

**PAPER – 8 : INDIRECT TAXES**

**QUESTIONS**

1. Pravaal purchases duty paid wire rods and draws them into a thinner gauge. The two items fall under different tariff headings. Pravaal claims that the process undertaken by him does not amount to manufacture. His claim is based on a decision given by the Apex Court in the case of *Collector of Central Excise v Technowled Industries 2003 (155) E.L.T. 209 (S.C.)*. Is the claim of the assessee correct in the present position of law?
2. Alpha Industries Ltd. manufactures shoes on the basis of bulk orders received from various Government Departments. Footwear is covered under the Third Schedule to the Central Excise Act, 1944. Alpha Industries Ltd. does not make any retail sale to individual buyers, nor does it affix any MRP on shoe packages sold by it. Even the necessary declarations required under statutes are not filed by it. How should the goods be valued?
3. The value of the operational software should not be included in the value of the computer. Discuss the correctness of the statement with reference to the provisions of the Central Excise Act, 1944.
4. M/s. Della Traders is in the practice of charging each of its customers compulsorily, a certain amount as labour charges for repair of the finished products during warranty period. This repair is done by the dealers. The Central Excise Officer added the value of such charges in the assessable value of the finished products for the purpose of computation of duty, on the ground that such repair charges are in the nature of 'after sale service' done by M/s. Della Traders to promote marketability. However, the contention of M/s. Della Traders is that such charges are recovered as service charges for repairs, a service being provided by the dealers. Do you agree to the stand taken by the Central Excise Officer? Give reasons.
5. With reference to Cenvat Credit Rules, 2004 answer the following questions:
  - (i) How can the credit of duties of excise and service tax be utilized? Are there any restrictions in this regard?
  - (ii) Whether it is necessary that credit can be taken, only after making payment against the bill/invoice/challan?
  - (iii) Who is an "input service distributor"?
6. India Cements Ltd. is engaged in the business of manufacturing cement. For this purpose, limestone is excavated from a mine, which is situated at a distance of few kilometres from the plant where the cement is manufactured. The mine is connected to the main plant through a ropeway. Explosives are used for blasting the mine to excavate limestone. Can Cenvat credit be taken on such explosives?
7. Discuss the mechanism for removal of goods at concessional rate of duty for manufacture of excisable goods with reference to Central Excise Act, 1944 and the rules made thereunder.
8. Discuss the provisions governing packing, re-packing, labelling or re-labelling within the warehouse in respect of Export Warehousing.
9. Write short notes on:
  - (a) Compounding of offences
  - (b) Offence by companies
10. Discuss the provisions prescribed in Cenvat Credit Rules, 2004 for a situation where a output service provider renders both taxable as well as exempted output services by using common inputs/input services and maintains only one set of books of accounts for taxable and exempted services.
11. When can the 'transaction value' be accepted under the Customs Act, 1962 and the Customs Valuation (Determination of Price of Imported goods) Rules, 1988 even if the buyer and seller are related persons? Write a brief note.

12. M/s. Neeraj Containers imported by air from USA certain goods at CIF value \$ 8400.00. Air freight US \$ 1,600 and insurance charges US \$ 800 were also paid. Bill of Entry was presented on 28-2-04, but the date of arrival of the aircraft was 10-03-04. Other relevant information is as follows:

|                                | As on<br>28-02-04 | As on<br>10-03-04 |
|--------------------------------|-------------------|-------------------|
| <b>Rates of Exchange</b>       |                   |                   |
| As announced by CBEC US \$ 1 = | Rs.48.50          | Rs.48.20          |
| As announced by RBI US \$ 1 =  | Rs.48.90          | Rs.48.50          |
| <b>Rates of Custom Duty</b>    |                   |                   |
| Basic Customs Duty             | 14%               | 16%               |
| Additional Customs Duty        | 16%               | 16%               |
| Special Additional Duty        | 4%                | 4%                |

The same goods are exempt from excise duty in India, if manufactured without the aid of power.

Compute the assessable value and give the rates of Basic, Additional and Special Additional Duty to be adopted in this case, and also the basis for arriving at the Basic, Additional and Special Additional Duty (actual duty calculations need not be given). Clearly show your assumptions.

13. Does the principle of unjust enrichment apply to refund of import duty paid on capital goods?
14. Pranjal had imported certain goods. Due to some technical problems he had to pay the redemption fine. Later on, he decides to abandon the goods. So, he claims the refund of redemption fine being paid by him. Is his claim tenable in law? Discuss.
15. Sudha Traders had imported certain goods and got them cleared for home consumption. Later, the Department found that the goods had been imported in contravention of Import Control Act and Import Control Order and, therefore, were liable for confiscation under section 111(d) of Customs Act and penalty under section 112 of the Act. Is the stand taken by the revenue correct in law? Examine the situation with the help of the case laws, if any.
16. Write short notes on :
- Education cess on customs duty
  - Fee for filing an appeal to Appellate Tribunal
17. Discuss the provisions of section 143A of Customs Act, 1962 in respect of duty deferment.
18. Answer the following with reference to the Finance Act, 1994 as amended relating to applicability of Service Tax.
- Services provided by multi-system operator to cable operators.
  - Maintenance services provided by M/s. Complete Software Solutions for computers sold by it.
  - Services provided by Sarwan Tent House in respect of pandal and shamiana for the purpose of holding a purely religious congregation.
  - Route navigation services provided by Airports Authority of India to various airlines.
  - Service provided by an individual in respect of procuring the inputs and managing the inventory for a company.
19. Answer the following with reference to the Finance Act, 1994 as amended relating to applicability of Service Tax.
- Service provided by a sub-broker to a main broker.
  - Services provided by a banking company or financial institutions to Government of India or a State government.
  - Services provided by the outdoor caterer to a client on a railway train.

- (iv) Premium paid on a life insurance policy.
  - (v) Advance received for rendering a particular service.
20. Briefly discuss the provisions of the Finance Act, 1994 as amended relating to Service tax with respect to any one of the following taxable services:
- (i) Business Exhibition Service
  - (ii) Opinion poll service.

### SUGGESTED ANSWERS/HINTS

1. The Apex Court had held in the case of *Collector of Central Excise v Technowled Industries 2003 (155) E.L.T. 209 (S.C.)* that there is no manufacture of a new product when the guage of the rod is made thinner and the product is finished a little better.

However, Finance (No. 2) Act, 2004 has inserted a section note in section XV of the First Schedule to the Central Excise Tariff Act so as to provide that 'the process of drawing or redrawing a rod, wire or any other similar article, into wire' shall amount to 'manufacture'. Therefore, this chapter note overrules the judgment of the Supreme Court.

Hence, the contention of the assessee is not correct in law.

2. A similar issue came up for consideration before the Tribunal in the case of *Commissioner of C. EX. & Cus., BBSR –II v. Mehar Shoes Industries 2004 (172) E.L.T. 409 (Tri. – Kolkata)*. The question, which arose before the Tribunal, was that whether the goods had to be valued as per the provisions of section 4 or as per the provisions of section 4A. The Tribunal followed the *Circular No. 625/16/2002 – C.X., dated 28.02.2002* that read:

"Sec.4A of the Central Excise Act, 1944 is applicable in respect of those cases only where the manufacturer is **legally obliged** to print the MRP on the packages of the goods, under the provisions of the Standards of Weights and Measures Act, 1976 or the rules made there under or any other law for the time being in force.

The basic issue, therefore, is to determine the circumstances in which sec.4A of the C.E. Act can be applied. The wording of Sec.4A (1) makes it very clear that it will apply only to such goods "..... in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976, or the rules made there under or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods....". In other words, if there is no statutory requirement under the provisions of Weights and Measures Act to declare the retail sale price on the packages, Sec.4A will not apply. As for example, in respect of bulk sale of ice-cream to hotels/restaurants which are not meant for retail sales as such, the provisions of the Weights and Measures Act will not apply. Chapter V of the Weights & Measures (Packaged Commodity) Rules, 1977 mentions the instances where MRP is not required to be printed on the packages. Thus, in these cases valuation will have to be done under sec.4 of the C.E. Act, 1944.

It is, therefore, clarified that, in respect of all goods (whether notified u/s.4A or not) which are not statutorily required to print/declare the retail sale price on the packages under the provisions of the Standards of Weight & Measures Act, 1976, or the rules made there under or any other law for the time being in force, valuation will be done u/s.4 of the C.E. Act, 1944 (or under section 3(2) of the Central Excise Act, 1944, if tariff values have been fixed for the commodity). Thus, there could be instances where the same notified commodity would be partly assessed on the basis of MRP u/s.4A and partly on the basis of normal price (prior to 1.7.2000) or transaction value (from 1.7.2000), u/s.4 of the C.E. Act, 1944.

It may be kept in mind that if an assessee does not declare or print the retail sale price in respect of a notified commodity, which it is statutorily required to do under the provisions of the Weights & Measures Act, or any other law for the time being in force, the goods, on removal, will be liable to confiscation u/s. 4A(4) of the C.E. Act, 1944."

In the situation referred to in the question there is no legal obligation on the manufacturer to print the MRP on the shoe packages as the shoes are not sold in retail. Therefore, the basic condition for the shoes to be valued as per provisions of section 4A is absent i.e, the MRP is not affixed on the goods. Thus, abovementioned Circular should be followed in this case also and the valuation of the goods sold in bulk should be done as per section 4 and not as per section 4A.

3. The issue was discussed in detail by the Supreme Court in the case of *CCE, Pondicherry v. Acer India Ltd. 2004 (172) E.L.T. 289 (S.C.)* wherein it was held by the Apex Court that the value of the operational software loaded on the computer is not includible in the assessable value of the computers.

Computer and operative softwares are different marketable commodities. They are available in the market separately and are classified differently. The rate of excise duty for computer is 16% whereas that of software is *nil*.

The computer and software are distinct and separate, both as a matter of commercial parlance and also under the statute. A computer may not be capable of functioning effectively without being loaded with software. However, it will not tantamount to bringing them within the purview of the part of the computer so as to include their value in the assessable value of the computers. Both computer and software must be classified under their respective headings viz., 84.71 and 85.24 and must be subjected to corresponding rates of duties separately.

Although the information contained in software is loaded in the hard disc, but the operational software does not lose its value and is still marketable as a separate commodity. It does not lose its character as a tangible goods being of the nature of CD-ROM. The fact that the manufacturers put different prices for the computers loaded with different types of operational software does not make any difference as regards nature and character of the 'computer'. Even if the manufacturers in terms of the provisions of a licence are obliged to preload software on the computer before clearing the same from the factory, the characteristic of the software cannot be said to have transformed into hardware so that it can be charged to excise duty along with the computer.

As regards valuation it was pointed out by the Apex court that the valuation of goods would be subjected to the charging provisions contained in section 3 of the Act and also subsection (1) of section 4. The definition of 'transaction value' must be read in the text and context of section 3, the charging section i.e., the expressions 'by reason of sale' or 'in connection with the sale' contained in the definition of 'transaction value' cannot be used to justify the chargeability of software to excise duty. These expressions refer to such goods, which are excisable to excise duty and not the one, which are not excisable. The legal text contained in Chapter 84, as explained in Chapter Note 6, clearly states that software, even if contained in hardware, does not lose its character as such. When an exemption has been granted from levy of any excise duty on software whether it is operating software or application software in terms of heading 85.24, no excise duty can be levied thereupon indirectly as it is impermissible to levy a tax indirectly.

The excise duty is chargeable on the excisable goods and not on the goods, which are not excisable. Thus, if non-excisable goods are transplanted into excisable goods, the assessee is not liable to pay excise duty on the combined value of both. Excise duty, in other words, is leviable only on the goods, which answer the definition of 'excisable goods' and satisfy the requirement of section 3. A machinery provision contained in section 4 and that too the explanation contained therein by way of definition of 'transaction value' can neither override the charging provision nor by reason thereof 'goods' which is not excisable will become excisable only because one is fitted into the other. While computing costs of manufacturing, expenses that add to the value of the excisable goods are to be considered and not the value of non-excisable goods.

4. The facts of the case are similar to the case of *Collector of Central Excise, Chandigarh v. Eicher Tractors Ltd. 2004 (164) E.L.T. 129 (S.C.)*. On this issue, the Supreme Court observed that service is distinct and separate from repairs. Dealers providing 'service' have nothing to do with 'repairs' during warranty period. If there is a provision for free repair during warranty period then

that is something which is being provided by manufacturers. Such service may be provided through dealers for benefit of the customer to whom an additional value is provided. Hence, it was held by the Apex Court that cost of labour charges recovered from the buyers for free repair provided by dealers during warranty period should be included in the assessable value.

Applying the ratio of the abovementioned decision in the given case, it can be said that the contention of M/s. Della Traders of service being provided by dealer is erroneous. Therefore, the stand taken by the Central Excise Officer is correct in law.

5. (i) Credit of the duties of excise paid on inputs and capital goods can be availed by the manufacturers of excisable goods for payment of their excise duty liability on the final products.

Credit of the duties of excise paid on inputs and capital goods can be availed by output service providers for payment of their service tax liability on the output services rendered by them.

Credit of service tax paid on input services can be availed by the manufacturers of excisable goods for payment of their excise duty liability on the final products.

Credit of service tax paid on input services can be availed by output service providers for payment of their service tax liability on the output services rendered by them.

However, such utilisation is subject to following restrictions:

- (i) Credit of Additional Excise Duty (Textile and Textile Articles) [AED (TTA)] can be used **only** for payment of AED (TTA), if leviable on final products..
  - (ii) Credit of National Calamity Contingent Duty (NCCD) can be used **only** for payment of NCCD, if leviable on final products.
  - (iii) Credit of Education cess on excise duty and service tax can be used **only** for payment of Education Cess on excise duty (in case of manufacturers) or for payment of Education Cess on service tax (in case of output service providers).
  - (iv) Credit of Additional Duty of Customs (CVD) equivalent to AED (TTA), NCCD or Education Cess on excise duty can be used **only** for payment of such AED (TTA) or NCCD or Education Cess on final products, respectively
  - (v) Additional Duty of Excise on Tea and Tea waste can be used **only** for payment of such Additional Duty of Excise on Tea and Tea waste, if leviable on final products.
- (ii) There are no such restrictions with regard to availment of credit of duties of excise, as the input/capital goods supplier has to discharge the duty indicated in the invoice, irrespective of the realisation of the proceeds. However, as per Cenvat Credit Rules, 2004, credit of service tax on input services, can be availed, only after making payment of the amount indicated in the invoice/bill/challan. This is necessary because the input service provider pays the service tax to the government only after he realises the payment, as the payment of service tax is only upon realisation. It is to be noted that if part of a bill is paid, service tax credit can be availed on proportionate basis.
- (iii) As per Rule 2(m) of Cenvat Credit Rules, 2004 an "input service distributor" means an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.

In many cases, various input services are consumed in the headquarters/administrative offices of manufacturers and output service providers. In such a case, the invoices indicating the payment of service tax are issued in the name of such headquarters/administrative offices. Rule 7 of Cenvat credit Rules, 2004 provides for availing credit of such service tax, in the premises where manufacturing activity is

undertaken or the premises where the output services are rendered. Such headquarters/administrative offices are known as “input service distributor (ISD)”. The input service distributor can distribute the total amount of service tax paid by it, to various manufacturing premises/various premises rendering the output service.

6. As per rule 3 of the Cenvat Credit Rules, 2004 credit can be taken only on the *inputs received in the factory of production*. Inputs has been defined in rule 2(g) of the said rules as “inputs.....used for manufacture of final products or for any other purpose, *within the factory of production*.” Thus, if the inputs are not used within the factory of production, they cannot be termed as eligible inputs under Rule 2(g) and also actual receipt and use of inputs within the factory is essential for availing credit on them.

Therefore, the issue which arises is that whether the mine connected with a ropeway to the main plant can be treated as a factory so that the credit can be taken on the explosives used therein. A similar issue came up for consideration before the Supreme Court in the case of *CCE, Jaipur v. J.K. Udaipur Udyog Limited 2004 (171) E.L.T 289 (S.C.)*. The Apex Court observed that as per section 2 (e) of Central Excise Act, “factory 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 connected with the production of these goods is being carried on or is ordinarily carried on.” *Therefore, it was held by the Supreme Court that a mine connected to the factory by a ropeway could not qualify to be a factory as no manufacturing process was carried out there. Hence, credit would not be available on the explosives as they were not used within the factory of production but were used in the mine, which could not qualify to be a factory.*

The ratio of this decision can be applied in the present case also. Thus, credit cannot be availed by India Cements Ltd. on the explosives used by it for blasting the mines.

7. Under Notification No.34/2001-C.E. (N.T.) dated 21.6.2001 the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 have been issued by the Central Government.

Under Rule 3 of the said Rules, a manufacturer who intends to receive the specified goods at concessional rate of duty is required to make an application in quadruplicate in the specified form to the jurisdictional Assistant/Deputy Commissioner of Central Excise. However, he is required to make separate application in respect of each supplier of subject goods.

Further, the manufacturer is required to execute a general bond with surety or security to cover the recovery of duty liability estimated to be involved at any given point of time.

The application shall be countersigned by the said Assistant/Deputy Commissioner of Central Excise certifying that the manufacturer has executed the required bond.

Of the four copies of application, one copy shall be forwarded to the jurisdictional range superintendent of the manufacturer of the subject goods and two copies shall be handed over to the applicant manufacturer and one copy shall be retained by the Assistant/Deputy Commissioner of Central Excise.

Under Rule 4, the manufacturer of the goods can avail the exemption from duty based on the above-referred application.

As per Rule 5, the manufacturer receiving the above goods is required to maintain a simple account indicating the quantity and value of subject goods received, consumed and quantity remaining in stock. Further, he is also required to submit a monthly return in the specified form.

As per Rule 6, if the material received at concessional rate of duty is not used for intended purpose, manufacturer shall be liable to pay differential duty along with interest. Provisions of Section 11A and section 11AB shall apply *mutatis mutandis* for effecting such recoveries.

If the manufacturer on receiving the subject goods finds them to be defective or damaged or unsuitable or surplus to his needs, he may return the subject goods to the original manufacturer

of the goods. Such returned goods shall be added to the non-duty paid stock of the manufacturer of the subject goods and dealt with accordingly.

If the goods are lost or destroyed by natural causes or by unavoidable accident during transport from place of procurement to the manufacturer's premises or from place of manufacturer to the place of procurement (if goods are returned) or during handling or storage in the manufacturer's premises, it will not be treated as used for 'intended purpose'. Consequently, differential duty and interest will become payable.

8. The operations of packing, re-packing, labelling or re-labelling in relation to excisable goods received and stored in the warehouse will be governed by the procedure specified under Rule 20. Suitable entries must be made in the Export-Warehouse register. In case of non-reconciliation of quantity, after adjusting any wastage or refuse, the differential quantity shall be treated as unaccounted and action for recovery of duty will be initiated.

The exporter may procure packing or labelling material and bring the same into the warehouse under the warehousing procedure itself. No duty paid goods will be permitted to be brought into the warehouse.

Where the process of packing, repacking, labelling or relabelling amounts to manufacture in terms of the provisions of the Central Excise Tariff Act, 1985, the goods permitted for clearance for home consumption shall be assessed accordingly.

9. (a) Finance (No. 2) Act, 2004 has inserted sub-section (2) in section 9A of the Central Excise Act, 1944. The sub-section (2) provides for compounding of offences, either before or after the institution of prosecution, under Chapter II of the Central Excise Act by Chief Commissioner of Central Excise on payment of compounding amount prescribed by the rules. Such amount shall be paid to the Central Government by the person accused of the offence.

A corresponding amendment has been made in section 37 to empower Central Government to make rules for specifying the amount to be paid for compounding of offences under section 9A.

- (b) This concept is known as the principle of vicarious liability. Section 9AA of the Act makes every person responsible to and every person in charge of the business of the company at the time of commission of the offence to be guilty of offence besides the company itself. However it will be a defence for such a person that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of the offence.

The section also deems any director, manager, secretary or other officer to be guilty where the offence is attributable to their consent or connivance or neglect. The term "company" includes a firm and association of individuals and the term "director" will mean a partner in relation to a firm.

The Delhi High Court has held in *Vidya Wati v. State - 1988 (37) E.L.T. 341* that the term "incharge of and responsible to the company" would mean that the person was in overall control of the day-to-day affairs of the company. Only if this can be proved, the person can be deemed guilty of offence.

10. As per Rule 6 of the Cenvat Credit Rules, 2004, the provider of output service, opting not to maintain separate accounts, shall utilize credit only to extent of an amount not exceeding twenty percent of the amount of service tax payable on taxable output service. In other words, credit can be utilised only to an extent of 20% of service tax liability. For example, if the service tax liability for a specific period is Rs.10000 and the credit available is Rs. 4000, the credit can be utilised only to an extent of Rs.2000 and the balance liability of Rs.8000 has to be paid in cash. The remaining credit of Rs. 2000 can be carried forward and used for the subsequent period. However, credit of the whole of service tax paid on following taxable services:

- Consulting engineer;
- Architect;

- Interior decorator;
- Management consultant;
- Real estate agent;
- Security agency;
- Scientific or technical consultancy;
- Banking and other financial services;
- Insurance auxiliary services;
- Erection, commissioning and Installation agency;
- Maintenance or repair;
- Technical testing and analysis;
- Technical inspection and certification;
- Foreign exchange brokers;
- Construction service;
- Intellectual property service;

shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services. In other words, even if the abovementioned input services are used commonly in rendering taxable as well as exempted services, the obligations prescribed under the rules, will not be attracted. However, if these services are exclusively used in rendering exempted service, no credit can be availed.

If the provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 14, for recovery of CENVAT credit wrongly taken.

No CENVAT credit shall be allowed on capital goods, which are used exclusively in providing exempted services.

- 11.** Rule 4(3) of Customs Valuation Rules provides for acceptance of transaction value of sale between related persons provided:

- (a) the examination of the circumstances of the sale of the imported goods indicate that the relationship did not influence the price.
- (b) the importer demonstrates that the price is similar to identical or similar goods sold to unrelated buyers in India. The value of identical or similar goods may be ascertained from
  - (i) Transaction value or
  - (ii) Deductive value or
  - (iii) Computed value of identical or similar goods.

While comparing prices of identical or similar goods to unrelated buyers, account should be taken of difference in commercial levels, quantity levels, adjustments in accordance with the provision of Rule 9 of these rules and cost incurred by the seller in sales in which he and the buyer are not related.

- (c) substitute values shall not be established under the provisions of clause (b) of this sub-rule.

Rule 10A also states that the customs officer can ask for further information and evidence. Thus, burden of proof is on the importer.

- 12.** In the case of import by air, airfreight should not be higher than 20% of FOB price, hence FOB price may be ascertained.

|                   | US \$      | US \$       |
|-------------------|------------|-------------|
| CIF value         |            | 8400        |
| Less: Air freight | 1600       |             |
| Insurance charges | <u>800</u> | <u>2400</u> |
| FOB value         |            | <u>6000</u> |

|                                             |             |
|---------------------------------------------|-------------|
| <i>Computation of Assessable value</i>      | US \$       |
| FOB value as calculated above               | 6000        |
| Add: Freight restricted to 20% of FOB value | 1200        |
| Insurance charges (actual)                  | <u>800</u>  |
|                                             | <u>8000</u> |

|                                         |                 |
|-----------------------------------------|-----------------|
| CIF value in Indian Rupees              | Rs.             |
| US \$ 8000 x Rs.48.50                   | 3,88,000.00     |
| Add: landing charges at 1% of CIF value | <u>3,880.00</u> |
| Assessable value                        | 3,91,880.00     |
|                                         | =====           |

*Rates of Basic, Additional, Special Customs Duty to be adopted*

Basic 16%; Additional 16%, Special 4%

*Basis for calculation of Basic, Additional, Special Customs Duty*

Basic 16% of Assessable value

Additional 16% of (Assessable value + Basic Customs Duty)

Special 4% of (Assessable value + Basic Customs Duty + Additional Customs Duty)

**Notes:-**

- (i) Landing charges have been considered as per Rule 9(2)(b) of the Customs Valuation Rules, 1988.
  - (ii) Rate of exchange as applicable on date of presentation of Bill of Entry as notified by CBEC has been considered.
  - (iii) Rate of duty as applicable on the date of arrival of aircraft which is later than the date of submission of the Bill of Entry has been considered.
  - (iv) Rate for Additional Duty (CVD) is considered as mentioned in the Central Excise Tariff Act, 1985, subject to any general exemption notification. Any specific exemption notification (as in the given case) has not been considered while calculating CVD.
- 13.** The Apex Court in the case of *Solar Pesticides* has held that the doctrine of unjust enrichment applies in respect of raw material imported and consumed in the manufacture of final products. However, the position in respect of capital goods is not very clear.
- Recently, the Tribunal in the case of *Design Classics Exports (P) Ltd. v. Commissioner of Customs, Chennai 2004 (172) E.L.T. 423 (Tri. – Chennai)* had addressed this issue. The CESTAT followed the judgements given by the Tribunal in the case of *Grasim Industries v. CCE, Chennai III -2003 (157) E.L.T. 123* and *Golden Iron & Steel Forgings* wherein it was held that the ratio of the decision in *Solar Pesticides* was not applicable to a claim of refund of customs duty paid on imported capital goods. Therefore, it was held by the Tribunal that the *doctrine of unjust enrichment under section 27 of the Customs Act did not apply to the claim for refund of import duty paid on capital goods*.
- 14.** The facts of the case are similar to that of *Purfin Chemicals Pvt. Ltd. v. CEGAT Madras 2004 (167) E.L.T. 145 (Mad.)*. The High Court, in this case, asserted that provisions of section 125 of the Customs Act give an option to the importer to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Therefore, the redemption fine becomes leviable only in lieu of confiscation. The High Court observed that in this case the importer had abandoned the goods and thus, there remained no scope for confiscation of the same. Therefore, it was held by the High Court that the fine should be refunded.
- Applying the ratio of this decision in the given case, it can be said that Pranjal can claim the refund of the redemption fine.

15. The facts of the given case are similar to the case of *Bussa Overseas & Properties P. Ltd. v C.L. Mahar, Asstt. C.C., Bombay 2004 (163) E.L.T. 304 (Bom.)* wherein the High Court has held that once goods are cleared for home consumption they cease to be imported goods as defined in section 2(25) of the Customs Act and as per section 111(d) only 'imported' goods can be confiscated. Hence power to confiscate the goods, after their clearance for home consumption, can be exercised only in cases where the order of clearance is revised and cancelled.

On the issue of penalty the contention of the assessee was that since the goods were not liable for confiscation penalty could not be levied. Section 112(a) provides that any person who in relation to any goods, does or omits to do any act which act or omission will render such goods liable to confiscation under section 111, or abets the doing or omission of such act, is liable to a penalty. The High Court observed that the power to impose penalty could be exercised not only when the goods were available for confiscation but when such goods were liable to confiscation. *The Court held that the expression 'liable to confiscation' clearly indicated that the power to impose penalty could be exercised even if the goods were not available for confiscation. The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods were not available for confiscation could not divest Customs Authorities of the powers to levy penalty under section 112 of the Act.*

Hence, in case of Sudha Traders also the same analogy will apply i.e., the goods cannot be confiscated but the penalty will be levied.

16. (a) With effect from 10.09.2004 an Education Cess has been levied by the Finance (No. 2) Act, 2004 on items imported into India. It is leviable @ 2% of the aggregate of duties of customs (except safeguard duty under section 8B and 8C, countervailing duty under section 9 and anti dumping duty under section 9A of the Customs Tariff Act) leviable on such goods. Items attracting customs duty at bound rates under International Commitments have been exempted from this cess. The cess attributable to the additional duty of customs leviable under section 3 of the Customs Tariff Act, paid on inputs and capital goods will be available as credit for payment of cess on the final products manufactured in India. The Education Cess so collected shall be utilized for providing and financing universalised quality basic education.

The Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force. The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations, as the case may be.

- (b) Sub-section (6), of section 129A, which prescribes the amount of fee for filing an appeal to the Appellate Tribunal, has been amended by Finance (No. 2) Act, 2004 from the date to be notified. The fee for filing an appeal has been increased. The details of increase in the fees are given below:

| Amount of duty, interest demanded and penalty levied | Fee for filing an appeal |
|------------------------------------------------------|--------------------------|
| Less than or equal to Rs. 5,00,000                   | Rs. 1,000.00             |
| More than Rs.5,00,000 but not exceeding Rs.50,00,000 | Rs. 5,000.00             |
| More than Rs.50,00,000                               | Rs.10,000.00             |

However, no such fee shall be payable in the case of an appeal preferred by Commissioner of Customs. Also, no fee shall be payable in case of filing of a memorandum of cross-objections.

Further, a new sub-section (7) has been inserted in section 129A, which prescribes a fee of Rs.500 for every application made before the Appellate Tribunal. The application can be an appeal for grant of stay or for rectification of mistake or for any other purpose; or for restoration of an appeal or an application. However, no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Customs.

17. When any material is imported under an import licence belonging to the category of Advance Licence granted under the Imports and Exports (Control) Act, 1947, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may, notwithstanding anything contained in this Act, permit clearance of such material without payment of duty leviable thereon. There has to be an obligation to export the goods as are specified in the said licence within the period specified therein [Sub-section (1)].

The permission for clearance without payment of duty under sub-section (1) shall be subject to the following conditions:

- (a) the duty payable on the material imported shall be adjusted against the drawback of duty payable under this Act or under any other law for the time being in force on the export of goods specified in the said Advance Licence; and
- (b) where the duty is not so adjusted either for the reason that the goods are not exported within the period specified in the said Advance Licence, or within such extended period not exceeding six months as the Assistant Commissioner of Customs or Deputy Commissioner of Customs may, on sufficient cause being shown, allow, or for any other sufficient reason, the importer shall, notwithstanding anything contained in section 28, be liable to pay the amount of duty not so adjusted together with simple interest thereon at the rate of twelve per cent per annum from the date the said permission for clearance is given to the date of payment.[Sub-section (2)]

While permitting clearance under sub-section (1), the Assistant Commissioner of Customs or Deputy Commissioner of Customs may require the importer to execute a bond with such surety or security as he thinks fit for complying with the conditions specified in sub-section (2).

18. (i) Finance (No.2) Act, 2004 has expanded the scope of the definition of cable operators to include services provided to *any person* by a cable operator including a *multi-system operator*. Therefore, now the services provided by multi-system operator to cable operators will be chargeable to service tax.
- (ii) *Notification No. 20/2003-ST dated 21-8-2003* has been rescinded to withdraw the exemption to maintenance or repair service in relation to computers, computer systems or computer peripherals [**Notification No. 7/2004-ST dated 09.07.2004**]. Hence, the maintenance services provided by M/s. Complete Software Solutions for the computers sold by it will be chargeable to service tax.
- (iii) As per the clarification *M.F. (D.R.) Letter F. No. B2/8/2004 – TRU, dated 10.09.2004* pandal/shamiana services provided for pure religious ceremonies or congregation are not liable to service tax.
- (iv) Finance (No.2) Act, 2004 has introduced service tax on services provided in an airport or civil enclave, to any person by Airport Authority of India. Route navigation is one such service provided by Airport Authority of India to various airlines. Therefore, service tax will be chargeable on it.
- (v) Finance (No.2) Act, 2004 has enlarged the scope of business auxiliary services to include services relating to procurement of inputs and management of inventory of an organization. However, the tax is leviable only when the service provider is a *commercial concern*. Therefore, in this case, the service provided by the individual shall not be charged to service tax.
19. (i) Prior to 10.09.2004, only the services provided by a stock-broker to an investor were liable to service tax. Further, section 65(101) did not include sub-brokers in the definition of stockbrokers. However, after the enactment of Finance (No.2) Act, 2004 service tax has

been levied on the service provided by stock-brokers to any person and not only to the investors. Also, the sub-brokers have been included in the definition of stockbrokers. Thus, the service provided by a sub-broker to his main broker will be taxable.

- (ii) Banking company or financial institutions have been exempted from service tax payable on the service provided to Government of India or a State Government for collection of any duties or taxes vide **Notification No. 13/2004-S.T., dated 10.09.2004.**
- (iii) Service provided by the outdoor caterer to a client on a railway train has been exempted from payment of service tax vide **Notification No. 19/2004 S.T., dated 10.09.2004.**
- (iv) The scope of life insurance services has been restricted by Finance (No.2) Act, 2004. Now only the component of premium attributable to the risk cover shall be liable for service tax under the category of life insurance business.
- (v) An explanation has been inserted in Rule 6 of Service Tax Rules, with effect from the date to be notified in the Official Gazette, to clarify that in case payment is received in advance, service tax will be payable on *pro rata* basis [**Notification No.5 /2004-ST dated 09.07.2004**].

## 20. (i) **Business Exhibition Service**

The taxable service in case of business exhibition service means any service provided to an exhibitor, by the organiser of a business exhibition, in relation to business exhibition [Section 65(105)(zzo)].

Here, business exhibition means an exhibition,—

- (a) to market; or
- (b) to promote; or
- (c) to advertise; or
- (d) to showcase,

any product or service, intended for the growth in business of the producer or provider of such product or service, as the case may be [Section 65(19a)].

## (ii) **Opinion poll service**

The taxable service in relation to opinion poll service means any service provided to any person, by an opinion poll agency, in relation to opinion poll [Section 65(105)(zzs)].

Here, opinion poll means any service designed to secure information on public opinion regarding social, economic, political or other issues [Section 65(75a)].

Opinion poll agency means any person engaged in providing any service in relation to opinion poll [Section 65(75b)].

## **RECENT AMENDMENTS IN DIRECT TAXES AND INDIRECT TAXES**

Students are advised to study thoroughly the Supplementary Study Paper on Direct taxes and Indirect taxes for the Final Course. This contains the amendments made by the Finance (No.2) Act, 2004 as well as the relevant notifications. This Supplementary Study Paper is available at various branch and regional Sales Counters of the Institute. This is very important since considerable weightage is being given to the latest amendments in the examinations.

Students should also regularly read the monthly publication of the Board of Studies – ‘The Chartered Accountant Student’ - for legal decisions and relevant notifications and circulars .

Students may note that the Board of Studies has come out with a new publication “Select Cases in Direct and Indirect Taxes [2004] – An Essential Reading for Final Course”. This contains important recent judgements of Supreme Court, High Court and Appellate Tribunal in both Direct Taxes and Indirect Taxes.

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