ financial year,
✓ half year period (April-September or October-March),
✓ name of the assessee,
✓ registration number of the premises for which return is being filed,
✓ category of taxable services are required to be furnished.
Apart from this, some significant month-wise details also need to be furnished. For instance:
✓ amount received towards taxable service(s) provided and amount</td></tr>
</table>

	received in advance towards taxable service(s) to be provided; ✓ Gross amount billed for exempted services and services exported without payment of tax; ✓ amount billed for services on which tax is to be paid; ✓ abatement claimed – value; ✓ notification number of abatement and exemption; ✓ service tax payable; ✓ GAR-7 challan date and number'; ✓ credit details for service tax provider/recipient.
Return by input service distributor	Half yearly returns giving out the details of credit received and distributed in form ST - 3 by the following due date: April to September - to be filed by October 31st October to March - to be filed by April 30th
Single return sufficient for multiple services provided	For an assesee who provides more than one taxable service, only a single return will be sufficient. However, the details in each of the columns of the Form ST-3 have to be furnished separately for each of the taxable service rendered by him.
Nil return to be filed	Even if no service has been provided during a half year and no service tax is payable; the assessee has to file a Nil return within the prescribed time limit.
First Return	Every assessee shall furnish to the Superintendent of Central Excise, *at the time of filing of return for the first time*, a list in duplicate, of- i. all the records prepared or maintained by the assessee for accounting of transactions in regard to,- a) providing of any service, whether taxable or exempted; b) receipt or procurement of input services and payment for such input services; c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods; d) other activities, such as manufacture and sale of goods, if any. ii. all other financial records maintained by him in the normal course of business.

Notes:

1) E-filing of returns is mandatory for the assesses

With effect from 01.10.2011, every assessee will have to submit half-yearly service tax return electronically, irrespective of the amount of service tax paid by him in the preceding financial year.

2) Late fee may be reduced/waived if service tax payable is nil

Where the gross amount of service tax payable is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filling the return, reduce or waive the penalty (late fee) [Proviso to rule 7C].

3) Relevant date for recovery to be the date of filing of revised return

It has been clarified that where an assessee submits a revised return, the **'relevant date'** for the purpose of recovery of service tax, if any, under section 73 of the Act shall be the date of submission of such revised return.

Illustration:

BCC Ltd. is engaged in providing taxable services. For the half year ended on 30th September, it filed its return on:-

Case I: 9th November

Case II: 23rd November

Case III: 25th January

Determine the amount of late fee payable by BCC Ltd. in each of the independent cases.

Solution:

Case I - Return has been filed with a delay of 15 (i.e. 6+9) days from the date prescribed for submission of the return therefore penalty shall be Rs.500/-.

Case II - Return has been filed with a delay of 29 (i.e. 6+23) days from the date prescribed for submission of the return therefore penalty shall be Rs.1,000/-.

Case III - Return has been filed with a delay of 92 (i.e. 6+30+31+25) days from the date prescribed for submission of the return. Penalty shall be lower of the following two amounts:-

(i) Rs.1,000 + (Rs.100 × 62 days)

(ii) Rs.20,000/-

Late fees leviable is Rs.7,200/-.

19.9 Annual Return - [Rule 7(3) & 7(3A)]

1) Annual returns must be filed by 30th November of the succeeding financial year

Every assessee shall submit an annual return for the financial year to which the return relates, in such form and manner as may be specified in the notification in the Official Gazette by the Central Board of Excise and Customs, by the 30th day of November of the succeeding financial year.

2) Central Government shall specify the class of assesses who may not be required to submit the annual return

The Central Government may, subject to such conditions or limitations, specify by notification an assesse or class of assesses who may not be required to submit the annual return referred to in sub-rule(3A).

3) Late filing fee of Rs.100 per day upto a maximum of Rs.20,000 is payable for delay in filing of return

Where the annual return is filed by the assessee after the due date, the assessee shall pay late filing fee of Rs.100 per day for the period of delay in filing of such return, subject to a maximum of Rs.20,000/-.

4) Annual return can be revised within a period of one month

An assessee who has filed the annual return by the due date may submit a revised return within a period of one month from the date of submission of the said annual return.

Note: *It is important to note that revision is possible only if the annual return is filed within the due date. If the annual return is not filed within the due date then the same cannot be revised.*

[Inserted vide Notification No. 19/2016-ST]

Amendment Note:

Currently, there is a concept of annual return in central excise. Further, filing of an annual return will be a key requirement in the GST regime. Therefore, in order to accustom the assesses with the GST regime and to streamline the procedural laws in central excise and service tax, the concept of annual return has been introduced even in the service tax law vide Notification No.19/2016-ST.

19.10 Audit of service tax assesses - [Sec 72A]

Section 72A provides for the special audit by the practicing Chartered Accountant/Cost Accountant.

1) Commissioner may order Special audit based on following circumstances

If the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax (herein referred to as "such person"),—

i. has failed to declare or determine the value of a taxable service correctly; or
ii. has availed and utilised credit of duty or tax paid—
   a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or
   b) by means of fraud, collusion, or any wilful misstatement or suppression of facts; or
iii. has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner,

then he may direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

2) CA/CMA shall submit duly certified report to Commissioner within the specified period

The said Chartered Accountant or Cost Accountant shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.

3) Opportunity of being heard needs to be given

The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the special audit and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

4) Special audit applicable even if accounts are already audited under any other law

The provisions of subsection (1) shall apply even if the accounts of such person have been audited under any other law for the time being in force.

Note:

Director General of Audit, New Delhi has published Service Tax Audit Manual, 2010. As per the guidelines, frequency of audit the taxpayers would be as per following norms:-

Service tax payment (Cash + CENVAT)	To be audited
Above Rs.3 crores (Mandatory Units)	every year
Between Rs.1 crore and Rs.3 crores	once every two years
Between Rs.25 lakhs and Rs.1 crore	once every five years
Upto Rs.25 lakhs	2% of taxpayers to be audited every year

19.11 Large Tax Payer

LTU scheme is the beneficial scheme which would act as the single window facilitation centre for all large entities paying Central Excise Duty/Service Tax/Corporate tax. This was introduced as there was a need to monitor large tax paying entities in revenue interest [The concept of large tax payer has been discussed in detail in Chapter 5 of Module-1: Central Excise]. Rule 2(1)(cc) of the Service Tax Rules, 1994 defines "large tax payer" to have the meaning assigned to it in the Central Excise Rules, 2002. Procedures and facilities for large tax payer: Rule 10 has been inserted in the Service Tax Rules, 1994

which lays down the procedure and facilities for the large taxpayer. The provisions of this rule are discussed below:
Notwithstanding anything contained in these rules, the following shall apply to a large taxpayer:

1) Single or centralized return as the case may be needs to be filed
A large taxpayer shall submit the returns, as prescribed under these rules, for each of the registered premises. A large taxpayer who has obtained a centralized registration under rule 4(2) shall submit a consolidated return for all such premises.

2) Records to be made available in electronic form, if demanded
A large taxpayer, on demand, may be required to make available the financial, stores and CENVAT credit records in electronic media, such as, compact disc or tape for the purposes of carrying out any scrutiny and verification, as may be necessary.

3) Option to opt out with intimation of 30 days in advance
A large taxpayer may, with intimation of at least 30 days in advance, opt out to be a large taxpayer from the first day of the following financial year.

4) Notice deemed to have been issued by the Central excise officer until accepted by the Principal chief commissioner (LTU) or chief commissioner (LTU)
Any notice issued but not adjudged by any of the Central Excise Officer administering the Act or rules made thereunder immediately before the date of grant of acceptance by the Chief Commissioner of Central Excise, (Large Taxpayer Unit), shall be deemed to have been issued by Central Excise Officers of the said unit.

5) Service tax rules apply to LTU unless inconsistent
Provisions of these rules, in so far as they are consistent with the provisions of this rule shall mutatis mutandis apply in case of a LTU.

Practical Questions & Answers

Question 1

Compute independently, in each of the following cases, the taxable value of services provided by an authorized dealer in foreign exchange to its customers. Show working notes as may be required.
(i) 2500 US $ are sold by Mr. Adani to the 'Sewak Cook', an authorized dealer @ Rs.62.50 per US $. The RBI reference rate is Rs. 63.00 for that day.
(ii) Rs.80,00,000 is changed into Canadian $ and the exchange rate offered is Rs.50 per Canadian $. RBI reference rate for conversion of INR into Canadian $ is not available.
(iii) On 01-05-2015, Mr. Exchange gets Rs.1,00,000 Euro converted into 5,00,000 Dirham. As on 01-05-2015, RBI reference rate is 1 Euro = Rs.70, 1 Dirham = Rs.16.

Answer:
(i) *Value of taxable service = (RBI reference rate for $ – Selling rate for $) × Total units of US $ [Rule 2B of the Service Tax (Determination of Value) Rules, 2006]*
= Rs. (63-62.50) × 2,500
=Rs.1,250/-
(ii) *First proviso to rule 2B of the aforesaid rules provides that if the RBI reference rate for a currency is not available:*
Value of taxable service = 1% of the gross amount of Indian Rupees provided/received by money changer
=1% of Rs.80,00,000
=Rs.80,000/-

(iii) *Second proviso to rule 2B of the aforesaid rules provides that in case neither of the currencies exchanged is Indian Rupee:*
Value of taxable service = 1% of the lesser of the two amounts the money changer would have received by converting any of the two currencies into Indian Rupee at that time at the reference rate provided by RBI.
Hence, in the given case, value of taxable service would be 1% of the lower of the following:-
(a) Euro 1,00,000 × Rs.70 = Rs.70,00,000
(b) Dirham 5,00,000 × Rs.16 = Rs.80,00,000
Value of taxable service = 1% of Rs.70,00,000 = Rs.70,000/-

–x–

Section – D

COMMON TOPICS

Chapter 21 - Appeals

Section Referencer

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By virtue of section 83 of the finance act, 1994 (service tax law), certain provisions of the Central Excise Act, 1944 apply for the purpose of levy of service tax. The same is indicated by stating section 83 in the table.

21.1 Introduction

In taxation laws, litigation is inevitable as the taxpayer interprets the provisions to his benefits and the revenue interprets to its benefit. Appeal is a remedy available to the aggrieved by the decision or order passed by the authority, wherein the higher authority decides about the correctness of the said decision or order. It is important to understand that if appeal is not preferred, the order passed even if it were incorrect / questionable would become final. "The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant." ***[Vijay Prakash D. Mehta v. Collector of Customs 1989 (39) E.L.T. 178 (S.C.)]***

21.2 Appellate stages

Order Passed by	Appellate authority
All officers upto & including Additional Commissioner	Appeal lies before Commissioner (Appeals)
***Principal Commissioner/* Commissioner or Commissioner (Appeals)**	Appeal lies before CESTAT, **except in the following cases where the order relates to:–** a) A case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; b) A rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; c) Goods exported outside India (except to Nepal or Bhutan) without payment of duty;
Commissioner (Appeals)	Revision application to Central Government (in matters relating to rebate of duty on exports, export without payment of duty, loss of goods in transit and processing loss). No further appeal.
CESTAT	Appeal lies before Supreme Court (matters relating to valuation and rate of duty)
CESTAT	Appeal lies before High Court (Other than matters relating to valuation and rate of duty)
High Court	Appeal lies before Supreme Court

21.3 Appeals to Commissioner (Appeals)

When to file an appeal?	If aggrieved by an order passed by all adjudicating officers upto & including Additional Commissioner
Time-limit for filing appeal?	Within **60 days** from the date of the communication of decision/order. **Extension:** further **30 days** by Commissioner (Appeals) on sufficient cause being shown. **Note:** 60 days and 30 days must be read as 2 months and 1 month in case of service tax.
Adjournment for hearing	Commissioner (Appeals) may grant adjournment **maximum of 3 times** to a party, if sufficient cause is shown, at any stage of proceeding.
Procedure in appeal?	1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard. 2) At the hearing of an appeal, Commissioner (Appeals) may allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if he is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.

Order by Commissioner (Appeals)	1) The Commissioner (Appeals) can pass such order, as he thinks fit, ***confirming, modifying or annulling*** the decision or order appealed against.
Principles of natural justice	Order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order. Further, where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit as specified to show cause against the proposed order.
Time-limit of passing order?	*Where it is possible to do so*, commissioner (Appeals) must hear and decide every appeal within a period of **6 months** from the date on which it is filed.
Communication of the order?	Order passed shall be communicated to the appellant, the adjudicating authority, the Principal Chief Commissioner/ Chief Commissioner of Central Excise and the Principal Commissioner/ Commissioner of Central Excise.

21.4 Appeals to Appellate Tribunal

When to file an appeal?	1) Any assessee aggrieved by an order passed by Principal Commissioner/ Commissioner or Commissioner (Appeals); or 2) A Committee of Commissioners may, against an order passed by the Commissioner (Appeals) direct any Central Excise Officer authorized in this behalf to file an appeal to the Appellate Tribunal against such order.
Orders not appealable?	Order passed by Commissioner (Appeals) if such order relates to - **Excise:** a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; c) goods exported outside India (except to Nepal or Bhutan) without payment of duty; **Customs:** a) any goods imported or exported as baggage; b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in

<table>
<tr><td></td><td colspan="2">India, or are short of the quantity required to be unloaded at that destination;
c) payment of drawback as provided in Chapter X, and the rules made thereunder.</td></tr>
<tr><td>Rejection of appeal by CESTAT?</td><td colspan="2">The Appellate Tribunal may, in its discretion, refuse to admit an appeal where in any disputed case, (other than a case relating to the determination of rate of duty or valuation of goods) the difference in duty involved or the duty involved or the fine or penalty does not exceed Rs.2,00,000/-.</td></tr>
<tr><td>Time-limit for filing an appeal?</td><td colspan="2">Every appeal under this section shall be filed within 3 months from the date on which the order sought to be appealed against is communicated to the Principal Commissioner/ Commissioner of Central Excise, or, as the case may be, the other party preferring the appeal.</td></tr>
<tr><td>Who should file Memorandum of cross objection and time-limit?</td><td colspan="2">On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may file a memorandum of cross-objections within 45 days of the receipt of the notice.</td></tr>
<tr><td rowspan="8">Fee for filing an appeal?</td><td>Amount of duty, interest demanded and penalty levied</td><td>Fee for filing an appeal</td></tr>
<tr><td>Less than or equal to Rs.5,00,000/-</td><td>Rs.1,000/-</td></tr>
<tr><td>More than Rs.5,00,000/- but not exceeding Rs.50,00,000/-</td><td>Rs.5,000/-</td></tr>
<tr><td>More than Rs.50,00,000/-</td><td>Rs.10,000/-</td></tr>
<tr><td>Application made for rectification of mistake or for restoration of an appeal or an application</td><td>Rs.500/-</td></tr>
<tr><td>Rectification application filed by or on behalf of CCEx</td><td>Nil</td></tr>
<tr><td>Appeal filed by the department</td><td>Nil</td></tr>
<tr><td>In the case of filing of a memorandum of cross-objections</td><td>Nil</td></tr>
<tr><td>Order by appellate Tribunal?</td><td colspan="2">The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against. The Tribunal may even refer the case back to adjudicating authority for fresh adjudication.</td></tr>
<tr><td>Adjournment for hearing</td><td colspan="2">CESTAT may grant adjournment maximum of 3 times to a party, if sufficient cause is shown, at any stage of proceeding.</td></tr>
<tr><td>Time-limit of passing order?</td><td colspan="2"><u>Where it is possible to do so,</u> CESTAT must hear and decide every appeal within a period of 3 years from the date on which it is filed.</td></tr>
<tr><td>Time-limit for Rectification of Mistake?</td><td colspan="2">1) The Appellate Tribunal may, at any time within 6 months from the date of the order may with a view to rectifying any mistake apparent from the record can amend any order passed by it. However, an amendment which has the effect of increasing the liability of the other party shall be made only after giving a notice and allowing a reasonable opportunity of being heard.

2) Such mistake must have been brought to its notice by Principal Commissioner/ Commissioner of Central Excise or the other party to the Appeal.</td></tr>
</table>

21.5 Pre-Deposit percentage of duty or penalty imposed before filing appeal

Erstwhile section 35F of Central Excise Act, 1944 mandated that an appeal could be filed before Commissioner (Appeals) and/or CESTAT only when the duty demanded or the penalty levied in the order being appealed against was deposited with the adjudicating authority. However, Commissioner (Appeals) and CESTAT were empowered to waive off such pre-deposit if the same caused undue hardship to the appellant. Due to this provision, the appellants invariably opted to file an application seeking two reliefs namely:
(a) Waiver of the condition of pre-deposit; and
(b) Staying the recovery proceedings till appeal is disposed of

To expedite the process of disposal of appeals and with a view to freeing appellate authorities from hearing stay applications and to take up regular appeals for final disposal, the said provisions have been substituted with effect from 06.08.2014. The new provision is tabulated below for ease of reference:

Stage of appeal	***Appellate Authority***	***Quantum of pre-deposit***
First Appeal	Commissioner (Appeals) or CESTAT	7.5% of the duty where only duty or both duty and penalty are in dispute (OR) 7.5% of the penalty where only penalty is in dispute
Second Appeal	CESTAT	10% of the duty where only duty or both duty and penalty are in dispute (OR) 10% of the penalty where only penalty is in dispute

Points to be noted:

a) Quantum of pre-deposit shall in any case not exceed **Rs.10 Crore.**
b) Pre-deposit shall be computed as a percentage of only duty demanded even in cases where dispute involves both duty demanded and penalty levied. Only when penalty alone is in dispute, would the pre-deposit be computed on the basis of penalty.
c) New section 35F does not include interest payable within the ambit of duty demanded. Thus, pre deposit of 7.5%/10% would exclude interest, if any, payable on the duty demanded.

21.6 CBEC clarification on Pre-Deposit

CBEC has issued Circular No. 984/08/2014 CX dated 16.09.2014 which clarifies the following:

1) Quantum of pre-deposit:

a) 10% of duty demanded or penalty imposed must be paid before tribunal for order against Commissioner (Appeals)

Where an appeal is made against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This amount may or may not be same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

b) Pre-deposit percentage must be calculated on aggregate of all penalties, if penalty alone is in dispute

Where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, pre-deposit would be calculated based on the aggregate of all penalties imposed in the order sought to be appealed against.

2) Payments made during investigation:

c) Payments made during investigation can be off-set from pre-deposit requirement

Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10% (subject to a limit of Rs.10 crore), will be considered as payments towards pre-deposit for filing the appeals.

d) No Coercive action can be taken by department if proof of pre-deposit can be established

In respect of appeals filed on or after 06.08.2014, no coercive measures for the recovery of balance amounts of demands of tax and penalties can be taken if the party/assessee shows the proof of payment of pre-deposit (7.5% / 10%) and the copy of appeal memo.

e) Recovery of entire amount with interest can be made only on final disposal of the appeal, subject to stay by the higher authority

Recovery can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department unless order of Commissioner (Appeals) or CESTAT is stayed by authority/higher court. The amount to be recovered will include interest calculated from the date duty became payable till the date of payment.

3) Refund of Pre-Deposit:

f) Refund of amount pre-deposited can be filed in case of a favourable order

Refund of pre-deposit is not refund of duty and hence the same will not be governed by provisions of refund section 11B of Central Excise Act/section 27 of Customs Act, 1962. Therefore, once the appeal is decided in favour of the assessee, he can apply for refund of pre-deposit.

g) Refund must be granted within 15 days of receipt of letter seeking the same

Refund of pre-deposit along with interest will have to be made within 15 days of receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

h) Refund cannot be held on the grounds that department is seeking further appeal

Refund of pre-deposit should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party.

i) Even in case of remand, pre-deposit needs to be refunded along with interest

In the event of a remand of order back to the lower authorities, refund of the pre-deposit shall be payable along with interest.

21.7 Interest on delayed refund of amount pre-deposited

1) Delayed in refund of pre-deposit shall be payable along with interest @ 6%

Where an amount deposited by the appellant under the aforesaid provisions is required to be refunded consequent upon the order of the appellate authority, then interest will have to be paid on the refund of such pre-deposit from the date of its payment to the date of refund. The rate of interest would be anywhere between 5% to 36% and would be notified separately. Notification No.24/2014 CE (NT) dated 12.08.2014 has been issued to specify 6% as the rate of interest payable on delayed refund of pre-deposit.

21.8 Monetary limits for filing of appeals by the Department

1) Department shall file appeal only if the duty involved is above the threshold limit fixed

As per the National Litigation Policy, in Revenue matters, appeal shall not be filed if the amount involved is less than the monetary limit fixed by the Revenue authorities for the said purpose. CBEC has issued the instructions fixing the following monetary limits of duty as tabulated below, below which an appeal shall not be filed by the Department in CESTAT, High Court and Supreme Court:-

Appellate Forum	Monetary limit
CESTAT	5,00,000
High Court	10,00,000
Supreme Court	25,00,0000

Following clarifications have been given by the Board with regard to the monetary limits:

(i) Monetary limit shall apply on the disputed duty and not on the total duty demanded in a case.
(ii) Monetary limits being would apply to cases of refund as well.
(iii) Monetary limits will not be applicable to application filed before the Joint Secretary (Revision Application).

21.9 Review by Committee of Chief Commissioners and Principal Commissioner/ Commissioner

Which order can be reviewed?	1) *Order passed by* Principal Commissioners/ Commissioners of Central Excise can be reviewed by Committee of Chief Commissioners of Central Excise; 2) Orders passed by officers below the rank of Principal Commissioner/ Commissioner can be reviewed by Principal Commissioner/ Commissioner of Central Excise.
Procedure of Review by Committee of Chief Commissioners of Central Excise	Committee of Chief Commissioners of Central Excise may of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner/ Commissioner of Central Excise has passed any order to satisfy itself upon the legality or propriety of the order. Thereafter, the Committee of Chief Commissioners may direct such Commissioner or any other Commissioner to file an appeal to the Appellate Tribunal and to determine such points as may be specified by it.
Difference in opinion in the Committee of Chief Commissioners of Central Excise	Where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board. If the Board, after considering the facts of the order, is of the opinion that the decision or order passed by the Principal Commissioner/ Commissioner of Central Excise is not legal or proper, it may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.
Procedure for Review by *Principal Commissioner/* Commissioner of Central Excise	Similar powers of review as explained above are granted to the Principal Commissioner/ Commissioner of Central Excise in respect of orders passed taken by the adjudicating authority subordinate to him. The Principal Commissioner/ Commissioner may direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner (Appeals) to determine such points as may be specified by him.

Time limit for passing the order?	Every order as specified above shall be made within a period of **3 months** from the date of communication of the decision or order of the adjudicating authority. However, the Board may on sufficient cause being shown extend the said period by another **30 days.**
Time limit for making the application to CESTAT/Commissioner (Appeals)?	Principal Commissioner/ Commissioner or the adjudicating authority shall make an application to the Appellate Tribunal or the Commissioner (Appeals) within **1 month** from the date of communication of the order of the Committee of the Chief Commissioner or Principal Commissioner/ Commissioner. **Note:** The time-limit of 1 month shall be replaced as 4 months in case of service tax where application is to appellate tribunal, it shall remain as 1 month in case an application is to commissioner (appeals).

21.10 Revision by the Central Government

Orders that can be revised?	Revision application can be filed with the Central Government against the orders passed by the Commissioner (Appeals), if such order relates to: (a) loss of goods in transit from factory to warehouse or from warehouse to warehouse; (b) rebate of duty of excise on goods exported; (c) goods exported outside India (except Nepal and Bhutan) without payment of duty; (d) processing loss; (e) *rebate of service tax on input services or rebate of duty paid on inputs, used in providing the service which has been exported.* ***[inserted vide Finance act, 2015]*** **Note:** In respect of the orders passed by the Commissioner (Appeals) in relation to any of the matters listed above, appeal will not lie to Appellate Tribunal, but a revision application will have to be filed with the Central Government.	
Minimum amount of duty/fine/penalty for filing a revision application?	The Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed **Rs.5,000/-**.	
Revision application by the Department?	The Principal Commissioner/ Commissioner of Central Excise may direct the proper officer to make an application to the Central Government for revision of the order passed by the Commissioner (Appeals) if he thinks that such order is not legal or proper.	
Time limit for filing the application?	The revision application by an assessee has to be made within **3 months** from the date of the communication of the disputed order to the applicant. However, such period can be extended by a further period of 3 months by the Central Government, if it is satisfied by the sufficiency of the cause.	
Fee for filing the application?	**Amount of duty, interest demanded and fine/penalty levied**	**Fee for filing an appeal**
	Less than or equal to Rs.1,00,000/-	Rs.200/-
	More than Rs.1,00,000/-	Rs.1,000

	However, no such fee shall be payable if the application is filed by the proper officer on behalf of the Principal Commissioner/ Commissioner of Central Excise.
Revision Order?	The Central Government may, of its own motion, **annul or modify** any order.
Principles of Natural justice	No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed unless the person affected by the proposed order has been given notice to show cause against it within **1 year** from the date of the order sought to be annulled or modified. Further, in case of non/short levy of excise duty, no order levying or enhancing the duty shall be made unless the aggrieved person is given notice to show cause against it within the time-limit as specified in the act.

Amendment Note:

1) In respect of orders passed by Commissioner (Appeals) relating to transit loss, processing loss, rebate of duty or export without payment of duty, a revision application has to be filed with the Revision Authority (Central Government) and not an appeal before CESTAT

2) As per section 86 of the Finance Act 1994, an appeal can be made to the CESTAT, *inter alia,* against an order passed by the Commissioner (Appeals). In line with the provisions of section 35EE, section 35B of Central Excise Act, 1944 bars an appeal to the CESTAT in respect of transit loss, processing loss, rebate of duty or export without payment of duty. However, there is no such restriction in section 86 under service tax.

3) This created doubts as to whether in respect of cases involving service tax rebate, an appeal needs to be filed with CESTAT or a revision application is to be filed with the Central Government.

4) The Delhi High Court in the case of *CCEx. v. Glyph International Ltd 2014 (35) STR (30) (All.)* held that in such cases the appeal will lie to CESTAT.

5) Therefore, the Finance Act, 2015 has, amended section 86 to prescribe that remedy against the order passed by Commissioner (Appeals), in a matter involving rebate of service tax on input services or rebate of duty paid on inputs, used in providing the service which has been exported shall lie before the Central government for revision application and not before CESTAT.

21.11 Appeal to High Court

Who can file appeal?	Any person aggrieved by an order passed in appeal by the Appellate Tribunal (not being an order relating the rate of duty or value).
When appeal be accepted?	If the High Court is satisfied that the case involves a substantial question of law.
Time period	Any party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court within **180 days** from the date on which the order appealed against is received.
Filing Fee?	Appeal needs to be accompanied by a fee of **Rs.200/-**. No filing fee in case appeal is filed by the department.
Condonation for delay in filing the appeal?	The High Court has power to condone the delay and admit an appeal after the expiry of the period of **180 days**, if it is satisfied that there was sufficient cause for not filing the same within that period.
Hearing on Question of Law?	Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard only on the question so formulated, and the respondents shall, at

	the hearing of the appeal, be allowed to argue that the case does not involve such question. However, the Court has the power to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.
Order of the High Court	The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit. The High Court may determine any issue which has not been determined by the Appellate Tribunal or has been wrongly determined by the Appellate Tribunal, by reason of a decision on a question of law. **Decision by majority of the Judges:** When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges. **Where there is no such majority**, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

21.12 Appeal to Supreme Court

When appeal can be filed?	1) Any person aggrieved by the judgment of the High Court can file an appeal to supreme court if the High Court certifies that the case is fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgment. 2) Any person aggrieved by an order of the Appellate Tribunal in relation to the determination of rate of duty or value.

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Chapter 22 - Advance Ruling & Settlement Commission

Section Referencer

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22.1 Introduction

'Advance ruling' means the determination, by the Authority of a question of law or fact specified in the application regarding the liability to pay duty or tax in relation to a manufacture of goods, import/export of goods or towards provision of service by the applicant.

'Settlement Commission' is a mechanism for speedy settlement of cases involving high revenue stakes. This is similar to what is constituted under the Income Tax law. This is a beneficial piece of legislation to settle the case and pay the dues without going through adjudication stages having legal challenges, recoveries and harassments. It may also be referred as "out of court" settlement. The proceedings before the settlement commission shall be deemed to be judicial proceedings for the purpose of Indian Penal Code.

22.2 Advance Ruling

Who can file an application?	Applicant: means :- (i) (a) a non-resident setting up a joint venture in India in collaboration with a nonresident or a resident; or (b) a resident setting up a joint venture in India in collaboration with a nonresident; or (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India; (ii) a joint venture in India; or (iii) a public sector company, resident public limited companies and resident private limited companies *and* ***resident firm***. ***[Amended vide Union Budget 2015]*** **Amendment Note:** Earlier, public sector companies, resident public limited companies and resident private limited companies were notified under section 23A(c)(iii) of Central Excise Act, 1944 as the class or category of resident persons who can apply for advance ruling. However, Notification No. 11/2015 CE (NT) dated 01.03.2015 has expanded the scope of advance ruling by additionally notifying ***resident firm*** as class or category of residents who can also apply for advance ruling in case of specified matters. Thus, now a resident firm will also be eligible to make an application for advance ruling. **Notes:** 1) "firm" shall have the meaning assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932) , and includes- (i) the limited liability partnership; or (ii) limited liability partnership which has no company as its partner; or (iii) the sole proprietorship; or (iv) One Person Company. 2) In case of customs, 'A resident who proposes to import goods claiming for assessment under heading 9801 of first schedule to customs tariff act, 1975 (i.e. project imports by resident) can also apply for advance ruling.
Does vacancy or defect in the constitution of Authority invalidate proceedings?	No proceeding before, or pronouncement of advance ruling by, the Authority under this Chapter shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.
Questions on which	(a) classification of any goods or service;

Advance ruling can be sought?	(b) the valuation of goods or services; (c) the principles to be adopted for the purposes of determination of value of the goods or services; (d) applicability of exemption notifications issued; (e) admissibility of credit of duty or tax/determination of the origin of goods; (f) determination of the liability to pay duty or tax.
Copies and fees for application?	The application shall be made in quadruplicate and be accompanied by a fee of **Rs.2,500/-**.
Time-limit for withdrawal of application?	An applicant may withdraw an application within **30 days** from the date of the application.
Procedure on receipt of application?	1) On receipt of an application, a copy thereof shall be forwarded to the CCE and, if necessary, call upon him to furnish the relevant records. 2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application. 3) Where an application is allowed, the Authority shall after examining such further material as may be placed before it by the applicant or obtained by the Authority pronounce its advance ruling on the question specified in the application. 4) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.
When can advance ruling authority reject the application?	The Authority shall not allow the application where the question raised in the application is: a) already pending in the applicant's case before any Central Excise Officer or the Appellate Tribunal or any Court; or b) the same as in a matter already decided by the Appellate Tribunal or any Court. **Note:** No application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard. Also, where the application is rejected, reasons for such rejection shall be given in the order.
Time-limit of passing order?	The Authority shall pronounce its advance ruling in writing **within 90 days** of the receipt of application.
Communication of the order?	A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the CCE, as soon as may be, after such pronouncement.
Applicability of advance ruling?	The advance ruling pronounced by the Authority shall be binding only: (a) on the applicant who had sought it in respect of any matter referred in the application; and (c) on the Principal commissioner/commissioner and the authorities subordinate to him, in respect of the applicant.
When can Advance ruling be void?	Where the Authority finds, on a representation made to it by the principal commissioner/commissioner or otherwise, that an advance ruling pronounced by it has been obtained by the applicant by fraud or

	misrepresentation of facts then the authority may, by order, declare such ruling to be void ab-initio and thereupon all the provisions of this Chapter shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

22.3 Settlement Commission

Who can make an application for settlement? Can it be withdrawn?	An assessee may make a case for settlement. An assessee is defined in as 'Any person who is liable to pay excise duty assessed and includes any manufacturer/producer or a registered person of a private warehouse in which excisable goods are stored'. It can also be an importer or exporter or any person. An application once made cannot be withdrawn.
What is it that can be settled?	A **'case'** can be settled. The **'case'** is defined as any pending proceedings under this act or any other act for the levy, assessment and collection of duty or taxes, before an adjudicating authority on the date on which an application is made. **Notes:** 1) When any proceeding is referred back by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause. Thus, Settlement Commission can only be approached when original adjudication is pending. ***[Amendment vide Union Budget 2015]*** 2) Since Commissioner (appeals) is not an 'adjudicating authority', therefore 'case' pending before it cannot be settled. **Amendment Notes:** The words *'in any appeal or revision as the case may'* be has been deleted and therefore as a consequence all proceedings referred back to the adjudicating authority for a fresh adjudication shall be ineligible for settlement and not just the proceedings referred back in any appeal or revision.
Can a completed proceeding be re-opened?	No, the Settlement Commission cannot reopen the proceedings that are already completed.
What categories of cases cannot be settled?	The following categories of cases can be settled: a) Assessee must have filed the application for settlement in respect of a case relating to him before the adjudication thereof; b) The applicant must have filed returns showing production, clearance and central excise duty paid. **Note:** If Settlement Commission is satisfied that circumstances exist for not filing the returns, it may allow the applicant to make an application for settlement after recording reasons for the same. Thus, Settlement Commission has the discretion to allow such applications after recording reasons therefor. c) Applicant must have received a show cause notice; d) Case must not be pending before the Appellate Tribunal or any Court; e) Dispute must not be related to interpretation of classification;

	f) The additional amount of duty accepted by the applicant in his application must exceed atleast **Rs.3,00,000/-**; g) Applicant, while filing the application, must have deposited the additional amount of excise duty accepted by him along with interest***;*** h) Particulars of excisable goods in respect of which short levy on account of misclassification, undervaluation, inapplicability of exemption notification or CENVAT credit or otherwise. i) In Customs, the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or a declaration accompanying the goods imported/exported through post or courier, as the case may be and in relation to such documents, a show cause notice has been issued to him by the proper officer.
Can Settlement Commission grant immunity from prosecution and penalty/ interest/ fine?	The Commission can grant immunity from prosecution only for any offence under the Central Excise, Customs or service tax Act and either wholly or in part from the imposition of penalty and fine if it is satisfied that the applicant has made full and true disclosure and co-operated with the Commission. **<u>Note:</u>** It may be noted that if prosecution is launched before receipt of application, immunity against such prosecution cannot be granted.
Can such immunity be withdrawn?	Immunity can be withdrawn only if the person fails to pay the sums due within the time specified in the settlement order or where the applicant has concealed any material to the settlement or given false evidence relating to the settlement.
Can the case be sent back by the Settlement Commission to the Central Excise/Customs officer?	This can be done only where the Commission is satisfied that the person has not cooperated. The consequences of this are that it would be deemed that no application has been made before the Commission.
Can the Central Excise officer who received the case back use the materials produced before the Commission?	Yes. Central Excise/Customs officer can use the materials produced before the commission for further assessment proceedings.
Is the order of settlement final?	Except as provided in Chapter V, the order is final and conclusive and shall not be re-opened in any proceeding under this Act or under any other law. **<u>For example:</u>** If the order was obtained by fraud or misrepresentation, it would become void.
What is the time limit for payment of amounts ordered by Settlement Commission?	The duty, interest, fine and penalty payable in pursuance of the order shall be paid by the assessee within **30 days** of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest due thereon.
Is the proceeding before the Settlement Commission a judicial proceeding?	The proceeding is a judicial proceeding within the meaning of Sec. 193 and 228 of the Indian Penal Code.
Where are the Benches of the Settlement	The principal Bench is at New Delhi with other Benches at Chennai, Calcutta and Mumbai. The jurisdiction of the Bench is decided not by the

Commission located?	place of business of the applicant but by the location of the headquarters of the Commissionerate passing the order.
Can the applicant take legal assistance?	Assistance of authorized representative can be taken.
Can the property of the applicant be attached?	Provisional attachment by Settlement Commission is possible. See procedure to be followed by Commission below for details.

22.4 Procedure to be followed by the Settlement Commission

1) Settlement commission shall either allow or reject the application at its discretion

The Settlement Commission shall issue a notice to the applicant within **7 days** from the date of receipt of the application, to explain in writing as to why the application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the applicant, the Settlement Commission shall, within a period of **14 days** from the date of the notice, pass an order either allowing the application to be proceeded with, or rejecting the same. The proceedings before the Settlement Commission shall abate on the date of rejection. However, where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

2) Report must be called for from the Principal Commissioner etc. and same must be furnished within 30 days

Where an application is allowed or deemed to have been allowed to be proceeded with, the Settlement Commission shall, within **7 days** from the date of order, call for a report along with the relevant records from the Principal Commissioner/ Commissioner having jurisdiction. The Principal Commissioner/ Commissioner shall furnish the report within a period of **30 days** from the date of the receipt of communication from the Settlement Commission. However, where the Principal Commissioner/ Commissioner does not furnish the report within the aforesaid period of **30 days**, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner/ Commissioner.

3) Report must be called for from the Commissioner (investigation) if needed, and same must be furnished within 90 days

After examination of the report of the Principal Commissioner/ Commissioner submitted within time, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct, for reasons to be recorded in writing, the Commissioner (Investigation) within **15 days** of the receipt of the report, to make such further enquiry or investigation on the matters covered by the application and any other matter relating to the case. The Commissioner (Investigation) should furnish the report of such enquiry within a period of **90 days** from the date of the receipt of the communication from the Settlement Commission. However, where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under subsection (5) without such report.

4) Order must be passed based on above reports and after giving an opportunity of being heard to both the parties

The Settlement Commission may pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Principal Commissioner/ Commissioner of Central Excise and Commissioner (Investigation) after examination of the records. An opportunity of being heard either in person or through a representative duly authorised in this behalf shall be given to the applicant and to the Principal Commissioner/ Commissioner of Central Excise having jurisdiction before passing of such order. The Commission shall also examine any further evidence as may be placed before it or obtained by it before passing the order.

5) Order of settlement commission must be passed within 9 months or additional 3 months

The order under sub-section (5) shall be passed within **9 months** from the last day of the month in which the application was made. However, if the order is not passed within the stipulated time, the settlement proceedings shall abate and the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made. However, the aforesaid period may be extended, for reasons to be recorded in writing, by the Settlement Commission for a further period not exceeding 3 months.

8) Order must contain the terms of settlement, reasons for rejection etc.

The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective. However, in case of rejection the order shall contain the reasons therefor.

9) Order to be void if later found that settlement obtained by fraud or misrepresentation of facts

The order shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts. The amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant.

10) Central Excise officer shall complete the proceedings within 2 years if order of settlement commission becomes void

Where a settlement becomes void as mentioned above, the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The Central Excise Officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of **2 years** from the date of the receipt of communication that the settlement became void.

11) Duty, interest, fine penalty as per order shall be paid within 30 days

The duty, interest, fine and penalty payable in pursuance of the order under sub-section (5) shall be paid by the assessee within **30 days** of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest.

22.5 Bar on subsequent application for settlement in certain cases

A person shall not be entitled to apply for settlement in relation to any other matter in the following cases:-

1) When settlement commission imposes penalty on the grounds of concealment

Where an order of the Settlement has been passed which provides for the imposition of a penalty on the applicant for settlement, on the ground of concealment of particulars of his duty liability made from the Central Excise Officer; or

Note: In this clause, the concealment of particulars of duty liability relates to any such concealment made from the officer of customs."

2) Person is convicted of any offence in relation to the 'case'

Where after the passing of an order of settlement, in relation to a case, such person is convicted of any offence in relation to that case; or

3) Where 'Case' is sent back to the Central excise officers by the settlement commission

Where the case of such person is sent back to the Central Excise Officer by the Settlement Commission.

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Section – F

CASE LAWS

Chapter 25 - Important Case Laws

CENTRAL EXCISE

BASIC CONCEPTS

1. Does printing on jumbo rolls of GI paper as per design and specification of customers with logo and name of product in colourful form, amount to manufacture?

CCE v. Fitrite Packers 2015 (324) ELT 625 (SC)

Yes, Printing on the GI paper as per the design and specifications of the customer amounts to manufacture

The assessee purchased duty paid GI paper from the market and carried out printing on it according to the design and specifications of the customer. The printing was done on jumbo rolls of GIP twist wrappers. On the paper, logo and name of the product was printed in colorful form and the same was delivered to the customers in jumbo rolls without slitting. The customer intended to use this paper as a wrapping/packing paper for packing of their goods. Revenue contended that the process amounted to manufacture and the assessee was liable to pay excise duty thereon.

The Supreme Court referred to one of its earlier judgments in the case of *Servo-Med Industries Pvt. Ltd. v. CCEx. 2015 (319) ELT 578*. In this case, the Apex Court had culled out four categories of cases to ascertain whether a particular process would amount to manufacture or not:

i. Where the goods remain exactly the same even after a particular process - There is obviously no manufacture involved.
ii. Where the goods remain essentially the same after the particular process – Again there can be no manufacture.
iii. Where the goods are transformed into something different and / or new after a particular process but the said goods are not marketable - No manufacture of goods takes place.
iv. Where the goods are transformed into goods which are different and / or new after a particular process and such goods are marketable as such - It is in this category that manufacture of goods can be said to take place.

The Apex Court observed that GI paper was meant for wrapping and its use did not undergo any change even after printing. However, whereas the blank paper could be used as wrapper for any kind of product, after the printing of logo and name of the specific product thereupon, its end use got confined to only that particular and specific product of the particular company / customer. The printing, therefore, was not merely a value addition but had transformed the general wrapping paper to special wrapping paper. ***The Supreme Court held that the process of aforesaid particular kind of printing resulted into a product i.e., paper with distinct character and use of its own which it did not bear earlier***. ***The Court emphasised that there has to be a transformation in the original article and this transformation should bring out a distinctive or different use in the article, in order to cover the process under the definition of manufacture***. Since these tests were satisfied in the present case, the Apex Court held that the process amounted to manufacture.

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

Balrampur Chini Mills Ltd. v. Union of India 2014 (300) ELT 372 (All.)

No, Though 'Bagasse' is a marketable product still excise duty cannot be imposed as it is not manufactured - High court quashes CBEC's Circular dated 28-10-2009

High Court made the following observations:

(i) Supreme Court in its judgement given vide order dated 21.7.2010 in Civil Appeal No.2791 of 2005 has held that reversal of 8% amount (now 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 and thus, rule 6(2) and rule 6(3) would not be applicable.

(ii) Explanation added to section 2(d) deems the goods, which are capable of being bought and sold, to be marketable. Earlier also, bagasse was being bought and sold for a consideration and even after the amendment in 2008 it is being bought and sold for a consideration. Hence, it was marketable earlier also and no difference has been made about the marketability of bagasse on account of addition of explanation to section 2(d) of CEA, 1944 in as much as it does not cease to be waste and it does not become a manufactured final product for the purposes of rule 6 of CENVAT Credit Rules. The High Court concluded that ***though bagasse is an agricultural waste of sugarcane, it is a marketable product. However, duty cannot be imposed thereon simply by virtue of the explanation added under section 2(d) of the Central Excise Act, 1944 as it does not involve any manufacturing activity. The High Court quashed the CBEC's Circular dated 28-10-2009.***

3. 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) E.L.T. 162 (S.C.)

No, Mere improvement in quality without emergence of new or distinct product does not amounts to manufacture

The Supreme Court observed that:

"Manufacture" could be said to have taken place only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use. ***It is a well settled principle that mere improvement in quality did not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it could no longer be regarded as the original commodity but was instead recognized as a new and distinct article that manufacture could be said to have taken place.***

The process of mixing polymers and additives with bitumen merely resulted in the improvement of quality of bitumen. However, bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely mixing of aggregates for constructing the roads.

The Apex 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.***

4. 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. v. UOI 2011 (273) E.L.T. 10 (S.C.)

No, Generation of metal scrap or waste during the repairing process does not amounts to manufacture

The Apex Court observed that for imposition of excise duty under section 3 of the Central Excise Act, two conditions that the goods being excisable goods under section 2(d) and goods being manufactured in the terms of section 2(f) of the Act, need to be satisfied conjunctively. The metal scrap and waste were excisable goods under section 2(d) of the Act. Further, the 'manufacture' in terms of section 2(f), inter alia, includes any process incidental or ancillary to the completion of the manufactured product.

The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient.

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 metal scrap and waste arise, had no contribution or effect on the process of manufacturing of the cement, (the end product). ***The repairing activity can never be called as a part of manufacturing activity in relation to production of end product.*** Therefore, the metal scrap and waste could not be said to be a by-product of the final product. At the best, it was the by-product of the repairing process. The Supreme Court held that ***the generation of metal scrap or waste during the repair of the worn out machineries/parts of cement manufacturing plant did not amount to manufacture.***

5. Are the physician samples excisable goods despite them being statutorily prohibited from being sold?

Medley Pharmaceuticals Ltd. v. CCE & C., Daman 2011 (263) E.L.T. 641 (S.C.)

Yes, Statutory prohibition of sale does not mean that product is not capable for sale

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.*** Moreover, ***the Drugs and Cosmetics Act, 1940 (Drugs Act) and the Central Excise Act, 1944 operated in different fields. The prohibition imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss.*** And could not be inferred that that the product was not capable of being sold. Since physician sample was capable of being sold in open market, the physician samples were excisable goods and were liable to excise duty.

6. 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 (263) E.L.T. 655 (S.C.)

Yes, Assembling of the testing equipments for testing the final product in the factory amounts to manufacture

The appellant assembled a machinery in the nature of testing equipments to test their final products. Balance sheet of the appellant stated that addition to plant and machinery included testing equipments. The said position was further corroborated by the Director's report wherein it was mentioned that during the year, the company developed a large number of testing equipments on its own. Revenue sought to levy excise duty on the said testing equipment on the ground that process of assembling testing equipments undertaken by the assessee amounted to manufacture. However, the assessee contended that said process could not be said to be a manufacturing process because testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange,

The Supreme Court observed that:-

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

(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.

In the light of the aforesaid observations, the Apex Court held that duty was payable on such testing equipments used for testing the final product.

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

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (260) E.L.T. 338 (S.C.)

Yes, Product with a short shelf life can also be considered marketable unless it is proved that there is absolutely no shelf life

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

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

CCE v. Solid & Correct Engineering Works and Ors 2010 (252) ELT 481 (SC)

Yes, Machine not permanently attached to earth cannot be called immovable property and is liable for excise duty

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, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently.*** 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.

9. 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?

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

No, Stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product and the same does not amounts to manufacture

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.

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

CCE v. GTC Industries Ltd. 2011 (266) E.L.T. 160 (Bom.)

No, Process of cutting and embossing aluminium foil did not transform aluminium foil into distinct and identifiable commodity and does not amounts to manufacture

The assessee was the manufacturer of the cigarettes. A roll of aluminium foil was cut horizontally to make separate pieces of the foil and the word 'PULL' was embossed on it. Thereafter fixed number of cigarettes were wrapped in it. Aluminium foil being resistant to moisture was used as a protector for the cigarettes and to keep them dry. 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 to the foil, but only made it usable for packing.*** Cut to shape/embossed aluminium foils used for packing cigarettes could not be considered as distinct marketable commodity and hence, it was not liable to excise duty.

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 (249) E.L.T. 341 (Bom.)

No, Activity of packing of imported compact discs in a jewel box along with inlay card does not amounts to manufacture

The appellant imported recorded audio and video discs in boxes of 50 and packed each individual disc in transparent plastic cases known as jewel boxes. An inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole thing was then shrink wrapped and sold in a wholesale. The High Court observed that none of the activity that the assessee undertook involved any process on the compact discs that were imported. It held that the Tribunal rightly concluded 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**. Thus, the question of law was answered in favour of assessee and against Revenue.

12. 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 exigible to payment of excise duty?

Amrit Bottlers Private Limited v. CCE 2014 (306) ELT 207 (All.)

No, Contaminated, under or over filled bottles or badly crowned bottles does not amount to manufactured finished goods and are not required to be entered in R.G.-1 register, and not liable for payment of excise duty

The appellant was engaged in manufacturer of aerated water. Revenue alleged that the appellant was draining out manufactured aerated water on account of contaminated, under filled, over filled, badly crowned bottles, without entering them in R.G.1 register [daily stock account] and without payment of excise duty on the same. Revenue issued a demand-cum show cause notice on the appellant for the recovery of said duty.

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***. The law required the appellant to provide a screening test before it could declare the manufactured product as a finished product, which was marketable.

Under filled or over filled or badly crowned caps bottles ***could not be treated as being fully manufactured nor could they 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 need not be entered in R.G. 1 register.

The Court held that in the instant case, ***contaminated, under filled, over filled and badly crowned bottles found at the stage of production were not marketable goods. Thus, they were not required to be entered under R.G.-1 register and consequently, no excise duty was payable on them.***

CLASSIFICATION OF EXCISABLE GOODS

13. 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?

CCEx. v. Ciens Laboratories 2013 (295) ELT 3 (SC)

Cream having pharmaceutical constituents and its use in curing certain skin diseases would be classifiable as a medicament

The Apex Court observed that the cream was not primarily intended to protect the skin but was meant for treating or curing dry skin conditions of the human skin. The Apex Court stated that presence of pharmaceutical ingredients in the cream show that it is used for prophylactic and therapeutic purposes. The Supreme Court made the following further significant observations:

(i) When a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably 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.***
(ii) Though ***a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over / across the counter are cosmetics.*** There are several products that are sold over-the-counter and are yet, medicaments.
(iii) Prior to adjudicating upon whether a product is a medicament or not, it ought to be seen as to how do the people who actually use the product, understand it to be. ***If a product's primary function is "care" and not "cure", it is not a medicament. Medicinal products are used to treat or cure some medical condition whereas cosmetic products are used in enhancing or improving a person's appearance or beauty.***
(iv) ***A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients, even in small quantities, is to be treated as a medicament.***
The Supreme Court held that owing to the pharmaceutical constituents present in the cream 'Moisturex' and its use for the cure of certain skin diseases, the same would be classifiable as a medicament under Heading 30.03.

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

CCE, Bhopal v. Minwool Rock Fibres Ltd. 2012 (278) E.L.T. 581 (S.C.)

Yes, Heading according to the composition of goods shall be preferred over specific heading

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. ***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.

15. 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 (277) E.L.T. 299 (S.C.)

Yes, antiseptic cleansing solution used for cleaning/degerming or scrubbing the skin of the patient before the operation can be classified as a 'medicament'

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. 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. 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.***

16. 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 (286) E.L.T. 321 (S.C.)

Yes, 'Soft serve' served at McDonalds shall be classified as 'Ice cream'

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" shall not be less than 10%. Hence, if the 'soft serve', containing 5% milk fat content is marketed 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'.***

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".

VALUATION OF EXCISABLE GOODS

17. 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?

CCEx v. Super Synotex (India) Ltd. 2014 (301) E.L.T. 273 (S.C.)

Yes, Sales Tax/VAT shall be included in the assessable value if the same is not remitted to the sales tax department of the state government

What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. Supreme Court further observed that ***unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value" under section 4(3)(d) of Central Excise Act, 1944, and it is not excludible.*** As is seen from the facts, only 25% of the sales tax collected had been paid to the State exchequer by way of deposit 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" as substituted with effect from 1.7.2000 and therefore, the assessee is bound to pay excise duty on the said sum.***

18. 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 (286) E.L.T. 161 (Bom.)

No, PDI and free after sales services charges can be included in the transaction value only when they are charged by the assessee to the buyer.

The High Court, after considering the rival submissions observed as follows:-

1. The High Court accepted the contention of the petitioners that it did not charge the dealer for the expenses incurred by the dealer towards PDI and said services. It further stated that ***when a car was sold by the petitioner to dealer, price was the sole consideration and the petitioners and dealer were not related to each other. Hence, since the requirements of section 4(1)(a) were being complied with, the assessable value would be the transaction value*** [determined as per section 4(3)(d)]. Accordingly, the expenses incurred for PDI and said services should not be included in the transaction value of the car.
2. The High Court opined that in Clause 7 of Circular dated 1st July, 2002, reference to rule 6 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000 was not correct. Valuation rules, in the first place, would not apply in the instant case as this ***transaction did not fall within the ambit of section 4(1)(b) because the transaction of sale of a car between the petitioners and the dealer was governed by the provisions of section 4(1)(a).***
3. The Court noted that the ***said circular wrongly held that the expenses incurred by dealer towards PDI and said services were on behalf of manufacturer. Thus, such expenses could not be said to form as one of the considerations for sale of goods.***

In the light of the above discussion, the High Court held that ***Clause No. 7 of Circular dated 1st July, 2002 and Circular dated 12th December, 2002 (where it affirms the earlier circular dated 1st July, 2002) were not in conformity with the provisions of section 4(1)(a) read with section 4(3)(d) of the Central Excise Act, 1944.*** Further, **as per section 4(3)(d), the PDI and free after sales services charges could be included in the transaction value only when they were charged by the assessee to the buyer**.

CENVAT CREDIT

19. Is the assessee entitled to avail CENVAT credit of service tax paid on outward transportation of goods cleared from factory?

CCE v. Haryana Sheet Glass Ltd. 2015 (39) STR 0392 (P&H)

Yes, Assessee is entitled to avail CENVAT credit of service tax paid on outward transportation of goods cleared from factory

The High Court relying upon its earlier decision in the case of *Ambuja Cements Ltd. v. Union of India 2009 (236) ELT 431 (P&H)* held that outward transportation up to the place of removal falls within the expression "input service". If a manufacturer is to deliver the goods to the purchaser, the place of removal would not be a factory gate of the manufacturer but that of the purchaser. In the given case, there is no evidence that the property in goods stood transferred to the purchaser at the factory door of the assessee. Therefore, the assessee is entitled to avail CENVAT credit of service tax paid on outward transportation of goods cleared from factory.

Note: *(1) The above case establishes that factory cannot necessarily be the place of removal in all cases. Only if the property in goods is transferred at factory gate, the sale will get complete at the factory gate, and then the factory will be considered as the place of removal.*

20. Can a commercial training and coaching institute claim CENVAT credit in respect of the input services of catering, photography and tent services used to encourage the coaching class students, maintenance and repair of its motor vehicle and travelling expenses?

Bansal Classes v. CCE & ST 2015 (039) STR 0967 (Raj.)

No, CENVAT credit of the input services of catering, photography and tent services used to encourage the coaching class students is not eligible

Assessee is engaged in providing taxable commercial training and coaching services to students. It organises celebrations during the academic sessions whereby the services of catering, photography and tents are used. Further, it hires examination hall on rent basis for the purpose of conducting examination for students under the coaching. It also undertakes the maintenance and repair of vehicles used by it and incurs travelling expenses for the business tours.

It has availed CENVAT credit on the aforesaid services availed by it. However, Revenue alleged that CENVAT credit on such services was not admissible as these are not covered under the definition of input services under rule 2(l) of the CENVAT Credit Rules, 2004 since not used in/ in relation to providing output services.

The High Court agreed with the view taken by the Tribunal that ***once the students pass their coaching classes, the activities of catering, photography and tent services cannot be said to have been used to provide the output service of commercial training or coaching. Similarly, the assessee maintains and repairs its motor vehicle during the course of the business and there is no material to show that maintenance and repairs have any nexus to commercial training or coaching. Likewise, the travelling expenses incurred by assessee for the business tours cannot be related to provision of commercial training or coaching.*** Thus, High Court held that the assessee is not eligible for CENVAT credit of the service tax paid on catering, photography and tent services, maintenance and repair of its motor vehicle and travelling expenses.

21. Whether assessee is entitled to claim CENVAT credit of service tax paid on house-keeping and landscaping services availed to maintain their factory premises in an eco-friendly manner?

Commr. of C. Ex., & S.T., LTU v. Rane TRW Steering Systems Ltd. 2015 (039) STR 13 (Mad.)

Yes, Service tax paid on house-keeping and landscaping services to maintain the factory premises is eligible as CENVAT credit

The High Court noted that principle enunciated in case of *CCE v. Millipore India Pvt. Ltd. 2012 (26) S.T.R. 514 (Kar.)* is applicable to the case on hand. In this case, the Karnataka High Court held that landscaping of factory or garden certainly would fall within the concept of modernization, renovation, repair, etc., of the office premises. At any rate, the credit rating of an industry is depended upon how the factory is maintained inside and outside the premises. The environmental law expects the employer to keep the factory without contravening any of those laws. That apart, now the concept of corporate social responsibility is also relevant. It is to discharge a statutory obligation, when the employer spends money to maintain their factory premises in an eco-friendly manner, certainly, the tax paid on such services would form part of the costs of the final products. ***The High Court agreeing held that the tax paid on such services would form part of the cost of the final products***. Therefore, housekeeping and gardening services would fall within the ambit of input services and the assessee is entitled to claim the benefit of CENVAT credit on the same.

22. Can CENVAT credit of duties, other than National Calamity Contingent Duty (NCCD), be used to pay NCCD?

CCEx. v. Prag Bosimi Synthetics Ltd. 2013 (295) ELT 682 (Gau.)

No, CENVAT credit of other duties/taxes cannot be utilized for payment of NCCD

Rule 3(4) of CCR provides that CENVAT credit may be utilized for payment of any duty of excise on any final product. Therefore, CENVAT credit of NCCD may also be utilized for payment of any duty of excise on any final product in terms of rule 3(4). However, rule 3(7) of CCR limits the utilization of CENVAT credit in respect of NCCD as also other duties mentioned in rule 3(7)(b). Rule 3(7)(b) provides that CENVAT credit in respect of NCCD and other duties shall be utilized towards payment of duty of excise leviable under various statutes respectively. ***The High Court stressed upon the importance of the word "respectively" as it confines the utilization of CENVAT credit obtained under a particular statute for payment of duty under that statute only.*** The High Court, however, categorically added that the converse does not follow from the above discussion. The High Court held that ***merely because CENVAT credit in respect of NCCD can be utilized only for payment of excise duty, it does not lead to the conclusion that credit of any other duty can be utilized for payment of NCCD.***

23. 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 (276) E.L.T. 153 (S.C.)

Yes, CENVAT credit can be availed on the testing material of machines as the machines are not marketable and manufacture is not complete until they are tested

The Supreme Court observed that the process of manufacture would not be complete if a product is not saleable as it would not be marketable and the duty of excise would not be leviable on it. The Supreme Court was of the opinion that ***the process of testing the customized packing machines was inextricably connected with the manufacturing process, in as much as, 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 was, 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.***

24. Is assessee 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?

CCE v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.)

CENVAT credit cannot be denied on the grounds of repayment by insurance company for loss of goods along with excise duty

The High Court observed that 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 benefit to assessee, as contended by the Department. The High Court held 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.*** Excise Department cannot demand reversal of credit or payment of the said amount.

25. Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company?

Ashok Kumar H. Fulwadhya v. UOI 2010 (251) E.L.T. 336 (Bom.)

No, Penalty cannot be imposed on the directors for wrong availment of CENVAT credit by the company

The Court observed that words "any person" used in rule 13(1) of the erstwhile CENVAT Credit Rules, 2002 [now rule 15(1) of the CENVAT Credit Rules, 2004] clearly indicate that ***the person who has***

availed CENVAT credit shall only be the person liable to the penalty. The Court held that the petitioners-directors of the company could not be said to be manufacturer availing CENVAT credit and penalty cannot be imposed on them for the wrong CENVAT credit availed by the company.

26. Can CENVAT credit be taken on the basis of private challans?

CCEx. v. Stelko Strips Ltd. 2010 (255) ELT 397 (P & H)

Yes, CENVAT credit can be taken on the basis of private challans if the same is not fake

The High Court placed reliance on its decision in the case of *CCE v. M/s. Auto Spark Industries CEC No. 34 of 2004 decided on 11.07.2006* 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 MODVAT credit on duty paid on inputs.*** The High Court also relied on its decision in the case of *CCE v. Ralson India Ltd. 2006 (200) ELT 759 (P & H)* wherein it was held that ***if the duty paid character of inputs and their receipt in manufacturer's factory and utilization for manufacturing a final product is not disputed, credit cannot be denied.*** The High Court held that ***MODVAT credit 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.***

27. 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 (30) S.T.R. 3 (Guj.)

CENVAT credit can be availed for services received prior to the commencement of commercial production. Further Sales commission agent services are not eligible for CENVAT credit

The High Court observed that the activity of testing and analysis of the trial batches was in relation to the manufacture of final product as unless such trial batches were tested and approval from the regulatory authority was obtained, the final product could not be manufactured. ***It was more so as the trail batches were removed on payment of excise duty and thus, CENVAT credit of service tax paid in respect of such services could not be denied.***

As regards the commission paid to foreign agents, the High Court observed that there was nothing on record to indicate that the foreign agents were actually involved in any sales promotion activities like advertising which was covered in inclusive part of definition of input service. The High Court further elaborated that neither were such services used directly or indirectly, in or in relation to manufacture of final products or clearance of final products from (now upto) place of removal nor were they analogous to illustrative activities mentioned in the Rule 2(l) viz., accounting, auditing, etc. 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.***

28. Will two units of a 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. vs. CCEx 2013 (287) ELT 261 (Guj.)

No, Two units of a manufacturer surrounded by a common boundary wall having separate registration shall be considered as separate factories for the purpose of availment of CENVAT credit

The reason given by the High Court for such an observation was that the 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 separate registration. 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 (textile division). However, credit on inputs utilized to produce electricity which was supplied to a factory registered as a different unit (plastic division) would not be allowed. The High Court rejected the contention of the assessee that separate registration of two units situated within a common boundary wall would make them a single factory.

29. Whether CENVAT credit can be availed of service tax 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?

Commissioner v. Dynamic Industries Limited 2014 (35) STR 674 (Guj.)

Partially Yes, CENVAT credit can be availed on CHA services, shipping agents & container services etc. when used by manufacturer for the purpose of export on FOB basis but CENVAT credit of service tax paid on overseas commission agents services cannot be availed

The High Court referred to definition of 'input service' as also placed reliance on various cases dealing with subject and made the following observations:

i. In case of all three services no specific inclusion of such services in the definition of input service.
ii. 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.
iii. 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.
iv. 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.
v. With regard to the services of overseas commission agent also, the decision of this Court in **Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.) would apply wherein it was held that the CENVAT credit on a service could be availed if that service is used directly or indirectly in the manufacture or clearance of final product**. As the services of overseas commission agent have not been used for these purposes, the denial in the referred case shall apply to the present case also. ***Consequently, CENVAT credit would not be admissible in respect of the commission paid to foreign agents.***

The High Court held that CENVAT credit shall be admissible in respect of customs house agents services, shipping agents and container services and cargo handling services, ***but the CENVAT credit availed for the services of overseas commission agent is not allowed.***

Note:

'Place of removal' *is a significant concept in the CENVAT Credit Rules, 2004. The services relating to clearance upto place of removal are covered in the definition of input service and services beyond the place of removal are not so covered. The above judgment deals with this concept, and takes a view that in the present case since the property in the goods was passed at port, the port would be considered as place of removal and services of CHA etc. used till port are therefore covered in the definition of input service.*

30. Can CENVAT credit availed on inputs (contained in the work-in-progress destroyed on account of fire) be ordered to be reversed under rule 3(5C) of the CENVAT Credit Rules, 2004?

CCE v. Fenner India Limited 2014 (307) ELT 516 (Mad.)

No, CENVAT credit availed on inputs (work-in-progress) destroyed on account of fire need not be reversed under rule 3(5C) of the CENVAT Credit Rules, 2004

The High Court observed that, it was not in dispute that the inputs on which the CENVAT credit had been availed were destroyed in a fire accident when the work was in progress. Once the fact was not disputed, then the assessee could not be called upon to reverse the credit. The High Court placed reliance upon the view taken by the Gujarat High Court in the case of ***CCE v. Biopac India Corporation Limited 2010 (258) E.L.T.56 (Gujarat H.C.),*** wherein it was held that the ***goods destroyed in fire after being used for many years cannot be said as not used in the manufacture of final product and the assessee need not reverse the credit availed on such inputs.***

The High Court further noted that rule 3(5C) can be invoked where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002.

The High Court held that ***CENVAT credit would need to be reversed only when the payment of excise duty on final product is ordered to be remitted under rule 21 of the Central Excise Rules, 2002***, which deals with the remission of duty. In the present case, the ***assessee has not claimed any remission and no final product has been removed, hence, assessee need not reverse the CENVAT credit taken on inputs (contained in the work-in-progress) destroyed in fire***.

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

Bharti Airtel Ltd. v. CCEx. Pune III 2014 (35) STR 865 (Bom.)

No, Cellular mobile service provider cannot avail CENVAT credit on tower parts & pre-fabricated buildings (PFB) as they are neither 'capital goods' under rule 2(a) nor 'inputs' under rule 2(k) of the CCR

The High Court observed as under:

i. A combined reading of rule 2(a)(A)(i), 2(a)(A)(iii) and 2(a)(2) indicates that ***only the category of goods in rule 2(a)(A) falling under 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 services would be eligible for credit.

ii. The appellant's contention that they were entitled for credit of the duty paid on account of BTS being a single integrated/composite system classifiable under Chapter 85.25 of the CETA Tariff Act, is not acceptable. Since the various components of the BTS had independent functions, it could not be classified as single integrated/composite system so as to be capital goods. In that case, tower and parts thereof and PFB would not fall under clause (i) of rule 2(A)(a) of CCR.

iii. The other contention of the appellant of tower being an accessory of antenna is also without substance as the antenna can be installed irrespective of tower. It would be misconceived and absurd to accept that tower is a part of antenna. An accessory or a part of any goods would necessarily mean such accessory or part which would be utilized to make the goods a finished product or such articles which would go into the composition of another article. 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.

iv. Therefore, the goods in question namely the tower and part thereof and the PFB did not fall within the definition of capital goods and hence, the appellants could not claim the credit of duty paid on these items.

v. The alternative contention of the appellant that the tower and parts thereof and the PFB would also fall under the definition of "input" under rule 2(k), could also not be sustained.
vi. 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.
vii. Even in the CKD or SKD condition, the tower and parts thereof would fall under the Chapter heading 7308 of the Central Excise Tariff Act which is not specified in clause (i) of rule 2(a)(A) of CCR so as to be capital goods.

The High Court rejected the appeals of the appellant and upheld the findings of the Tribunal holding that ***the mobile towers and parts thereof and shelters / prefabricated buildings are neither capital goods under rule 2(a) nor inputs under rule 2(k) of the CCR. Hence, CENVAT credit of the duty paid thereon by a cellular mobile service provider was not admissible.***

32. 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 Private Limited v. CCEx. & Cus. 2014 (34) STR 814 (Guj.)

In case of conflict, decision of jurisdictional high court prevail over the decision of any other high court or over the decision of the CBEC circular

The High Court held that –
i. if there is any conflict between the decision of the jurisdictional High Court and the CBEC Circular, then decision of the jurisdictional High Court will be binding to the Department rather than CBEC Circular. Therefore, the assessee would not be entitled to CENVAT credit on sales commission services obtained by them.
ii. merely because there might be a contrary decision of another High Court is no ground to refer the matter to the Larger Bench.
iii. when there are two contrary decisions, one of jurisdictional High Court and another of the other High Court, then the decision of the jurisdictional High Court would be binding to the Department and not the decision of another High Court.

EXPORT PROCEDURES

33. Whether rule 18 of Central Excise Rules, 2002 (CER) allows export rebate of excise duty paid on both inputs as well as the final product manufactured from such inputs?

Spentex Industries Ltd v. CCE 2015 (324) ELT 686 (SC)

Yes, Rule 18 of Central Excise Rules, 2002 (CER) allows export rebate of excise duty paid on both inputs as well as the final product manufactured from such inputs

Rule 18 of CER stipulates that where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods OR duty paid on material used in the manufacturing or processing of such goods. The issue in the instant case was that the word 'OR' used in between the two kinds of duties in respect of which rebate can be granted, postulates grant of one of the two duties or both the duties. The Apex Court made the following significant observations:
i. Rules 18 and 19 of CER provide two alternatives to an exporter for getting the benefit of exemption from paying excise duty.
ii. Under rule 19 of CER, the exporter is not required to pay any excise duty at all. When the exporter opts for this method, he is not required to pay duty either on the final product, i.e., on

excisable goods or on the material used in the manufacture of those goods. The intention thus, is that goods meant for exports are free from any excise duty.

iii. Once this scheme is kept in mind, it cannot be the intention of the Legislature to provide rebate only on one item in case a particular exporter opts for other alternative under rule 18, namely, paying the duty in the first instance and then claiming the rebate. Giving such restrictive meaning to rule 18 would not only be anomalous but would lead to absurdity as well and would defeat the very purpose of grant of remission from payment of excise duty in respect of export goods. It may also lead to invidious discrimination and arbitrary results.

iv. The Central Government has issued necessary notifications under rule 18 for rebate in respect of both the duties, i.e., on intermediate product as well as on the final product. Further, and which is more significant, these notifications providing detailed procedure for claiming such rebates contemplate a situation where excise duty may have been paid both on the excisable goods and on material used in the manufacture of those goods and enable the exporter to claim rebate on both the duties.

v. It is to be borne in mind that it is the Central Government which has framed the Rules as well as issued the notifications. If the Central Government itself is of the opinion that the rebate is to be allowed on both the forms of excise duties, the rule in question has to be interpreted in accordance with this understanding of the rule maker.

vi. Though, the principle is that the word ‘or’ is normally disjunctive and ‘and’ is normally conjunctive, there may be circumstances where these words are to be read as *vice versa* to give effect to manifest intention of the Legislature as disclosed from the context.

The Supreme Court also referred to the order passed by the Revision Authority on the said issue (when the matter was brought before it vide a revision petition) wherein the Authority had held that the word ‘OR’ occurring in rule 18 cannot be given literal interpretation as that leads to various disastrous results. Therefore, ‘or’ has to be read as ‘and’ to carry out the objectives of the rule 18 and also to bring it at par with rule 19 and also because that is what was intended by the rule maker in the scheme of things.

The Supreme Court held that normally the two words ‘or’ and ‘and’ are to be given their literal meaning. However, wherever use of such a word, viz., ‘and’/’or’ produces unintelligible or absurd results, the Court has power to read the word ‘or’ as ‘and’ and *vice versa* to give effect to the intention of the Legislature which is otherwise quite clear. The Apex Court held that the exporters/appellants are entitled to both the rebates under rule 18 and not one kind of rebate.

Note: This case is in line with the Government’s policy of neutralising the duty element (both Customs and Central Excise) on the goods exported with a view to promote exports of domestic products and make then internationally competitive. This case overrules the Rajasthan High Court’s decision in the case of Rajasthan Textile Mills v. UOI 2013 (298) ELT 183 reported in Select Cases in Direct and Indirect Tax Laws – 2015 [August 2015 Edition]. In this case, the High Court had held that under rule 18 of the Central Excise Rules, 2002, rebate can be claimed either on excisable goods or on materials used in the manufacture or processing of such goods i.e. on raw material, but not on both.

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

UM Cables Limited v. Union of India 2013 (293) ELT 641 (Bom.)

No, Non-production of ARE-1 forms ipso facto cannot invalidate rebate claim

The High Court observed that the objective of the procedure laid down in *Notification No. 19/2004 CE (NT) dated 06.09.2004* and CBEC’s Manual of Supplementary Instructions 2005 is to facilitate the processing of a rebate claim and 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. The High Court referred to the decision of Supreme Court in the case of *Mangalore Chemicals & Fertilizers Ltd.* v. *Deputy Commissioner 1991 (55) E.L.T. 437 (SC)* wherein the Apex Court held that ***non-compliance of***

a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. However, it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they intend to serve, as some requirements may merely relate to procedures. The High Court, therefore, held that the ***procedure cannot be raised to the level of a mandatory requirement.*** Rule 18 itself makes a distinction between conditions and limitations subject to which a rebate can be granted and the procedure governing the grant of a rebate. It was held by the High Court that ***while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.*** The High Court ruled that ***non-production of ARE-1 forms ipso facto cannot invalidate rebate claim. In such a case, exporter can demonstrate by cogent evidence that goods were exported and duty paid and satisfy the requirements of rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE (NT).***

35. 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 Textile Mills v. UOI 2013 (298) E.L.T. 183 (Raj.)

No, Rebate claim under rule 18 can be made either on manufactured/finished goods or on raw material, but not on both

The High Court considering the contentions of the petitioner observed as under:-

(i) ***The word "or" is interpreted as 'and' only when the literal interpretation of the word produces absurd results. However, in rule 18, if word "or" is taken to be disjunctive, no absurd result occurs, rather the intention manifested in rule 18 can be given full effect to,*** i.e. to give the benefit admissible on one of the item, either on finished goods or inputs used in the manufacture or processing of such goods.

(ii) Rule 19 provides benefit on the finished goods i.e. any excisable goods can be exported without payment of duty from the factory of producer. However, it does not provide for rebate of duty paid on the materials used in manufacture or processing of such goods. Thus, the intention of rule 19 is to provide benefit on finished goods and not on raw materials. The procedures & stages in rules 18 and 19 are different. The word 'or' used in rule 18 cannot be interpreted as 'and' to provide benefit on both, with the aid of different provision of rule 19.

(iii) It is important to note that *Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004* provides rebate of the whole of the duty paid on all "excisable goods" while *Notification No. 21/2004-C.E. (N.T.) dated 06.09.2004* provides the rebate of whole of the duty paid on 'materials' *i.e.* inputs used in the manufacture or processing of export goods. Issuance of two difference notifications further makes it clear that both the benefits cannot be claimed simultaneously.

(iv) ***Since a combined Form ARE-2 can be used to claim both the benefits, i.e. the rebate on finished goods or on inputs used in manufacture of such goods, it cannot be inferred out that the rebate is available on both i.e., finished goods as well as on the inputs.***

Under rule 18 of the Central Excise Rules, 2002, grant of ***rebate of duty paid is available either on excisable goods or on materials used in the manufacture or processing of such goods i.e. on raw material.*** Thus, it is open to claim the benefit of rebate either on manufactured/finished goods or on raw material, but not on both.

GENERAL PROCEDURES UNDER CENTRAL EXCISE

36. 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 v. CCE & C 2015 (317) ELT 192 (Bom.)

No, Interest is not payable under rule 7(4) of the Central Excise Rules, 2002, if differential amount of duty is paid in full "before" final assessment order is passed

The High Court observed that on finalization of provisional assessment, it is possible that duty liability determined is more than that recovered in the provisional assessment. Liability to pay interest under rule 7(4) arises on any such amount payable to Central Government consequent to order for final assessment under rule 7(3). ***The Court agreed that since in the assessees case, final assessment resulted in nothing due and payable to the Government later part of rule 7(4) was not attracted.*** Consequently, no interest was recoverable from them. Indeed, in case where assessee had paid the differential duty prior to finalization of the assessment, if the interest was to be recovered and was payable on such date, rule would have specifically said so.

The High Court held that if amount of differential duty is paid in full "before" the final assessment order is passed, provisions of rule 7(4) will not be applicable and hence, the interest would not be payable.

DEMAND, ADJUDICATION AND OFFENCES

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

Hans Steel Rolling Mill v. CCEx., Chandigarh 2011 (265) E.L.T. 321 (S.C.)

No, Time-limit under section 11A of the Central Excise Act, 1944 cannot be applied to recovery of dues under compounded levy scheme

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 a comprehensive scheme in itself, general provisions of the Central Excise Act and rules are excluded. The Supreme Court affirmed that ***importing one scheme of tax administration to a different scheme is inappropriate and would disturb smooth functioning of such unique scheme. Hence, the Supreme Court held that the time-limit under section 11A of the Central Excise Act, 1944 is not applicable to recovery of dues under compounded levy scheme.***

38. 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 v. CCEx 2012 (28) S.T.R. 350 (M.P.)

No, SCN for recovery of penalty & dues can be issued even if SCN for confiscation of goods pending adjudication

The High Court observed that ***since the subsequent show cause notice only formed prima facie view in regard to allegations, it could not be said to be issued after pre-judging the question involved in the matter.*** The High Court opined that since it was not a case of show cause notice being issued without jurisdiction, adjudicating authority could not be restrained from proceeding further with the SCN. 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.***

39. 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 (290) E.L.T. 200 (Del.)

Penalty cannot be imposed on the 'firm' for clandestine removal of goods by the 'manufacturer'

CESTAT noted that penalty under rule 25(1) could be imposed only on four categories of persons:-
(i) producer;

(ii) manufacturer;
(iii) registered person of a warehouse; or
(iv) a registered dealer.

The above four categories of persons are also mentioned at the end of rule 25(1) where the liability of penalty has been spelt out. ***Since, the respondents were neither producers nor manufacturers of the said zarda, neither were they the registered persons of a warehouse in which the said zarda had been stored nor were the registered dealers, penalty under rule 25(1) (higher of duty payable on excisable goods in respect of which contravention has been committed or Rs.2,000), could not be imposed on the respondents.*** The Department aggrieved by the said order filed an appeal with High Court wherein it contended that clause (c) of rule 25(1) of the Central Excise Rules, 2002 would be applicable in the instant case. ***However, High Court concurred with the view of the Tribunal and concluded that rule 25(1)(c) would have no application in the present case because said clause would also apply only in respect of four categories of persons mentioned in rule 25(1) of said rules.***

40. 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 (284) E.L.T. 15 (All.)

Yes, Pronouncement of order in open court to authorized agent of assessee is deemed to be the 'service of notice'

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. Thus, when the order was passed by the Tribunal on 22nd July, 2010 in presence of advocate of the assessee, the order would be deemed to be communicated to the authorized agent of the assessee (i.e. his advocate) on the same date and 30 days period would start from 22nd July, 2010. 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, the date of pronouncement of order would be deemed to be the date of service of order.***

41. 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 v. CCE 2015 (318) ELT 15 (SC)

No, If revenue authorities itself have doubts about the dutiability of a product, then extended period of limitation cannot be invoked alleging that assessee has suppressed the facts

Referring the order of the Commissioner in case of ***M/s Pioneer Profile Industries, Pune***, the Apex Court inferred 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. The Supreme Court 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.***

42. 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 Limited v. CESTAT Kolkata 2015 (37) STR 673 (Ori.)

<u>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 and have retrospective effect</u>

The High Court observed that in view of section 28 of the Indian Post Office Act, 1898, any postal article which is registered at the post office from which it is posted, and a receipt has been issued in respect of such article, is to be treated as "registered post". The High Court pointed out that since for both "registered post" as well as "speed post", receipts are required to be issued when articles are delivered to the post offices, both "speed post" and "registered post" satisfy the requirement of section 28 of the Indian Post Office Act, 1898. The only difference between the two is that the charges payable for the "speed post" are higher as the same ensures delivery at an early date.

Consequently, the High Court was of the view that addition of the term "speed post" in section 37(C)(1)(a) was merely clarificatory. The High Court further stated that the said amendment is clearly curative since various other High Courts have held that "communication of notices through speed post was in consonance with law".

The High Court reiterated that it is well settled in law that ***where an amendment which is brought about is "clarificatory in nature", the same would date back to the date on which the original provision was introduced*.*** The High Court, therefore, held that insertion of words "***or by speed post with proof of delivery" in section 37C(1)(a) of the Central Excise Act, 1944 is clarificatory and a procedural amendment and hence, would have retrospective effect.***

<u>REFUND</u>

43. 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. v CESTAT, CHENNAI 2014 (302) E.L.T. 45 (Mad.)

<u>No, Filing of refund claim not required for re-availing CENVAT credit</u>

The High Court held that ***this process involves only an account entry reversal and factually there is no outflow of funds from the assessee by way of payment of duty. Thus, filing of refund claim under section 11B of the Central Excise Act, 1944 is not required.*** Further, it held that on a technical adjustment made, the question of unjust enrichment as a concept does not arise.

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

CCEx v. Superintending Engineer TNEB 2014 (300) E.L.T. 45 (Mad.)

<u>No, Doctrine of unjust enrichment is not applicable to the state undertakings as 'state represents the people of the country' and no one speaks of people being unjustly enriched</u>

The High Court relied on the decision of the Constitution Bench of the Apex Court rendered in the case of *Mafatlal Industries Ltd.* v. *Union of India 1997 (89) E.L.T. 247 SC*. The Supreme Court in the said case held as under: ***"The doctrine of unjust enrichment is a just and salutory doctrine. No person can seek to collect the duty from both ends.*** In other words, he 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 law. The power of the Court is not meant to be exercised for unjustly enriching a person. ***The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched." The High Court followed the decision of the Apex Court and held that the concept of unjust enrichment is not applicable as far as State Undertakings are concerned and to the State.***

APPEALS

45. 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. v. CCEx. 2013 (292) E.L.T. 16 (Bom.)

No, High court cannot be entertain writ petition if the order passed earlier is time barred

The High Court referred to the case of *Raj Chemicals v. UOI 2013 (287) ELT 145 (Bom.)* wherein it held that ***where the appeal filed against the order-in-original was dismissed as time-barred, the High Court in exercise of writ jurisdiction could neither direct the appellate authority to condone the delay nor interfere with the order passed by the adjudicating authority. Consequently, it refused to entertain the writ petition in the instant case.***

Note: *Gujarat High Court has taken a contrary view in case of Texcellence Overseas v. Union of India 2013 (293) ELT 496 (Guj.) as reported below:-*

46. 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 v. Union of India 2013 (293) ELT 496 (Guj.)

Yes, Delay can be condoned if the length of delay is small and if the case is good on merits

The petitioner, while challenging the impugned order before the Commissioner (Appeals), had also preferred an application for condonation of delay and substantiated the same with sufficient and acceptable grounds. The High Court, thus, concluded that the petitioner had sufficiently explained the delay from the very beginning, though the appellate forums were bound by the law on the issue. The High Court opined that ***since the total length of delay was very small and the case had extremely good ground on merits to sustain, its non interference at that stage would cause gross injustice to the petitioner. Thus, the High Court, by invoking its extraordinary jurisdiction, quashed the order which held that refund was erroneously granted.*** The High Court held that such powers are required to be exercised very sparingly and in extraordinary circumstances in appropriate cases, where otherwise the Court would fail in its duty if such powers are not invoked.

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

Habib Agro Industries v. CCEx. 2013 (291) E.L.T. 321 (Kar.)

Yes, Expiry of mother of authorized representative is a reasonable cause for condoning the delay

The High Court observed that ***there did not appear to be any deliberate latches or neglect on the part of the authorised 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.

48. If Revenue accepts judgment of the Commissioner (Appeals) on an issue for one period, can it be precluded to make an appeal on the same issue for another period?

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

No, Revenue cannot subsequently preclude from the judgment accepted by it earlier

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.***

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

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

No, Re-appreciation of evidence and reconsideration of legal view cannot be considered for rectifying a mistake – Only mistake apparent from record must be taken up by CESTAT

The Supreme Court observed that ***arguments not accepted earlier during disposal of appeal cannot be accepted while hearing rectification of mistake application***. 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 Apex Court held that ***CESTAT*** had reconsidered its legal view as it concluded differently by accepting the arguments which it had rejected earlier. Hence, the Court opined that ***CESTAT exceeded its powers under section 35C(2) of the Act. In pursuance of a rectification application, it cannot re-appreciate the evidence and reconsider its legal view taken earlier.***

50. 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?

CCE v. Fact Paper Mills Private Limited 2014 (308) ELT 442 (SC)

No, Appeal cannot be filed before the Supreme Court against an order of the CESTAT relating to clandestine removal of manufactured goods or clandestine manufacture of goods

The Supreme Court held that the 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.

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

M/s Venus Rubbers v. The Additional Commissioner of Central Excise, Coimbatore 2014 (310) ELT 685 (Mad.)

No, Commissioner (Appeals) does not have any power to review his own order

The High Court held that there is no provision of law under the Central Excise Act, 1944 which gives power to the Commissioner (Appeals) to review his order. However, such a power is available to the Tribunal under section 35C(2) of the Central Excise Act, 1944 to rectify any mistake apparent on the record. The High Court elaborated that when there is no power under the statute, the Commissioner (Appeals) has no authority to entertain the application for review of the order.

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

52. Whether an assessee using a foreign brand name, assigned to it by the brand owner with right to use the same in India exclusively, is eligible for SSI exemption?

CCE v. Otto Bilz (India) Pvt. Ltd 2015 (324) ELT 430 (SC)

No, Assessee using a foreign brand name assigned to it with right to use the same exclusively in India is eligible for SSI exemption

The assessee was availing the benefit of SSI exemption notification and was using a brand name 'BILZ' of a foreign company. The foreign company had assigned the said brand name in favour of the assessee under an agreement with right to use the said trade mark in India exclusively. The Revenue contended that since the assessee was using a brand name of a foreign company, it was ineligible to seek exemption under the aforesaid Notification. The Supreme Court held ***that because of the aforesaid assignment, the assessee was using the trade mark in its own right as its own trade mark and therefore, it could not be said that it was using the trade mark of another person.*** The assessee was entitled to SSI exemption.

53. 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?

CCEx v Xenon 2013 (296) ELT 26 (Jhar.)

No, Penalty cannot be imposed upon dubious company if it did not undertake any transactions

The High 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 the transactions of the original company and clubbed with the transactions of the original company. The High Court held that ***when it had been established that dubious company did not undertake any transactions, penalty could not be levied on the same for the transactions undertaken by the original company. The High Court emphasized that penalty could not be imposed upon the company who did not undertake any transaction.***

Note: *Though the above-mentioned case relates to the old provisions of law, the ratio of the judgment will also hold good in the context of present position of law as applicable to SSI exemption.*

54. 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?

Commissioner v. Elex Knitting Machinery Co. 2010 (258) E.LT. A48 (P & H)

No, Brand name of another firm cannot be considered as brand name belonging to the assessee even if the assessee is partner in that firm – SSI exemption eligible to assessee

The 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 the manufacture and clearance of goods in his individual capacity.*** Thus, assessee was eligible for benefit of SSI exemption in the given case. The said decision of the Tribunal was affirmed by the High Court in the instant case.

Note: *This case has been further affirmed by Supreme Court in case of CCEX v. Elex Knitting Machinery Co. 2012 (283) ELT A18 (SC).*

55. 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?

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

Yes, Clearances of two firms from same factory having common brand name, common management shall be clubbed for calculating SSI exemption

The High Court held that indisputably, in the instant case, 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, with common management and accounts etc.** Therefore, High Court was of the considered view that **the clearance of the common goods under the same brand name manufactured by both the firms had been rightly clubbed.**

56. 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 (287) ELT 385 (SC)

Yes, SSI exemption can be dis-entitled even if brand name is not physically bearing on the goods

The Supreme Court made the following significant observations:

(i) 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, which are incapable of physically bearing brand names viz., liquids, soft drinks, milk, dairy products, powders etc. ***Such goods would continue to be branded good, as long as its environment conveys so*** viz., packaging/wrapping, accessories, uniform of vendors, invoices, menu cards, hoardings and display boards of outlet, furniture/props used, the specific outlet itself in its entirety and other such factors, all of which together or individually or in parts, may convey that goods is a branded one.

(ii) ***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. 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. Therefore, 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.

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. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the good is sold. However, such factors would carry different hues in different scenarios. There can be no single formula to determine if a good is branded or not; such determination would vary from case to case.***

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

57. 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?

S & S Power Switch Gear Ltd. v. CCEx. Chennai-II 2013 (294) ELT 18 (Mad.)

No, Oppressive circular cannot be applied retrospectively – to be applied only prospectively

The High Court observed that similar issue had been considered by the Supreme Court in the case of *H.M. Bags Manufacturer* v. *Collector of Central Excise 1997 (94) ELT 3 (SC)* wherein the Apex Court held that a demand under section 11A of the Act cannot be raised for any date prior to the date of the Board Circular and the time-limit as provided under section 11A of the Act is not available to the Department. ***The High Court, thus, held that once reclassification Notification/Circular is issued, the Revenue cannot invoke section 11A of the Act to make demand for a period prior to the date of said classification notification/circular.***

SETTLEMENT COMMISSION

58. (i) Where a settlement application filed under section 32E(1) of the Central Excise Act, 1944 (herein after referred to as 'Act') 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 Limited v Union of India 2014 (301) E.L.T. 321 (Guj.)

Yes, Settlement commission can dismiss application for non-compliance of pre-deposit of taxes and interest. Second application filed after depositing the additional excise duty and interest would be maintainable

The High Court observed as under:
(i) Clause (d) of the first proviso to sub-section (1) of section 32E of the Act clearly lays down that ***no application under section 32E(1) shall be made unless the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB***. Therefore, if an application is made without complying with the first proviso, it would be defective and not maintainable.
(ii) ***Settlement Commission in its discretion may allow time to the applicants to remove the defects*** or may direct that the applications be returned. Such discretionary power must be deemed to have been conferred on Settlement Commission.
(iii) Under section 32F(1) only valid applications which do not suffer from any bar created by the first proviso to section 32E(1) can be considered and decided according to the procedure provided in the section. ***Therefore, the applications which are defective and non-maintainable in terms of the first proviso to section 32E(1) cannot be decided or rejected or declared to have abated under section 32F(1).***
(iv) Rejection of application cannot be taken as amounting to a final order, as that would render the mandatory bar created by clause (d) of proviso to section 32E(1) nugatory, redundant and otiose. Order rejecting the application for non-compliance with clause (d) of proviso to section 32E(1) would amount to administrative/technical order and it would not bar the second application filed by the petitioner. In other words, principle of *res judicata* would not apply as matter was not determined on merits.
(v) Moreover, second application would not be barred under section 32-O as no direction had been issued under section 32L (the application was rejected as not entertainable).
High Court held that ***since the earlier application was dismissed on technical defect for non-compliance of the provisions of clause (d) of the proviso to section 32E(1) of the Act and the same was not considered and decided on merits, the second application filed after depositing the additional excise duty and interest would be maintainable.***

59. Can the benefit of exemption notification be granted to assessee where one of the conditions to avail the exemption is not strictly followed?

CCE v. Honda Siel Power Products Ltd. 2015 (323) E.L.T. 644 (S.C.)

<u>No, Benefit of exemption notification cannot be granted even if one of the conditions to avail the exemption is not strictly followed</u>

The assessee was availing the benefit of an exemption notification but one of the conditions to avail the benefit of said notification was that duty was to be paid in either of two modes of payment of duty – in cash or through account current. However, the assessee cleared the goods through utilization of CENVAT credit which was not the prescribed mode mentioned as per said condition. The issue which arose for consideration was as to whether the assessee was entitled to avail the benefit of said notification. The Apex Court observed that the ***assessee was required to fulfill the condition in stricto senso viz. to pay the duty either in cash or through account current if it wanted to avail the benefit of exemption notification and not through adjustment of CENVAT credit which was not the mode prescribed in the aforesaid condition. It is trite that exemption notifications are to be construed strictly and even if there is any doubt same is to be given in favour of the Department.*** The Supreme Court held that once it is found that the conditions had not been fulfilled the obvious consequence would be that the assessee was not entitled to the benefit of said notification.

<u>SERVICE TAX</u>

<u>BASIC CONCEPTS OF SERVICE TAX</u>

60. Does preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete amount to provision of service?

Commissioner v. GMK Concrete Mixing Pvt. Ltd. 2015 (38) STR J113 (SC)

No, preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete does amount to provision of service

In this case, the assessee was engaged in preparation of ready mix concrete (RMC). While carrying out such dominant objects, other ancillary and incidental activities like pouring, pumping and laying of concrete were also carried out. The Revenue contended that the whole activity carried out by the assessee was not a sale transaction, as it also included element of service in it. Hence, the assessee was liable to pay service tax.

The Supreme Court upheld the decision of the Tribunal wherein it was held that the ***contract between the parties was to supply RMC and not to provide any taxable services***. Therefore, since the Finance Act, 1994 is not a law relating to commodity taxation, the adjudication was made under mistake of fact and law fails. By this judgment, the Supreme Court dismissed the appeal filed by the Revenue.

61. 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.)

Yes, Service tax liability created under law can be shifted by virtue of a clause in the contract entered into between the service provider and the service recipient

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.

62. 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.)

No, Municipality can pass on the burden of service tax to the tenants(beneficiary)

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. ***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. The High court held that Municipality can pass on the burden of service tax to the tenants.***

63. Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person, results in outdoor caterer service?

Indian Coffee Workers' Co-operative Society Ltd. v. CCE&ST 2014 (34) STR 546 (All.)

Yes, Supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person, results in outdoor caterer service

The High Court opined that the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. Further, since the assessee provides the services as a caterer ***at a place other than his own***, he is an outdoor caterer.

The High Court clarified that taxable catering service could not be confused with who had actually consumed the food, edibles and beverages which were supplied by the assessee. ***Taxability or the charge of tax does not depend on whether and to what extent the person engaging the service consumes the edibles and beverages supplied, wholly or in part.*** What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted.

Further the High Court elaborated that the charge of tax in the cases of VAT is distinct from the charge of tax for service tax. The charge of service tax is not on the sale of goods but on a taxable service provided. Hence, ***the fact that the assessee had paid VAT on the sale of goods on the supply of food and beverages to those who consume them at the canteen, would not exclude the liability of the assessee for the payment of service tax in respect of the taxable service provided*** by the assessee as an outdoor caterer. Based on the observation made above, the High Court held that the ***assessee was liable for payment of service tax as an outdoor caterer.***

64. Whether the course completion certificate/ training offered by approved Flying Training Institute and Aircraft Engineering Institutes is recognized by law (for being eligible for exemption from service tax) if the course completion certificate/ training/ is only for the purpose of eligibility for obtaining ultimate licence/ approval for certifying repair/ maintenance/ airworthiness of aircrafts?

CCE & ST v. Garg Aviations Limited 2014 (35) STR 441 (All.)

Yes, The course completion certificate/ training offered by approved Flying Training Institute and Aircraft Engineering Institutes is to be considered as recognized by law for being eligible for exemption from service tax even if the course completion certificate/ training/ is only for the purpose of eligibility for obtaining ultimate licence for certifying repair/ maintenance. etc of aircrafts

The High Court referred to the judgment of the Delhi High Court in ***Indian Institute of Aircraft Engineering v. Union of India,*** wherein the Delhi High Court made the following observations:

i. The ***expression 'recognized by law' is a very wide one***. The legislature has not used the expression “conferred by law” or “conferred by statute”. Thus, even if the certificate/ degree/ diploma/ qualification is not the product of a statute but has approval of some kind in 'law', it would be exempt.

ii. The Aircraft Act, 1934 (the Act) and the Aircraft Rules, 1937 (the Rules) and the Civil Aviation Requirements (CAR) issued by the DGCA under Rule 133B of the Rules, having provided for grant of approval to such institutes and having laid down conditions for grant of such approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA examination, have recognized the course completion certificate and the qualification offered by such Institutes.

iii. The certificate/training/qualification offered by Institutes which are without approval of DGCA would not confer the benefit of such relaxation. Thus, the certificate/training/qualification offered by approved Institutes, has by the Act, Rules and the CAR been conferred some value in the eyes of law, even if it be only for the purpose of eligibility for obtaining ultimate licence/ approval for certifying repair/ maintenance/ airworthiness of aircrafts.

iv. The Act, Rules and CAR distinguish an approved Institute from an unapproved one and a successful candidate from an approved institute would be entitled to enforce the right, conferred on him by the Act, Rules and CAR, to one year relaxation against the DGCA in a

Court of law. The inference can only be one, that the course completion certificate/training offered by such Institutes is recognized by law.

v. An educational qualification recognized by law will not cease to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken.

The Delhi High Court held that ***the recognition accorded by the Act, Rules and CAR supra to the course completion certificate issued by the institutes as the petitioner cannot be withered away or ignored merely because the same does not automatically allow the holder of such qualification to certify the repair, maintenance or airworthiness of an aircraft and for which authorization a further examination to be conducted by the DGCA*** has to be passed/cleared.

The High Court upheld the decision of the Tribunal and held that the ***Revenue had not been able to persuade the Court to take a contrary view as taken by the Delhi High Court in Indian Institute of Aircraft Engineering.*** The appeal filed by the Revenue would not give rise to any substantial question of law. Hence, the appeal filed was dismissed and the assessee was held not to be liable to pay service tax.

65. Whether section 66E(i) of the Finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food or any other article for human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity, is *ultra vires* the Article 366(29A)(f) of the Constitution?

Hotel East Park v. UOI 2014 (35) STR 433 (Chhatisgarh)

Yes, Section 66E(i) of the finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food etc. is supplied in any manner as a part of activity is ultra vires the Article 366(29A)(f) of the Constitution

The High Court observed as under:

i. The High Court observed that a tax on the ***sale and purchase of food and drinks within a State is in exclusive domain of the State***. The Parliament cannot impose a tax upon the same. Similarly, there is no entry in List II or List III of the Seventh Schedule to the Constitution under which service tax can be imposed. There is no legislative competence with the States to impose a tax on any service.

ii. The High Court observed that Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food, it rather separates sale of food and drinks from service. Section 65B(44) as well as section 66E(i) of the Finance Act, 1994, charge service tax only on the service part and not on the sales part. It indicates that the sale of the food has been taken out from the service part.

iii. The quantum of services to be taxed is explained under rule 2C of the Service Tax (Determination of Value) Rules, 2006 read with *Notification No. 25/2012 ST* notified by the Central Government. ***Rule 2C presumes a fixed percentage of bill value as the value of taxable service on which service tax should be charged. However, there is no provision in VAT Act to bifurcate the amount of bill into sale and service.***

The High court held that ***section 66E (i) of the Finance Act, 1994 is intra vires the Article 366(29A)(f) of the Constitution of India.*** Further, the High Court held that ***no VAT can be charged over the amount meant for service and that the amount over which service tax has been charged should not be subject to VAT.***

The High Court directed the State Government to frame such rules and issue clarifications to this effect to ensure that the customers are not doubly taxed over the same amount. The rules may be in conformity with the bifurcation as provided under the Finance Act, 1994 or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which service tax is being assessed.

66. Whether deputation of some staff to subsidiaries/group of companies for stipulated work or for limited period results in supply of manpower service liable to service tax, even though the direction/control/supervision remained continuously with the provider of the staff and the actual cost incurred was reimbursed by the subsidiaries/group companies?

Commissioner of Service Tax v. Arvind Mills Limited 2014 (35) S.T.R. 496 (Guj.)

No, Deputation of some staff to subsidiaries/group of companies for stipulated work or for limited period does not results in supply of manpower service and is not liable for service tax especially when the direction/control/supervision remained continuously with the provider of the staff and the actual cost incurred was reimbursed by the subsidiaries/group companies

The High Court observed that manpower supply services would not cover the activity of the assessee. The assessee, in order to reduce its cost of manufacturing, deputed some of its staff to its subsidiaries or group companies for stipulated work or for limited period. ***All throughout, the control and supervision remained with the assessee***. The assessee was not in the business of providing recruitment or supply of manpower. ***Actual cost*** incurred by the assessee in terms of salary, remuneration and perquisites was only reimbursed by the group companies. ***There was no element of profit or finance benefit. The subsidiary companies could not be said to be their clients.*** The High Court noted that the ***employee deputed did not exclusively work under the direction or supervision or control of subsidiary company***.

The High Court rejected the contention of the Revenue and held that deputation of the employees by the respondent to its group companies was only for and in the interest of the assessee. ***There is no relation of agency and client***. The ***assessee company was not engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to a client.*** Therefore, they were not liable to pay service tax.

67. 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.)

Yes, Running of guest houses by TTD even if as a shelter for pilgrims, would be liable for service tax

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, for providing of accommodation for a continuous period of less than three months is a taxable service. ***Therefore, the High Court held that since the petitioner was running guest houses 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.***

68. 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.)

If only content of data stored in the software is sold and not the software, then it would amount to service and not sale

The High Court observed that the law as to whether the software is goods or not is no longer res integra as it has been settled by the Supreme Court ruling in *TCS case [2004 (178) ELT 22 (SC)]*. The High Court reiterated that **software is goods as per Article 366(12) of the Constitution**. A software, 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.*** The High Court stated that ***as a transaction could be exclusive sale or exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax.*** The High Court explained that ***when a statute, particularly a taxing statute is considered with reference to the legislative competence, the nature of transaction and the dominant intention of such transaction would be relevant.*** In the instant case, the terms of EULA indicated the dominant intention of parties whereby the developer retained the copyright of each software, be it canned, packaged or customised, and only the right to use with copyright protection was transferred to the subscribers or the members. ***The High Court opined that in the transactions taking place between the members of ISODA (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. 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.***

69. 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)

No, Service tax is not chargeable on the buffer subsidy received from Government for storage of free sale sugar by the assessee

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.

70. 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)

Yes, Allowing the use of a name, logo and motto amounts to providing of franchisee services

The department contended that the petitioner was engaged in providing franchise service to schools that were running their institutes using its school name "Mayoor School". Therefore, a show cause notice proposing recovery of service tax along with interest and penalty was issued against them. 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.***

PLACE OF PROVISION OF SERVICE

71. 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.)

No, The rebate claim cannot be dis-entitled if non-filing of declaration is due to complex nature of assesses business

As per *Notification No. 12/2005 ST dated 19.04.2005*, rebate is granted of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India. Condition 3.1 of the Notification stipulated that the provider of taxable service to be exported has to file a declaration with the jurisdictional Assistant/Deputy Commissioner of Central Excise describing the taxable service intended to be exported with description, value and the amount of service tax/excise duty and cess payable on input services/inputs actually required to be used in providing taxable service to be exported, prior to date of export of such taxable service.

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.*** 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.

EXEMPTIONS AND ABATEMENTS

72. Is exemption in relation to service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorized operation) of final products considering these services as the services used in authorised operations of SEZ?

Commissioner of Service Tax v. Zydus Technologies Limited 2014 (35) STR 515 (Guj.)

Yes, Exemption in relation to service provided to the developer of SEZ or units in SEZ is also available for a period prior to actual manufacture (which is the authorized operation) of final products considering these as the services used in authorised operations of SEZ

The High Court relied on its decision passed in the case of ***Cadila Healthcare Ltd 2013 (30) STR 3 (Guj.)*** and held that no error has been committed by the CESTAT in holding that the assessee shall be entitled to refund, as ***though the operations of the assessee did not reach to the commercial production stage, the input services of scientific and technical consultancy procured by them were in relation to the manufacture which would take place at a later date***.

In the instant case, the High Court referring to their previous decision in case of ***CCEx. v. Cadila Healthcare Ltd.*** held that the ***services rendered for a period prior to actual manufacture of final product is commercial activity/production and assessee is entitled to exemption by way of refund claimed***.

73. Is 'hiring of cab' different from "renting of cab" for service tax purposes?

CCus. & CEx. v. Sachin Malhotra 2015 (37) STR 684 (Uttarakhand)

Yes, 'hiring of cab' is different from 'renting of cab' for service tax purposes. Service tax is charged only on renting and not on hiring

The High Court opined that under rent-a-cab scheme, the hirer is endowed with the freedom to take the vehicle wherever he wishes, and ***he is only obliged to keep the holder of the license informed of his movements from time to time.*** However, when a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service ***while retaining the control and possession of the vehicle with himself***. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled.

The High Court observed that though rent and hire may, in a different context, have the same connotation, in the context of rent-a-cab scheme and hiring, they signify two different transactions. The High Court upheld the decision of the Tribunal wherein it was held that ***unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting***.

SERVICE TAX PROCEDURES

74. Whether tax is to be deducted at source under section 194J of the Income-tax Act, 1961 on the amount of service tax if it is paid separately and is not included in the fees for professional services/technical services?

CIT v. Rajasthan Urban Infrastructure 2013 (31) STR 642 (Raj.)

No, TDS shall not be paid on Service tax component of the invoice

The High Court held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and is not included in the fees for professional services or technical services, ***the service tax component would not be subject to TDS under section 194J of the Income-tax Act, 1961.***

DEMAND, ADJUDICATION AND OFFENCES

75. Can service tax be demanded by a speaking order without issuing a show cause notice but after issuing a letter and giving the assessee an opportunity to represent his case along with personal hearing?

CCE v. Vijaya Consultants, Engineers and Consultants 2015 (040) STR 0232 (AP)

No, Service tax cannot be demanded by a speaking order through a letter without issuing a show cause notice

The High Court observed that a perusal of section 73 of the Finance Act, 1994 leaves no doubt that there is a requirement of issuance of notice stating whether the noticee falls within the category of section 73(1)(a) or 1(b) of the Act *[now section 73(1) and proviso to section 73(1)]* and further specify the amount of service tax that is payable. The High Court observed that in the present case no notice was issued to the respondent and reliance was placed on a letter. ***The letter did not satisfy the requirements of the notice as there was no allegation that a specified amount was required to be paid as service tax and even no period was mentioned therein***. The High Court held that ***by no stretch of imagination, the said letter could be treated as a show cause notice satisfying the requirement of section 73 of the Act***. The High Court further held that the procedural requirement of issuance of notice and calling for explanation cannot be dispensed with as otherwise the demand of money in the name of tax would be in violation of the very procedure prescribed under the Act. The High Court thus, dismissed the appeal.

76. Based on the contractual arrangement, can the assessee ask the Department to recover the tax dues from a third party or wait till the assessee recovers the same?

Delhi Transport Corporation v. Commissioner Service Tax 2015 (038) STR 673 (Del.)

No, Assessee cannot ask the department to recover the tax dues from a third party based on the contractual arrangement

The appellants entered into contracts with seven various agencies for display of advertisements, inter alia, on bus-queue shelters and time-keeping booths. The terms of the contract stated that it would be the responsibility of the contractors/advertisers to pay directly to the concerned authority the tax/levy imposed by such authority in addition to the license fee. The Department issued show cause notice asking the appellant to pay service tax along with interest and penalties on the service of display of advertisements rendered by them.

The appellant argued that they were under a bona fide belief that the liability to remit service tax stood transferred to the recipient qua the agreements; this caused the failure to file returns and remit service tax. They relied upon Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran 2012 (26) STR 289 (SC) to urge that having entered into the contracts in the nature mentioned above, it was a legitimate expectation that the service tax liability would be borne by the contractors/advertisers and, thus, there was no justification for the appellant being held in default or burdened with penalties.

The High Court, however, observed ***that the said ruling of Supreme Court cannot detract from the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax***.

The High Court agreed with the observations of CESTAT ***that the plea of "bona fide belief" is devoid of substance***. ***The appellant was a public sector undertaking and should have been more vigilant in compliance with its statutory obligations. It could not take cover under the plea that contractors engaged by it having agreed to bear the burden of taxation, there was no need for any further action on its part.*** For purposes of the taxing statute, the appellant was an assessee, and statutorily bound to not only get itself registered but also submit the requisite returns as per the prescription of law and rules framed thereunder.

The High Court held that undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. ***However, on account of such contractual arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party (the other party) or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors (the other party).***

77. Is it justified to recover service tax during search without passing appropriate assessment order?

Chitra Builders Private Ltd. v. Addl. Commr. of CCEx. & ST 2013 (31) STR 515 (Mad.)

No, Recovering service tax during search without passing appropriate assessment order is not justifiable

The Court observed that ***it is a well settled position in law that no tax can be collected from the assessee, without an appropriate assessment order being passed by the authority concerned and without following the procedures established by law.*** However, in the present case, no such procedures had been followed. Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability, it had failed to show that the petitioner was actually liable to pay service tax. Thus, the High Court held that ***the amount collected by Department, from the petitioner, during the search conducted, could not be held to be valid in the eye of law, and directed the Department to return to the petitioner the sum of Rs.2 crores, collected from it, during the search conducted.***

78. Can extended period of limitation be invoked for mere contravention of statutory provisions without the intent to evade service tax being proved?

Infinity Infotech Parks Ltd. v. UOI 2013 (31) STR 653 (Cal.)

No, Mere contravention of certain provisions does not enable the service tax authorities to invoke the extended period of limitation. There has to be a wil-ful intent to evade payment of tax

The High Court observed that as per proviso to section 73(1), extended period of limitation can be invoked if the service tax has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provision of Chapter V or of rules made thereunder with the intent to evade the payment of service tax. It held that ***mere contravention of provision of Chapter V or rules framed thereunder does not enable the service tax authorities to invoke the extended period of limitation. The contravention necessarily has to be with the intent to evade payment of service tax.***

79. Would service tax collected but not deposited prior to 10.05.2013 be taken into consideration while calculating the amount of Rs.50 lakh as contemplated by clause (ii) of section 89(1) of the Finance Act, 1994?

Kandra Rameshbabu Naidu v. Superintendent (A.E.), S.T., Mumbai-II 2014 (34) S.T.R. 16 (Bom.)

Yes, Entire amount of service tax outstanding should be taken into consideration while calculating the amount of Rs.50 lakh (minimum tax due to arrest a person)

The assessee was arrested on 22.01.2014 on the ground that he had collected service tax of Rs.2.59 crores during the period between financial years 2010-11 and 2013-14, but had deposited only Rs.15 lakh with the Government. The assessee did not dispute the liability to pay the service tax to the Government. However, he contended that only the amount collected between 10.05.2013 and 21.07.2013 (six months prior to his arrest) should be considered while calculating the amount of Rs.50 lakh (minimum default for arresting a person). He submitted that since penal provisions could not be made effective retrospectively, amended section 89(1) and newly introduced sections 90 and 91 of the Finance Act, 1994 (as introduced by the Finance Act, 2013) could not be made effective for a period prior to 10.05.2013 [i.e. the date on which Finance Act, 2013 came into effect]. The High Court held that ***since the said offence is a continuing offence, entire amount of service tax outstanding [which is required to be deposited with the Central Government] as on 10.05.2013, would be taken into consideration while calculating the amount of Rs.50 lakh as contemplated by section 89(1)(ii) of the Finance Act, 1994.***

80. Whether best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte assessment procedure?

N.B.C. Corporation Ltd. v. Commissioner of Service Tax 2014 (33) S.T.R. 113 (Del.)

No, Best judgment assessment under section 72 is not an ex-parte assessment procedure

The High Court held that section 72 could per se not be considered as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. ***Thus, said order is not akin to an ex parte order. Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.***

Note: *Ex-parte order means proceedings by one party in the absence of or without the notice to, the other*

81. 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)

No, Penalty u/s 76 is not payable if service tax and interest has been paid before issue of the show cause notice

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.***

82. 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.)

No, Refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation

The High Court of Karnataka, distinguishing the landmark judgment by Supreme Court in the case of *Mafatlal Industries v. UOI 1997 (89) E.L.T. 247 (S.C.)* relating to refund of duty/tax, held that ***service tax paid mistakenly under construction service although actually exempt, is payment made without authority of law.*** Therefore, mere payment of amount would not make it 'service tax' payable by the assessee. 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. 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.***

83. 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 CoOP v CCE Surat-II 2013 29 STR 352 (Guj.)

Yes, Penalty cannot be imposed if there was confusion regarding tax liability and divergent views were taken by various courts and assessee acted bonafide

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.***

The High Court opined that since the appellant was a society of persons, which was created in the interest of land losers - who had lost their lands with the ONGC setting up its plant in the area - and operating without any profit model, the submissions of the appellant ought to have been appreciated in light of overall circumstances. The High Court rejected the contention of the Revenue that there was no confusion and it was only on the ground of dispute with ONGC with regard to reimbursement of service tax that the said amount was not paid. 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.***

84. Whether the recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent upon the downward revision of charges already paid, and whether the question of unjust enrichment arises in such situation?

CCus CEx & ST v. Indian Farmers Fertilizers Coop. Limited 2014 (35) STR 492 (All)

Recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent to the downward revision of charges already paid, the question of unjust enrichment does not arises in such situation

The High Court relied on the case of ***Mafatlal Industries Ltd. v. Union of India 1997 (89) ELT 247*** wherein the Supreme Court held that **"*Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund.*** The High Court observed that since the respondent, being the recipient of taxable service, had borne the incidence of service tax themselves, there was no question of unjust enrichment. ***Hence, the respondent was entitled to claim refund of excess service tax paid consequent upon the downward revision of the charges payable by it***.

Further, the High Court pointed out that the fact that respondent had not filed the refund claim within the period of limitation was not challenged by the Revenue in the grounds of appeal before the first appellate authority [Commissioner (Appeals)] or in the form of cross objections before the Tribunal. The High Court relied on the Supreme Court's decision in the case of ***Commissioner of Customs* v. *Toyo Engineering India Limited 2006 (201) ELT 513 (SC)*** wherein it was held that the ***Revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal***.

The High Court upheld the decision of the CESTAT that since the burden of tax has been borne by the respondent as a service recipient, question of unjust enrichment will not arise as per section 11B of the Central Excise Act 1944 (as applicable to service tax under section 83 of Finance Act,1994). Further, the High Court held that once the finding of the adjudicating authority that the claim for refund was filed within the period of limitation was not challenged by the Revenue before the first appellate authority and CESTAT, Revenue could not assert to contrary and first time urge a point in an appeal before this Court which was not raised in grounds of appeal before authorities below.

85. Can the expression "suppression of facts" be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally?

Naresh Kumar & Co. Pvt. Ltd v. UOI 2014 (35) STR 506 (Cal.)

No, The expression "suppression of facts" cannot be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally

The High Court held that ***willful suppression cannot be assumed and/or presumed merely on failure to declare certain facts unless it is preceded by deliberate non-disclosure to evade the payment of tax.*** The extended period of limitation can be invoked on clear exposition that there has been a conscious act on the part of the assessee to evade the tax by non-disclosing the fact which, if disclosed, would attract service tax under sections 66 (now section 66B) & 67 of the Finance Act, 1994.

The non-disclosure of the fact which, ***even if, disclosed would not have attracted the charging section cannot be brought within the ambit of suppression of fact for the purpose of extension of limitation period.***

OTHER PROVISIONS

86. Can the Committee of Commissioners review its decision taken earlier under section 86(2A) of the Finance Act, 1994, at the instance of Chief Commissioner?

C.C.E. & S.T. (LTU), Bangalore v. Dell Intl. Services India P. Ltd. 2014 (33) S.T.R.362 (Kar.)

No, Committee of Commissioners cannot again review its decision taken earlier

The Karnataka High Court held that ***once the Committee of Commissioners, on a careful examination of the order of the Commissioner (Appeals), did not differ in their opinion against the said order of the Commissioner (Appeals) and decide to accept the said order, the matter ends there. The said decision is final and binding on the Chief Commissioner also.*** The Chief Commissioner is not vested with any power to call upon the Committee of Commissioners to review its order so that he could take decision to prefer an appeal. Such a procedure is not contemplated under law and is without jurisdiction.

87. Can the Commissioner (Appeals) remand back a case to the adjudicating authority under section 85 of the Finance Act, 1994?

Yes, The Commissioner (Appeals) is empowered to remand back a case to the adjudicating authority under section 85 of the Finance Act, 1994

Commissioner of Service Tax v. Associated Hotels Ltd. 2015 (37) STR 723 (Guj.)

The High Court observed that section 85(4) of the Finance Act, 1994 is worded widely and gives ample powers to the Commissioner while hearing and disposing of the appeals to pass such orders as he thinks fit including an order enhancing tax, interest or penalty. Such powers would, therefore, inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority. ***Further, the High Court rejected the Department's contention that by virtue of section 85(5) of the Finance Act, 1994, the limitation on power of Commissioner (Appeals) to remand a proceeding as contained in section 35A(3) of Central Excise Act, 1944 also applied to appeals under section 85 of Finance Act, 1994.*** This is so because, even though sub-section (5) of section 85 requires the Commissioner (Appeals) to follow the same procedure and exercise same powers in making orders under section 85, as he does while hearing the appeals under the Central Excise Act, 1944, sub-section (5) itself starts with the expression "subject to the provisions of this Chapter".

The High Court held that ***sub-section (4) of section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal under section 85. The scope of such powers flowing from sub-section (4), therefore, cannot be curtailed by any reference to sub-section (5) of section 85 of the Finance Act, 1994.***

The High Court, therefore, held that section 85(4) of the Finance Act, 1994 gives ample powers to the Commissioner (Appeals) while hearing and disposing of the appeals and such powers inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority.

88. Whether the period of limitation or the period within which delay in filing an appeal can be condoned, specified in terms of months in a statute, means a calendar month or number of days?

CCus & CEx. v. Ashok Kumar Tiwari 2015 (37) STR 727 (All.)

Period of limitation or the period within which delay in filing an appeal can be condoned, is specified in terms of calendar months in a statute, and the same shall not be interpreted in terms of the number of days

The High Court opined that where the legislature intends to define the period of limitation with regard to the number of days, it does so specifically. Section 85 of the Finance Act, 1994 has defined the period of limitation as well as the power to condone the delay with regard to a stipulation in terms of months and such a stipulation can only mean a calendar month. ***Once the legislature has used the expression "three months" both in the substantive part of sub -section (3) of section 85 as well as in its proviso*, it would not be open for the High Court to substitute the words "3 months" by the words "90 days" and if it does so, it would amount to rewriting the legislative provision, which is impermissible.***

The High Court noted that section 3(35) of the General Clauses Act, 1897 also defines the expression "month" to mean a month reckoned according to the British calendar. Further, the day on which order was received by the assessee, i.e. 08.10.2011 had to be excluded while computing the period of limitation in view of section 9 of said Act**. Since the original period of limitation and the period within which delay could be condoned expired on a public holiday, i.e. 08.04.2012, the assessee filed the appeal on the next working day, i.e. 09.04.2012.

In the given case, ***the Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay in filing of appeal by the assessee as the same had been filed within the stipulated time prescribed for the same.***

89. Can an appeal filed in time but to the wrong authority be rejected by the appellate authority for being time barred?

Chakiat Agencies v. UOI 2015 (37) STR 712 (Mad.)

No, An appeal filed in time but to the wrong authority cannot be rejected by the appellate authority for being time barred

The High Court noted that the appeal had been preferred in time, but reached different wing of the same building. Since the appeal was received by the adjudicating officer who has passed the original order, he ought to have sent it to the other wing of the same building, but he had not done the same. Therefore, the order passed by the appellate authority cancelling the appeal on the ground that it was not received in time, could not be accepted.

The High Court, further, referred to Andhra Pradesh High Court judgment in ***Radha Vinyl Pvt. Ltd. v. Commissioner of Income Tax and Another*** **case** where in similar circumstances it was held that although the appeal had been addressed to the wrong officer, Department could not deny the fact that the appeal was pending before it. ***Either the Department should have returned the appeal papers to the assessee to enable him to file appeal before the appropriate authority or should have handed over the appeal papers to the competent authority.*** Consequently, now the Department could not say that the appeal was not filed with the competent authority.

In the light of the above discussion, ***the High Court directed the appellate authority to entertain the appeal of the assessee and to pass appropriate orders on merits and in accordance with law, after affording him an opportunity of being heard.***

CUSTOMS

BASIC CONCEPTS

90. In case of import of crude oil, whether customs duty is payable on the basis of the quantity of oil shown in the bill of lading or on the actual quantity received into shore tanks in India?

Mangalore Refinery & Petrochemicals Ltd v. CCus. 2015 (323) ELT 433 (SC)

<u>Customs duty is payable on the basis of the quantity actually received into shore tanks in India and not based on the quantity as shown in the bill of lading</u>

The assessee imported crude oil. On account of ocean loss, the quantity of crude oil shown in the bill of lading was higher than the actual quantity received into the shore tanks in India. The assessee paid the customs duty on the actual quantity received into the shore tanks. The Department contended that the quantity of crude oil mentioned in the various bills of lading should be the basis for payment of duty, and not the quantity actually received into the shore tanks in India. This was stated on the basis that duty was levied on an *ad valorem* basis and not on a specific rate. The assessee contended that it makes no difference as to whether the basis for customs duty is at a specific rate or is *ad valorem*, inasmuch as the quantity of goods at the time of import alone is to be looked at.

The Tribunal accepted the Department's contentions. The assessee raised the issue before the Supreme Court. The Apex Court noted the following:

i. The levy of customs duty under section 12 of the Act is only on goods imported into India. Goods are said to be imported into India when they are brought into India from a place outside India. Unless such goods are brought into India, the act of importation which triggers the levy does not take place.
ii. If the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods.
iii. Under section 23(2), the owner of the imported goods may also at any time before such orders have been made relinquish his title to the goods and shall not be liable to pay any duty thereon.
iv. Further, as per section 47 of the Customs Act, the importer has to pay import duty only on goods that are entered for home consumption. Obviously, the quantity of goods imported will be the quantity of goods at the time they are entered for home consumption.

The Supreme Court set aside the Tribunal's judgment and declared that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty.

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

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

<u>No, Clearance of goods from DTA to SEZ is not chargeable to export duty under the SEZ Act, 2005 or under the Customs Act, 1962</u>

The High Court, on the basis of the following observations, inferred that the clearance of goods from DTA to Special Economic Zone is not liable to export duty either under the SEZ Act, 2005 or under the Customs Act, 1962:-

- A charging section has to be construed strictly. ***If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all***.
- ***SEZ Act does not contain any provision for levy and collection of export duty for goods supplied by a DTA unit to a Unit in a Special Economic Zone for its authorised operations.*** In the absence of a charging provision in the SEZ Act providing for the levy of customs duty on such goods, export duty cannot be levied on the DTA supplier by implication.
- 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.***

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

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

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

No, Remission of duty is not permissible if the remission application is filed after the expiry of the warehousing period (including extended warehousing period)

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***. Further, even before an order for clearance of goods for home consumption is made, relinquishing of title to the goods can be made; in such event also, an importer would not be liable to pay duty. 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 and not any period after the lapse of the aforesaid periods. The said expression cannot extend to a period after the lapse of the extended period merely because the licence holder has not cleared the goods within the stipulated time. Moreover, since in the given case, the goods continued to be in the warehouse, even after the expiry of the warehousing period, it would be a case of goods improperly removed from the warehouse as per section 72(1)(b) read with section 71. ***The High Court, overruling the decision of the Tribunal, held that the circumstances made out under section 23 were not applicable to the present case since the destruction of the goods or loss of the goods had not occurred before the clearance for home consumption within the meaning of that section. When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not permit the remission of duty under section 23 of the Act.***

93. Would countervailing duty (CVD) on an imported product be exempted if the excise duty on a like article produced or manufactured in India is exempt?

Aidek Tourism Services Pvt. Ltd. v. CCus. 2015 (318) ELT 3 (SC)

Yes, Countervailing duty (CVD) on an imported product shall be exempted if the excise duty on a like article produced or manufactured in India is also exempt

Supreme Court held that rate of additional duty leviable under section 3(1) of the Customs Tariff Act, 1975 would be only that which is payable under the Central Excise Act, 1944 on a like article. Therefore, the importer would be entitled to payment of concessional/ reduced or nil rate of countervailing duty if any notification is issued providing exemption/ remission of excise duty with respect to a like article if produced/ manufactured in India.

CLASSIFICATION OF GOODS

94. 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 (278) E.L.T. 578 (S.C.)

Yes, Classification recognized by the government in an exemption notification can be used to resolve the classification dispute

The Apex Court observed that the Central Government had issued an exemption notification dated 1-3-2002 and in the said notification it had classified the Electronic Automatic Regulators under Chapter sub-heading 9032.89. ***Since the Revenue itself had classified the goods in dispute under Chapter sub-heading 9032.89 from 1-3-2002, the said classification needs to be accepted for the period prior to it.***

95. (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 (255) ELT 228 (Mad.)

Yes, Description of the goods as per the documents submitted along with the Shipping Bill can be relevant criterion for the purpose of classification & No notice for payment of interest needs be issued separately as the payment of interest becomes automatic

The High Court held that the description of the goods as per the documents submitted along with the Shipping Bill would be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test. The petitioner could not plead that the exported goods should be classified under different headings contrary to the description given in the invoice and the Shipping Bill which had been assessed and cleared for export.

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

96. Whether the mobile battery charger is classifiable as an accessory of the cell phone or as an integral part of the same?

State of Punjab v. Nokia India Private Limited 2015 (315) ELT 162 (SC)

Mobile battery charger is classifiable as an accessory of the cell phone and the same is not an integral part of the cell phone

The Supreme Court decided the case in favour of Revenue and against the assessee holding that the battery charger is not a part of the mobile/cell phone but an accessory to it, on the basis of the following observations:

i. Had the charger been a part of cell phone, cell phone could not have been operated without using the battery charger. However, as a matter of fact, it is not required at the time of operation. Further, the battery in the cell phone can be charged directly from the other means also like laptop without employing the battery charger, implying thereby, that it is nothing but an accessory to the mobile phone.
ii. As per the information available on the website of the assessee, it had invariably put the mobile battery charger in the category of an accessory which means that in the common parlance also, the mobile battery charger is understood as an accessory.
iii. A particular model of Nokia make battery charger was compatible with many models of Nokia mobile phones and also many models of Nokia make battery chargers are compatible with a particular model of Nokia mobile phone, imparting various levels of effectiveness and convenience to the users.
iv. Rule 3(b) of the General Rules for Interpretation of the First Schedule of the Customs Tariff Act, 1975 can also not be applied in the assessee's case as merely making a composite package of cell phone and mobile battery charger will not make it composite goods for the purpose of interpretation of the provisions.

The Apex Court held that mobile battery charger is an accessory to mobile phone and not an integral part of it. Further, battery charger cannot be held to be a composite part of the cell phone, but is an independent product which can be sold separately without selling the cell phone.

VALUATION UNDER THE CUSTOMS ACT, 1962

97. Can the value of imported goods be increased if Department fails to provide to the importer, evidence of import of identical goods at higher prices?

Gira Enterprises v. CCus. 2014 (307) ELT 209 (SC)

Value of imported goods cannot be increased if Department fails to provide the evidence of import of identical goods at higher prices

Supreme Court observed that since Revenue did not supply the copy of computer printout, which formed the basis of the conclusion that the appellants under-valued the imported goods, the appellants obviously could not and did not have any opportunity to demonstrate that the transactions relied upon by the Revenue were not comparable transactions.

The Supreme Court held that mere existence of alleged computer printout was not proof of existence of comparable imports. Even if assumed that such printout did exist and content thereof were true, such printout must have been supplied to the appellant and it should have been given reasonable opportunity to establish that the import transactions were not comparable. Thus, in the given case, the value of imported goods could not be enhanced on the basis of value of identical goods as Department was not able to provide evidence of import of identical goods at higher prices.

IMPORTATION, EXPORTATION AND TRANSPORTATION OF GOODS

98. 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 (289) E.L.T. 401 (Guj.)

No, Time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be inferred as the time-limit for filing of bill of entry

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***.

WAREHOUSING

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

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

Issue: Following questions arose before the Larger Bench of the Tribunal for consideration:-

(a) Whether the entire premises of 100% EOU should be treated as a warehouse?

(b) Whether the imported goods warehoused in the premises of 100% EOU are to be held to have been removed from the warehouse if the same is issued for manufacture/production/processing by the 100% EOU?

(c) Whether issue for use by 100% EOU would amount to clearance for home consumption?

No, Imported goods warehoused in the premises of a 100% EOU and used for the purpose of manufacturing cannot be treated to have been removed for home consumption

The EOUs are licensed to manufacture goods within the bonded premises for the purpose of export. Tribunal held that ***neither the scheme of the Act nor the provisions contained in the Manual require filing of ex-bond bills of entry or payment of duty before taking the imported goods for manufacturing in bond nor there is any provision to treat such goods as deemed to have been***

removed for the purpose of the Customs Act, 1962. The Tribunal answered the issues raised as follows:-

(a) The ***entire premises of a 100% EOU has to be treated as a warehouse if the licence granted under to the unit is in respect of the entire premises.***

(b) and (c) 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.

DEMAND & APPEALS

100. Is the adjudicating authority required to supply to the assessee copies of the documents on which it proposes to place reliance for the purpose of re-quantification of short-levy of customs duty?

Kemtech International Pvt. Ltd. v. CCus. 2013 (292) E.L.T. 321 (S.C.)

Yes, Adjudicating authority is required to supply to the assessee copies of documents on which it proposes to place reliance for the purpose of re-quantification of customs duty

The Apex Court elucidated that for the purpose of re-quantification of short-levy of customs duty, the adjudicating authority, following the principles of natural justice, should supply to the assessee all the documents on which it proposed to place reliance. Thereafter the assessee might furnish their explanation thereon and might provide additional evidence, in support of their claim.

101. Can delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant, be condoned?

Margara Industries Ltd. v. Commr. of C. Ex. & Cus. (Appeals) 2013 (293) E.L.T. 24 (All.)

Yes, Delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant can be condoned

In this case, CESTAT rejected the appellant's application for condonation of delay in filing the appeal before CESTAT on the ground that the reasons given for filing the appeal beyond stipulated time were not convincing. The Counsel of the appellant filed his personal affidavit stating that the appeal had been filed with a delay due to his mistake. ***The High Court held that the Tribunal ought to have taken a lenient view in this matter as the appellant was not going to gain anything by not filing the appeal and the reason for delay in filing appeal as given by the appellant was the mistake of its counsel who had also filed his personal affidavit.***

102. Can a writ petition be filed against an order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975?

Rishiroop Polymers Pvt. Ltd. v. Designated Authority 2013 (294) E.L.T. 547 (Bom.)

No, No writ petition shall be filed by the asseessee if an alternate remedy by way of an appeal is available in accordance with law

The High Court observed that section 9A(8) of the Customs Tariff Act, 1975 specifically incorporates all the provisions of the Customs Act, 1962 relating to appeal as far as may be, in their application to the anti-dumping duty chargeable under section 9A. The order of the CESTAT passed in appeal would, therefore, clearly be subject to appeal, either to this Court under section 130 or to the Supreme Court under section 130E of the Customs Act, 1962 if the appeal relates to the rate of duty or to valuation of goods for the purposes of assessment. ***The High Court, therefore, held that it would not be appropriate for it to exercise the jurisdiction under Article 226 of the Constitution (i.e. filing writ petition), since an alternate remedy by way of an appeal was available in accordance with law. The High Court thus, dismissed the petition leaving it open to the assessee to take recourse to the appellate remedy.***

103. Can customs duty be demanded under section 28 and/or section 125(2) of the Customs Act, 1962 from a person dealing in smuggled goods when no such goods are seized from him?

CCus. v. Dinesh Chhajer 2014 (300) E.L.T. 498 (Kar.)

No, Duty is not leviable against the person who is neither the importer nor the owner of the goods and was also not in possession of such goods

The High Court observed as under:

(i) Section 28 applies to a case where the goods are imported by an importer and the duty is not paid in accordance with law, for which a notice of demand is issued on the person. In case of notice demanding duty under section 125(2), firstly the goods should have been confiscated and the duty demandable is in addition to the fine payable under section 125(1) in respect of confiscated goods. ***Thus, notices issued under sections 28 and 125(2) are not identical and fall into completely different areas.***

(ii) The material on record disclosed that the assessee did not import the goods. He was not the owner of the goods but only a dealer of the smuggled goods and therefore, there was no obligation cast on him under the Act to pay duty. Thus, ***the notice issued under section 28 of the Act to the assessee is unsustainable as he is not the person who is chargeable to duty under the Act.***

(ii) Since no goods were seized, there could not be any confiscation and in the absence of a confiscation, ***question of payment of duty by the person who is the owner of the goods or from whose possession the goods are seized, does not arise.***

The High Court held that Tribunal was justified in holding that no duty is leviable against the assessee as he is neither the importer nor the owner of the goods or was in possession of any goods.

104. 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 (285) E.L.T. 321 (S.C.)

Yes, Tribunal can condone the delay in filing of an application consequent to review by the committee of chief commissioners if it was satisfied that there was sufficient cause was shown for not presenting it within prescribed period

The High Court observed that Parliament intended that entire section 129A, as far as applicable, should be supplemental to section 129D(4). For the sake of brevity, instead of repeating what had been provided in section 129A as regards the appeals to the Tribunal, it had been provided that the applications made by the Commissioner under section 129D(4) should be heard as if they were appeals made against the decision or order of the adjudicating authority and the provisions relating to the appeals to the Tribunal would apply in so far as they might be applicable. The expression, *"**including the provisions of section 129A(4)**"* was by way of clarification and had been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under section 129D(4) otherwise it could have been inferred that provisions relating to appeals to the Tribunal had been made applicable and not the cross objections. The use of expression "***so far as may be***" was to bring general provisions relating to the appeals to Tribunal into section 129D(4). Consequentially, section 129A(5) also stood incorporated in section 129D(4) by way of legal fiction and must be given effect to. In other words, if the Tribunal was satisfied that there was sufficient cause for not presenting the application under section 129D(4) within prescribed period, it might condone the delay in making such application and hear the same. In light of the above discussion, ***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.***

105. 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 (288) ELT 161 (SC)

No, Extended period of limitation for demand of customs duty cannot be invoked merely because assessee has sought clarification about exemption from a wrong authority

The Apex Court observed that the primary issue under consideration in this case was the applicability of extended period of limitation for issuing a demand notice. The Apex Court noted that section 28 of the Customs Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of section 28 and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite. The Supreme Court observed that the assessee had shown *bona fide* conduct by seeking clarification from the Development Commissioner and in a sense had offered its activities to assessment. Only on receiving a satisfactory reply from the Development Commissioner did the assessee claim the exemption. The Apex Court elaborated that even if the Development Commissioner was not the most suitable repository of the answers sought by the assessee, it did not negate the bona fide conduct of the assessee. It still showed that assessee made efforts to adhere to the law rather than its breach. ***The Supreme Court reiterated that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. The Supreme Court held that mere non-payment of duties could not be equated with collusion or wilful misstatement or suppression of facts 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.***

106. Can a writ petition be filed before a High Court which does not have territorial jurisdiction over the matter?

Neeraj Jhanji v. CCE & Cus. 2014 (308) ELT 3 (SC)

A writ petition cannot be filed before a High Court not having territorial jurisdiction over the matter

The Supreme Court observed that the very filing of writ petition by the petitioner in Delhi High Court against the order in original passed by the Commissioner of Customs, Kanpur indicated that the petitioner had taken chance in approaching the High Court at Delhi which had no territorial jurisdiction in the matter. The filing of the writ petition before Delhi High Court was not at all bona fide.

REFUND

107. Whether interest is liable to be paid on delayed refund of special CVD arising in pursuance of the exemption granted vide *Notification No. 102/2007 Cus dated 14.09.2007?*

KSJ Metal Impex (P) Ltd. v. Under Secretary (Cus.) M.F. (D.R.) 2013 (294) ELT 211 (Mad.)

Yes, Department is liable to pay interest for delaying the refund of special CVD

The High Court stated that a ***conjoint reading of section 25(1) and section 27 of the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest***. The High Court, therefore, held that:

(i) ***It would be a misconception of the provisions of the Customs Act, 1962 to state that notification issued under section 25 of the Customs Act, 1962 does not have any specific provision for interest on delayed payment of refund.***

(ii) ***When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override***

the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.
(iii) Paragraph 4.3 of the *Circular No. 6/2008 Cus. dated 28.04.2008* being contrary to the statute has to be struck down as bad.

108. Is limitation period of one year applicable for claiming the refund of amount paid on account of wrong classification of the imported goods?
Parimal Ray v. CCus. 2015 (318) ELT 379 (Cal.)
No, limitation period of one year for claiming the refund is not to be applied, if amount is wrongly paid on account of incorrect classification of the imported goods
The High Court observed that the provisions of section 27 apply only when there is over payment of duty or interest under the Customs Act, 1962. When the petitioners case is that tunnel boring machines imported by it were not exigible to any duty, any sum paid into the exchequer by them was not duty or excess duty but simply money paid into the Government account. The Government could not have claimed or appropriated any part of this as duty or interest. Therefore, there was no question of refund of any duty by the Government. The money received by Government could more appropriately be called money paid by mistake by one person to another, which the other person is under obligation to repay under section 72 of the Indian Contract Act, 1872.

A person to whom money has been paid by mistake by another person becomes at common law a trustee for that other person with an obligation to repay the sum received. This is the equitable principle on which section 72 of the Contract Act, 1872 has been enacted. Therefore, the person who is entitled to the money is the beneficiary or *cesti qui trust**. When the said amount was paid by mistake by the petitioner to the Government of India, the latter instantly became a trustee to repay that amount to the petitioner. The obligation was a continuing obligation. When a wrong is continuing there is no limitation for instituting a suit complaining about it. The High Court, therefore, allowed the writ application and directed the respondents (Department) to refund the said sum to the petitioner.

PROVISIONS RELATING TO ILLEGAL IMPORT, ILLEGAL EXPORT, CONFISCATION, PENALTY & ALLIED PROVISIONS
109. Can penalty for short-landing of goods be imposed on the steamer agent of a vessel if he files the Import General Manifest, deals with the goods at different stages of shipment and conducts all affairs in compliance with the provisions of the Customs Act, 1962?
Caravel Logistics Pvt. Ltd. v. Joint Secretary (RA) 2013 (293) ELT 342 (Mad.)
Yes, In case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him
The High Court noted that section 116 of the Act imposes a penalty on the **person- in-charge** of the conveyance *inter alia* for short-landing of the goods at the place of destination and if the deficiency is not accounted for to the satisfaction of the Customs Authorities. Section 2(31) defines "person-in-charge" to *inter alia* mean in relation to a vessel, the master of the vessel. ***Section 148 provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment in respect of the matter in question of all obligations imposed on such person-in-charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.*** The High Court observed that if assessee affixed seal on containers after stuffing and took their charge, he stepped into shoes of/acted on behalf of master of vessel, the person-in-charge. The High Court held that ***conjoint reading of sections 2(31), 116 and 148 of Customs Act, 1962 makes it clear that in case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him. Hence, duly appointed steamer agent of a vessel, would be liable to penalty. However, steamer agent, if***

innocent, could work out his remedy against the shipper for short-landing. The High Court also clarified that in view of section 42 under which no conveyance can leave without written order, there is an automatic penalty for not accounting of goods which have been shown as loaded on vessel in terms of Import General Manifest. There is no requirement of proving *mens rea* on part of person-in-charge of conveyance to fall within the mischief of section 116 of the Customs Act.

110. Where goods have been ordered to be released provisionally under section 110A of the Customs Act, 1962, can release of goods be claimed under section 110(2) of the Customs Act, 1962?

Akanksha Syntex (P) Ltd. v Union of India 2014 (300) E.L.T. 49 (P & H)

No, Seized goods needs to be un-conditionally released if SCN is not issued within the prescribed time-limit

The High Court observed that the object of enacting section 110(2) of the Act is that the Customs Officer may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under subsection (1) thereof. Sub-section (2) of section 110 strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice within that period has been issued under section 124(a) for confiscation of the goods. Where no action is initiated by way of issuance of show cause notice under section 124(a) of the Act within six months or extended period stipulated under section 110(2) of the Act, the person from whose possession the goods were seized becomes entitled to their return. ***The High Court did not accept the contrary interpretation of the Bombay High Court in Jayant Hansraj Shah's case. The High Court was of the view that the said interpretation was not borne out from the plain reading of the aforesaid provisions. The remedy of provisional release is independent of remedy of claiming unconditional release in the absence of issuance of any valid show cause notice during the period of limitation or extended limitation prescribed under section 110(2) of the Customs Act, 1962.***

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

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

No, Benefit of exemption meant for imported goods shall not be given to the smuggled goods

The question which arose before the Apex Court for consideration was whether goods that were smuggled into the country could be considered as 'imported goods' for the purpose of granting the benefit of the exemption notification. The Apex Court held that ***the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962. The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling in the economy.***

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

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

Yes, Copies of documents seized during the course of seizure action needs to made available by the revenue officers to the assessee when asked for

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 or seeking extract, and not the officer. If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. ***The denial***

by the Revenue to make the documents available was clearly an act without jurisdiction. The High Court directed the Revenue to make available the copies of the documents asked for by the assessee which were seized during the course of the seizure action.

113. 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 (275) ELT 266 (GOI)

No, Re-export of smuggled goods is possible only if true declaration or request for detention has been made on arrival at airport

The Government noted that the passenger had grossly mis-declared the goods with intention to evade duty and to smuggle the goods into India. As per the provisions 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 can 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 authorities at the time of his arrival at airport, the re-export of said goods could not be allowed under section 80 of the Customs Act.***

114. Whether mere dispatch of a notice under section 124(a) would imply that the notice was "given" within the meaning of section 124(a) and section 110(2) of the said Customs Act, 1962?

Purushottam Jajodia v. Director of Revenue Intelligence 2014 (307) ELT 837 (Del.)

No, Mere dispatch of a notice under section 124(a) would not imply that the notice was "given" within the meaning of section 124(a) and section 110(2) of the said Customs Act, 1962

The Delhi High Court observed that section 124(a) clearly stipulates that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or person from whom goods have been seized is "given a notice" in writing, "informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty". In case such notice is not given within the stipulated period of six months or the extended period of a further six months, seized goods have to be released.

The object of section 124(a) is that the person from whom the goods have been seized had to be informed of the grounds on which the confiscation of the goods is to be founded. This can happen only when such person receives the notice and is capable of reading and understanding the grounds of the proposed confiscation. On a conjoint reading of section 110(2) and section 124(a) of the said Act, the Court opined that the notice contemplated in these provisions can only be regarded as having been "given" when it is actually received or deemed to be received by the person from whom the goods have been seized.

The Delhi High Court was in complete agreement with the Supreme Court‟s decision in case of *K. Narsimhiah* as followed by Gujarat High Court in case of *Ambalal Morarji Soni.* However, it disagreed with the decision of Calcutta High Court in case of *Kanti Tarafdar.* The Delhi High Court pointed out that the decision in the said case was arrived at on the (wrong) premise that section 124 requires that a notice be "issued" as against a notice being "given" when the body of the provision of section 124 nowhere uses the expression "issue of show cause notice". The Delhi Court elaborated that it is only the heading of that section which uses that expression (**issue** of show notice) and the body of section 124(a), on the contrary, uses the exact same expression "given" as used in section 110(2) of the said Act. Therefore, the Delhi High Court was of the view that very basis of the Calcutta High Court‟s decision in *Kanti Tarafdar* is incorrect. The Delhi High Court also disagreed with the Calcutta High Court‟s observation that the word "given" used in section 110(2) and section 124(a) is in any manner controlled by section 153. The Delhi High Court opined that in the context of the present cases, section

153 would only define the mode and manner of service and not the time of service or when a notice can be said to have been "given".

Further, Delhi High Court was of the view that Madhya Pradesh High Court, in case of *Ram Kumar Aggarwal,* wrongly concluded that when the legislature had used the words "notice is given" it would "obviously mean that the notice must be issued within six months of the date of seizure". The Delhi High Court, on the other hand, opined that expression "notice is given" does not logically translate to the conclusion that "notice must be issued within the stipulated period".

The High Court held that ***since the petitioners did not receive the notice under section 124(a) within the time stipulated in section 110(2) of the Act, such notice will not considered to be "given" by the Department within the stipulated time,*** i.e. before the terminal date. Consequently, the Department was directed to release the goods seized.

SETTLEMENT COMMISSION

115. Is judicial review of the order of the Settlement Commission by the High Court or Supreme Court under writ petition/special leave petition, permissible?

Saurashtra Cement Ltd. v. CCus. 2013 (292) E.L.T. 486 (Guj.)

Yes, judicial review of the "decision-making process" and not the "decision" of the Settlement Commission is permissible

While examining the scope of judicial review in relation to a decision of Settlement Commission, the High Court noted that ***although the decision of Settlement Commission is final, finality clause would not exclude the jurisdiction of the High Court under Article 226 of the Constitution (writ petition to a High Court) or that of the Supreme Court under Articles 32 or 136 of the Constitution (writ petition or special leave petition to Supreme Court). The Court would ordinarily interfere if the Settlement Commission has acted without jurisdiction vested in it or its decision is wholly arbitrary or perverse or mala fide or is against the principles of natural justice or when such decision is ultra vires the Act or the same is based on irrelevant considerations.*** The Court, however, pronounced that the scope of court's inquiry against the decision of the Settlement Commission is very narrow, i.e. ***judicial review is concerned with the decision-making process and not with the decision of the Settlement Commission.***

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

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

No, The assessee cannot accept settlement commissions order only to the extent what is favourable to them and reject the unfavourable portion

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.***

117. 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 (258) ELT 476 (Bom.)

Yes, Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue

The High Court noted that the Settlement Commission while considering the aforesaid question of its jurisdiction for taking up the cases relating to drawback had considered the definition of "drawback" as defined in rules relating to drawback as also the definition of the word "case" as defined in section 127A(b) and after referring to the various judgments of the Tribunal came to the conclusion that the ***Commission had jurisdiction to deal with the application for settlement.*** The High Court stated that the reasons given by the Settlement Commission in support of its order are in consonance with the law laid down by the Supreme Court in the case of Liberty India v. Commissioner of Income Tax (2009) 317 ITR 218 (SC) wherein the Supreme Court has observed that ***drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India.*** The High Court, thus, concluded that ***the duty drawback or claim for duty drawback is nothing but a claim for refund of duty as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act.*** Thus, the High Court held that the Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue.

MISCELLANEOUS PROVISIONS

118. Whether any interest is payable on delayed refund of sale proceeds of auction of seized goods after adjustment of expenses and charges in terms of section 150 of the Customs Act, 1962?

Vishnu M Harlalka v. Union of India 2013 (294) ELT 5 (Bom)

Yes, Interest is payable on delayed refund of sale proceeds by department on auction of seized goods

The High Court observed that though no period was stipulated in the order of the Settlement Commission for the grant of refund, the entire exercise ought to have been carried out within a reasonable period of time. The High Court noted that there was absolutely no reason or justification provided by the department for the delay in payment of balance sale proceeds. The High Court held that ***Department cannot plead that the Customs Act, 1962 provides for the payment of interest only in respect of refund of duty and interest.*** The High Court clarified that ***acceptance of such a submission would mean that despite an order of the competent authority directing the Department to grant a refund, the Department can wait for an inordinately long period to grant the refund.*** The High Court directed the Department to pay interest from the date of approval of proposal for sanctioning the refund.

119. 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 (288) E.L.T. 63 (Del.)

No, Director cannot be held liable for the recovery of the customs dues of the company

Considering the provisions of section 142 of the Customs Act, 1962 and the relevant rules*, the High Court elucidated that ***it was only the defaulter against whom steps might be taken for the recovery of the dues***. In the present case, it was the company who was the defaulter. ***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.***

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