

PAPER – 8: INDIRECT TAX LAWS

PART – I : STATUTORY UPDATES

Significant amendments made through Notifications or Circulars issued between
1.7.2012 and 30.04.2013

A. CENTRAL EXCISE

1. AMENDMENT IN THE CENTRAL EXCISE RULES, 2002

(a) Time period for computing interest on refund arising out of finalization of provisional assessment amended [Rule 7(5)]

In case of provisional assessment, where the assessee is entitled to a refund consequent to an order of final assessment, it is paid along with interest at the rate specified under section 11BB of the Central Excise Act, 1944.

Erstwhile position

Hitherto, the interest on such refund was computed from the first day of the month succeeding the month for which such refund was determined, till the date of refund [Rule 7(5)].

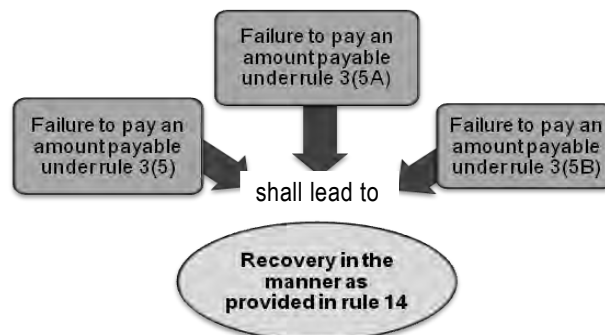
New position

With effect from 01.03.2013, rule 7(5) has been substituted to provide that the interest on refund arising out of finalization of provisional assessment will be computed from the date immediately after the expiry of three months from the date of receipt of refund application till the date of refund of such duty.

[Notification No. 02/2013 (CE) NT dated 01.03.2013]

2. AMENDMENT IN THE CENVAT CREDIT RULES, 2004

(a) Recovery provisions under rule 14 to apply in case of failure to pay the amount on removal of inputs/capital goods as such, removal of capital goods after use and writing off the value of the inputs/capital goods



With effect from 01.03.2013, if the manufacturer of goods or the provider of output service fails to pay the amount payable under following sub-rules of rule 3, it would be recovered, in the manner provided under rule 14, for recovery of CENVAT credit wrongly taken:-

Rule 3(5)-Inputs or capital goods removed as such from the factory/premises of the output service provider

Rule 3(5) requires payment of an amount equal to CENVAT credit availed where inputs or capital goods, on which CENVAT credit has been taken are removed as such from the factory/premises of the output service provider.

Rule 3(5A)- Capital goods removed after being used, whether as capital goods or as scrap or waste

Rule 3(5A) requires payment of specified amount where capital goods on which CENVAT credit has been taken have been removed after being used, whether as capital goods or as scrap or waste.

Rule 3(5B)- Inputs/ capital goods before being put to use written off fully or partially

Rule 3(5B) provides for payment of an amount equivalent to CENVAT credit taken in respect of input or capital goods, if the value of such input, or capital goods before being put to use is written off fully or partially or any provision in this respect has been made.

[Notification No. 03/2013 (CE) NT dated 01.03.2013]

3. Forms for filing appeals in CESTAT under Central Excise, Customs and Service Tax aligned [Rule 7]

Hitherto, Departmental appeal (under section 35B(2) of the Central Excise Act, 1944/section 129A(2) of the Customs Act, 1962) against orders passed by the Commissioner (Appeals) was filed in Form EA-3/CA-3 and Departmental application against order-in original of the Commissioner on the strength of the order of the Committee of Chief Commissioner (under section 35E(1) of the Central Excise Act, 1944/section 129D(1) of the Customs Act, 1962) was filed in Form EA-5/CA-5.

However, in service tax appeals are filed under section 86(2) and section 86(2A) of the Finance Act, 1994 against orders passed by the Commissioner and Commissioner (Appeals) respectively in a single form ST-7.

Therefore, in order to align the form of filing appeals under excise and customs with that of service tax, both appeals against the order of Commissioner as well as Commissioner (Appeals) are to be filed in Form EA-5/CA-5.

For carrying out the aforesaid amendment, with effect from 01.06.2013, rule 7 of the Central Excise (Appeals) Rules, 2001/Customs (Appeals) Rules, 1982 has been substituted with a new rule 7. New rule 7 of the respective rules provides as follows:-

- (1) An appeal under section 35B(2) of the Central Excise Act, 1944/129A(2) of the Customs Act, 1962 and application under section 35E(4)/129D(4) are to be filed in Form EA-5/CA-5.
- (2) The appeal or application, as the case may be, in Form No. EA-5/ CA-5 shall be filed in quadruplicate accompanied by an equal number of copies of the decision or order (one of which at least shall be a certified copy) passed:-
 - a) by the Commissioner (Appeals) and a copy of the order passed by the Committee of Commissioners under section 35B(2)/129A(2) of the Act.
 - b) by the Commissioner and a copy of the order passed by the Committee of Chief Commissioners under section 35E(1)/129D(1) of the Act.

Further, new forms for appeals have been prescribed for all appeals filed in the Tribunal [EA-3, EA-4 and EA-5/ CA-3, CA-4 and CA-5/ST-5, ST-6 and ST-7] on or after 1.6.2013 with an objective to ensure quick disposal of cases. Furnishing of PAN by the appellants has been made mandatory. In case where PAN is not available and the appellant is having UID, the same is required to be furnished. Furnishing of IEC (Importer Exporter Code) has been made mandatory in the appeal form for customs.

[Notification No.s 6/2013-CE (N.T.), 37/2013-Customs (N.T.) and 5/2013-ST, all dated 10.04.2013]

4. Benefit of advance ruling extended to resident public limited companies

Prior to 01.03.2013, only public sector companies were notified as the class or category of resident persons who can apply for advance ruling in case of specified matters relating to central excise. As per section 2(36A) of the Income-tax Act, 1961, public sector company means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956.

The scope of advance ruling has been expanded by additionally notifying resident public limited companies as class or category of resident persons who can apply for advance ruling in case of specified matters relating to central excise. Thus, resident public limited companies can also now obtain advance ruling in case of central excise matters.

Meaning of important terms

- (i) Public limited company:** means a company which -
- (a) is not a private company ;
 - (b) has a minimum paid-up capital of ₹ 5 lakh or such higher paid-up capital, as may be prescribed ;
 - (c) is a private company which is a subsidiary of a company which is not a private company and
- shall include a private company that becomes a public company by virtue of section 43A of the Companies Act, 1956.

(ii) **Resident:** shall have the same meaning as is assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a company.

[Notification No. 04/2013 (CE) NT dated 01.03.2013]

5. Recovery procedure against confirmed demand orders – CBEC amends the existing procedures

CBEC has amended the procedure of initiation of recovery proceedings against a confirmed demand in the following manner:

(a) Where NO appeal is filed with Commissioner (Appeals)/ CESTAT

Recovery to be initiated after the expiry of statutory period for filing appeal i.e 60 days / 90 days.

(b) Where an appeal is filed with Commissioner (Appeals)/ CESTAT, WITHOUT a stay application

Recovery to be initiated after filing of such appeal, without waiting for the statutory period of filing an appeal to be exhausted.

(c) Where an appeal is filed WITH a stay application with Commissioner (Appeals)/ CESTAT

Recovery to be initiated **30 days after the filing of appeal**, if no stay is granted, otherwise as per the conditions of the stay order.

Further, apart from above, recovery proceedings will be initiated IMMEDIATELY in the following cases :

- Where Commissioners (Appeals) confirms demand in the order in original
- Where Tribunal or High Court confirms the demand, with no stay in operation.

These guidelines have been issued on the basis of the decision of Hon'ble Supreme Court in the case of Collector of Customs, *Bombay v. Krishna Sales (P) Ltd* [1994 (73) E.L.T 519 (S.C)].

[Circular No. 967/01/2013 CX dated 01.01.2013]

Note: It may be noted that many High Courts, including Andhra Pradesh and Madras High Court, have granted an interim stay against this Circular.

6. Provisions of section 28AAA of the Customs Act, 1962 made applicable to excise duty also

The Central Government has provided that the provisions of section 28AAA of the Customs Act, 1962 shall be applicable in regard to like matters in respect of the duties imposed by section 3 of the Central Excise Act, 1944, subject to the necessary modifications and alterations which the Central Government considers necessary and desirable to adapt those provisions to the circumstances.

[Notification No. 29/2012-CE (NT) dated 10.10.2012]

B. SERVICE TAX

1. Benefit of advance ruling extended to resident public limited companies

Prior to 01.03.2013, only public sector companies were notified as the class or category of resident persons who can apply for advance ruling in case of specified matters relating to service tax. As per section 2(36A) of the Income-tax Act, 1961, public sector company means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956.

With effect from March 1, 2013, the scope of advance ruling has been expanded by additionally notifying resident public limited companies as class or category of resident persons who can apply for advance ruling in case of specified matters relating to service tax. Thus, resident public limited companies can also now obtain advance ruling in case of service tax matters.

Meaning of important terms

(i) **Public limited company** means a company which -

- (a) is not a private company ;
- (b) has a minimum paid-up capital of ₹ 5 lakh or such higher paid-up capital, as may be prescribed ;
- (c) is a private company which is a subsidiary of a company which is not a private company and

shall include a private company that becomes a public company by virtue of section 43A of the Companies Act, 1956.

(ii) **Resident:** shall have the same meaning as is assigned to it in section 2(42) of the Income-tax Act, 1961 in so far as it applies to a company.

[Notification No. 04/2013 ST dated 01.03.2013]

2. Lower abatement for commercial construction and high-end construction of residential units

Earlier, in case of construction services (both residential and commercial units), abatement of 75% of the amount charged by the service provider for providing the said taxable service was allowed subject to the following conditions:

- (i) The value of land was included in the amount charged from the service receiver and
- (ii) CENVAT credit had not been taken on inputs used for providing such service.

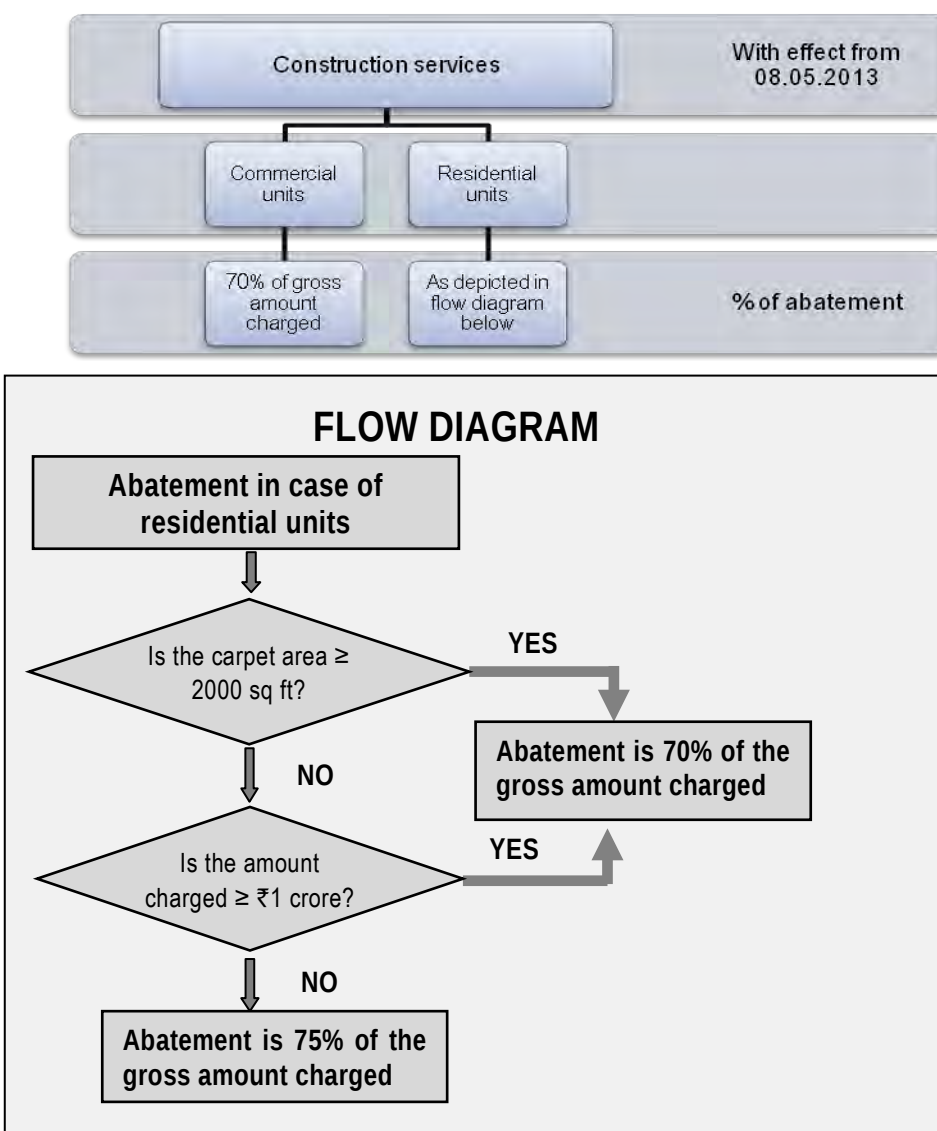
From May 8, 2013

Service tax abatement has been decreased from 75% to 70% in case of commercial construction and high-end residential construction. However, abatement of 75% would be available in case of residential units which fulfil the following **two conditions cumulatively**:

- (i) the carpet area of the unit is less than 2000 square feet; and
- (ii) the amount charged for the unit is less than ₹1 crore;

Thus, residential units having carpet area of 2000 sq ft or more or where the amount charged is ₹1 crore or more would be considered as high-end construction eligible for lower abatement of 70%.

The situation after the amendment has been depicted below:



Note: The two conditions to be satisfied for claiming the abatement remain the same.
[Notification No. 09/2013 ST dated 08.05.2013]

Example: ABC Constructions Ltd. has provided the following details with respect to individual residential units constructed by it at various cities as part of residential apartments:

Flat Type	Carpet Area (sq. ft.)	Amount Charged (₹)	
A	1980	1,10,00,000	Part of consideration received before issuance of completion certificate by the competent authority
B	2000	1,00,00,000	
C	2500	1,05,00,000	
D	2400	99,50,000	Entire consideration received before issuance of completion certificate by the competent authority
E	2100	1,00,00,000	
F	1600	80,00,000	
G	1940	90,00,000	Entire consideration received after issuance of completion certificate by the competent authority

Following details are also available:

Type of building	Amount charged (₹)	
Multi-level parking for Local Development Authority	3,10,00,000	Part of consideration received before issuance of completion certificate by the competent authority
Office Complex	12,20,00,000	Entire consideration received before issuance of completion certificate by the competent authority
Shopping Mall	30,00,00,000	Entire consideration received after issuance of completion certificate by the competent authority

In all the above construction activities, value of land is included in the amount charged from the service receiver and CENVAT credit on inputs used for construction has not been availed.

You are required to compute the taxable value of the construction service, if any, in each of the case separately on the basis of the service tax law as applicable for the months of -

- (i) February, 2013, and

(ii) June, 2013.

Solution: With effect from May 8, 2013, service tax abatement has been decreased from 75% to 70% in case of commercial and high-end residential construction. However, abatement of 75% would be available in case of residential units having carpet area of less than 2000 sq. ft. and where the amount charged is less than ₹ 1 crore.

Flat Type	Carpet Area (sq. ft.)	Amount charged (₹)	Abate ment %	Taxable Value (25%)	Amount charged (₹)	Abate ment %	Taxable Value
		February, 2013			June, 2013		Amount charged – Abatement
A	1980	1,10,00,000	75	27,50,000	1,10,00,000	70	33,00,000
B	2000	1,00,00,000		25,00,000	1,00,00,000	70	30,00,000
C	2500	1,05,00,000		26,25,000	1,05,00,000	70	31,50,000
D	2400	99,50,000		24,87,500	99,50,000	70	29,85,000
E	2100	1,00,00,000		25,00,000	1,00,00,000	70	30,00,000
F	1600	80,00,000		20,00,000	80,00,000	75	20,00,000
G	1940	90,00,000	NA		90,00,000	NA	It is not a case of service but a sale.

Type of building	Amount charged (₹)	Abatement %	Taxable Value (25%)	Amount charged (₹)	Abatement %	Taxable Value
	February, 2013			June, 2013		Amount charged – Abatement
Multi-level parking for Local Development Authority	3,10,00,000	75	77,50,000	3,10,00,000	70	93,00,000
Office Complex	12,20,00,000	75	3,05,00,000	12,20,00,000	70	3,66,00,000
Shopping Mall	30,00,00,000	NA		30,00,00,000	NA	It is not a case of service but a sale.

3. Mega exemption notification amended

Mega exemption notification, *Notification No. 25/2012 dated 20.06.2012*, has been amended as follows:-

(A) Services by way of slaughtering of ALL animals exempted

Mega exemption notification has been amended to provide the exemption to services by way of slaughtering of **ALL animals**. Earlier, this exemption was restricted to the slaughtering of **bovine animals** only.

[Notification No. 44/2012-S.T. dated 07.08.2012]

(B) Life insurance services provided under Janashree Bima Yojana and Aam Aadmi Bima Yojana exempt

Mega exemption notification has been amended to provide the exemption to services of life insurance business provided under following schemes -

- (a) Janashree Bima Yojana (JBY); or
- (b) Aam Aadmi Bima Yojana (AABY)

[Notification No. 49/2012-S.T. dated 24.12.2012]

(C) Mega exemption notification amended vide *Notification No. 03/2013-ST dated 01.03.2013*. Few exemptions have been withdrawn and few others have been rationalized. All these amendments will be effective from April 1, 2013.

I. Withdrawal of exemptions:

(i) Exemption to auxiliary educational services and renting of immovable property service provided BY an educational institution withdrawn

Earlier, auxiliary educational services and renting of immovable property services provided **TO** or **BY** an educational institution in respect of education exempted from service tax were exempted from service tax.

However, exemption to auxiliary educational services and renting of immovable property provided **BY** an educational institution has now been withdrawn. Thus, w.e.f. 01.04.2013, only the auxiliary educational services and renting of immovable property provided **TO** an educational institution in respect of education exempted from service tax would be exempt from service tax.

(ii) ALL restaurants with air-conditioning or central air heating liable to service tax

Earlier, serving of food or beverages by only those restaurants, eating joints or mess were liable to service tax which had:

- (i) the license to serve alcohol, and

- (ii) the facility of air-conditioning/ central air-heating in any part of the establishment, at any time during the year.

Thus, the restaurants, eating joint or mess which fulfilled any one of the two requirements or did not fulfill both the two requirements were exempt from service tax.

Requirement (i) has now been done away with. Hence, only non air-conditioned/non-centrally air-heated restaurants are eligible for exemption. Rest all are liable to service tax.

Example

Atithi Restaurant is a restaurant located at a prominent location in the city. It is centrally air-conditioned, but does not have the license to serve liquor. Determine whether it is liable to pay service tax in the month of March and April, 2013.

Solution: Atithi Restaurant is eligible for the exemption under mega exemption notification till 31.03.2013 as it does not have the licence to serve alcohol. However, with effect from 01.04.2013, all air conditioned restaurants, irrespective of whether they have the license to serve alcohol or not, have been made liable to service tax. Thus, Atithi Restaurant is liable to pay service tax with effect from 01.04.2013.

(iii) Exemption to parking of vehicles withdrawn

Earlier, services by way of motor vehicle parking to general public excluding leasing of space to an entity for providing such parking facility were exempt.

With effect from April 1, 2013, the said exemption has been withdrawn thereby making services by way of vehicle parking to general public (unreserved parking) liable to service tax. Leasing of space to an entity for providing such parking facility (reserved parking) which was liable to service tax even prior to 01.04.2013 will continue to be liable to service tax.

(iv) Exemption to repair or maintenance of Government aircrafts withdrawn

Services provided to Government, a local authority or a governmental authority by way of repair or maintenance of a vessel or an aircraft were exempt from service tax.

With effect from 01.04.2013, exemption in respect of services provided to the Government by way of repair or maintenance of an **aircraft** has been withdrawn. Thus, now exemption has been restricted to repair and maintenance of Government vessels only.

- (v) **Exemption upto ₹25 lakh available to entity registered under section 12AA of the Income tax Act, 1961 providing services for advancement of “any other object of general public utility” withdrawn**

The exemption available to entity registered under section 12AA of the Income tax Act, 1961 providing services for advancement of “any other object of general public utility” up to ₹ 25 lakh has been withdrawn. The said amendment has been given effect to by modifying the definition of “charitable activities”. The threshold exemption as available to all other taxable services will continue to be available up to ₹ 10 lakh.

- (vi) **Exhibition of films in a place other than a cinema hall or a theatre liable to service tax**

Till March 31, 2013, temporary transfer or permitting the use or enjoyment of a copyright of cinematograph films was exempt from service tax. However, the benefit of exemption in relation to copyrights for cinematograph films will now be available only to films exhibited in a cinema hall or theatre.

Therefore, exhibition of cinematograph films in a place other than cinema hall or theatre, will be taxable. This will allow service providers to pass on input tax credit to taxable end-user.

II. Rationalization of exemptions

1. **Exemption granted to the services of transportation of goods by road/rail/vessel harmonized**

Prior to April 1, 2013

Earlier, transport of certain goods through rail or a vessel was exempt from service tax but the transport of same goods in a goods carriage through road was liable to service tax. Thus, there was a disparity with respect to levy of service tax on transport of same goods in different modes of transportation viz. rail/vessel and goods carriage.

The exemptions granted to transport of goods through rail or a vessel and a goods carriage have been presented in the following table:

Transportation of the following goods by rail/vessel was exempt	Transportation of the following goods by a goods transport agency was exempt
(a) petroleum and petroleum products falling under Chapter heading 2710 and 2711 of the Central Excise Tariff Act, 1985;	(a) fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;
(b) relief materials meant for	(b) goods where gross amount

victims of natural or man-made disasters, calamities, accidents or mishap;	charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed ₹1500; or
(c) defence or military equipments;	(c) goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed ₹750.
(d) postal mail or mail bags;	
(e) household effects;	
(f) newspaper or magazines registered with the Registrar of Newspapers;	
(g) railway equipments or materials;	
(h) agricultural produce;	
(i) foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages;	
(j) chemical fertilizer and oil cakes.	

New position

With effect from 01.04.2013, exemptions available to transportation of goods by road/rail/vessel have been harmonized to a large extent in the following manner:

Transportation of the following goods by rail/vessel have been exempted from service tax	Transportation of the following goods by a goods transport agency have been exempted from service tax
Railway equipments or materials	(i) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods

	carriage does not exceed ₹1500; or
	(ii) goods, where gross amount charged for transportation of all such goods for a single consignee does not exceed ₹750.
Common exemptions	
(a) agricultural produce (b) foodstuff** including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages (c) chemical fertilizer and oilcakes (d) newspaper or magazines registered with the Registrar of Newspapers (e) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap (f) defence or military equipments	

Thus, with effect from 01.04.2013, exemption to transportation of petroleum and petroleum products, postal mails or mail bags and household effects by railways and vessels has been withdrawn. Moreover, the scope of exemption to transport of goods by goods transport agency has been widened. As against the earlier exemption available to transport of fruits, vegetables, eggs, milk, food grains or pulses by GTA in a goods carriage, now transportation of all agricultural produce and food stuff has been exempted.

****Note:** CBEC has clarified that the expression foodstuff here includes milk also [**Circular No.167/2/2013 – ST dated 01.01.2013**]

Example

Answer with respect to applicability of service tax in the following cases during the month of June, 2013:

- (i) *Transport facility provided by a School to its students through a fleet of buses and cabs owned by the School.*
- (ii) *Transport facility provided by a School to its students through a private Bus/Cab Operator.*
- (iii) *Service provided by a private transport operator to a School in relation to transportation of students to and from a School.*

- (iv) *Services provided by way of vehicle parking to general public in a shopping mall.*
- (v) *Service provided in relation to repair or maintenance of aircraft owned by a State Government.*
- (vi) *Services of a NGO registered under section 12AA of the Income tax Act, 1961 working for the rehabilitation of disabled. The aggregate value of taxable services of the NGO is ₹20 lakh.*
- (vii) *Exhibiting movies on television channels.*
- (viii) *Transport of foodstuff, agricultural produce, chemical fertilizers and newspaper registered with the Registrar of Newspapers by a goods transport agency in a goods carriage.*
- (ix) *Transportation of petroleum and petroleum products and household effects by railways.*
- (x) *Transportation of postal mails or mail bags by a vessel.*

Solution:

- (i) Taxable. Transport facility provided by a School to its students is an auxiliary educational service. With effect from 01.04.2013, the exemption provided to the auxiliary educational services provided by an educational institution has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (ii) Taxable. With effect from 01.04.2013, the exemption provided to the auxiliary educational services provided by an educational institution has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (iii) Exempt. Auxiliary educational services provided to an educational institution are exempt vide Notification No. 25/2012 ST dated 20.06.2012.
- (iv) Taxable. With effect from 01.04.2013, the exemption provided to the services provided by way of vehicle parking to general public has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (v) Taxable. With effect from 01.04.2013, the exemption provided in relation to repair or maintenance of aircraft owned by Government (Government includes State Government) has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (vi) Taxable. With effect from 01.04.2013, the exemption available to entities registered under section 12AA of the Income tax Act, 1961

providing services for advancement of “any other object of general public utility” up to ₹ 25 lakh has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].

- (vii) Taxable. With effect from 01.04.2013, the benefit of exemption in relation to copyrights for cinematograph films has been restricted only to films exhibited in a cinema hall or theatre. Therefore, exhibition of cinematograph films in a place other than cinema hall or theatre, will be taxable [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (viii) Exempt. With effect from 01.04.2013, services provided by a goods transport agency by way of transportation of foodstuff, agricultural produce, chemical fertilizers and newspaper registered with the Registrar of Newspapers have been exempted vide Notification No. 25/2012 ST dated 20.06.2012.
- (ix) Taxable. With effect from 01.04.2013, exemption granted to transportation of petroleum and petroleum products and household effects by railways has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].
- (x) Taxable. With effect from 01.04.2013, exemption granted to transportation of postal mails or mail bags by a vessel has been withdrawn [Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended].

4. Transportation of passengers and goods by Indian Rail service exempted till 30-9-2012

Following services provided by the Indian Railways are taxable as they have been specifically excluded from the negative list. However, they have been exempted from service tax between 02.07.2012 and 30.09.2012 (both inclusive):-

- (a) Service of transportation of passengers, with or without accompanied belongings, by railways in-
 - (A) first class; or
 - (B) an air conditioned coach
- (b) Services by way of transportation of goods by railways.

Consequently, with effect from October 1, 2012, the above services have again become liable to service tax @ 12.36% with an abatement of 70% been granted to such services. Therefore, the effective rate of service tax for such services would be 3.7%.

[Notification No. 43/2012-S.T. dated 02.07.2012]

5. Exemption to specified export promotion schemes-Focus Market Scheme, Focus Product Scheme and Vishesh Krishi and Gram Udyog Yojana

The taxable services provided or agreed to be provided against the following duty credit scrips by a person located in the taxable territory are exempt from service tax:-

- (i) Focus Market Scheme duty credit scrip issued to an exporter by the Regional Authority in accordance the Foreign Trade Policy.
- (ii) Focus Product Scheme duty credit scrip issued to an exporter by the Regional Authority in accordance with the Foreign Trade Policy.
- (iii) Vishesh Krishi and Gram Udyog Yojana (Special Agriculture and Village Industry Scheme) duty credit scrip issued to an exporter by the Regional Authority in accordance with the Foreign Trade Policy.

[Notification No.s 6/2013 to 8/2013-ST dated 18.04.2013]

6. Directors fee & security charges brought under Reverse Charge Mechanism

(i) Reverse charge notification amended

Notification No. 30/2012 dated 20.06.2012 has been amended to bring the directors fee & security charges under Reverse Charge System in the following manner:-

S.No.	Description of a service	Percentage payable by the service provider	Percentage payable by the service receiver
1	in respect of services provided or agreed to be provided by a director of a company to the said company	Nil	100%
2	in respect of services provided or agreed to be provided by way of security services for any purpose by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory	25%	75 %

(ii) Service Tax Rules, 1994 amended

Definition of **person liable to pay service tax** provided under rule 2(1)(d) of the Service Tax Rules, 1994 has also been accordingly amended as follows:-

- (i) Person liable for paying service tax in relation to service provided or agreed to be provided by a director of a company to the said company is the recipient of such service **[Item (EE) inserted to rule 2(1)(d)(i)]**.
- (ii) Person liable for paying service tax in relation to services provided or agreed to be provided by way of security services by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as a body corporate, located in the taxable territory are both the service provider and the service recipient to the extent notified under sub-section (2) of section 68 of the Act, for each respectively **[Item (F) to rule 2(1)(d)(i) amended]**.

Security services means services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity **[Rule 2(fa) of the Service Tax Rules, 1994]**.

[Notification No. 45 & 46/2012-S.T. dated 07.08.2012]

Clarifications

1. No service tax on remittances from abroad

CBEC has clarified that service tax is not leviable on the amount of foreign currency remitted to India from overseas as definition of 'service' under section 65B(44) specifically excludes transactions in money.

Further, service tax would also not be leviable on the fee or conversion fee chargeable for sending such money as the company conducting the remittances and the person sending the money are located outside India. Such services are deemed to be provided outside India in terms of the Place of Provision of Services Rules, 2012.

It has also been clarified that Indian counterpart or financial institutions or entity who charges the foreign bank or any other entity for the services provided at the receiving end will also not be liable to service tax as the place of provision of such service shall be the location of the recipient of the service, i.e., outside India, in terms of Rule 3 of the Place of Provision of Services Rules, 2012.

[Circular No.163/14/2012 ST dated 10.07.2012]

2. Determination of POT for works contracts in progression on July 1, 2012 – CBEC clarifies

CBEC has clarified the following issues relating to point of taxation arising out of the amendments made vide the Budget 2012 and subsequent amendments made effective from July 1, 2012:

- (a) Point of taxation and the applicable rate for continuous supply of services at the time of change in rates effective from 01.04.2012;

- (b) Applicability of the revised rule 2A of the Service Tax (Determination of Value) Rules, 2006 to ongoing works contracts for determination of value when the value was being determined under the erstwhile Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007; and
- (c) Applicability of partial reverse charge provisions in respect of specified services.

Till 31.03.2012, rule 6 of the Point of Taxation Rules, 2011 (POTR) determined point of taxation (POT) in case of continuous supply of services. Since, the rule started with a non-obstantate clause, “notwithstanding anything contained in rules 3, 4 ...”, the POT for continuous supply of services provided on or before 31.03.2012 would not be affected by rule 4 of POTR. In other words, if the invoice had been issued or payment received for such services on or before 31.03.2012, the POT would be determined under rule 6, not being affected by the amendments made effective only from 1.4.2012.

However, with effect from 01.04.2012, rule 6 has been omitted and the POT for continuous supply of services is also being determined ordinarily under the main rule i.e., rule 3 subject to provisions of rule 4. Rule 4 determines the POT when there is a “change in effective rate of tax”. *Change in effective rate of tax* includes a change in the portion of value on which tax is payable. The following examples have been given by the Board to illustrate as to what would constitute changes in effective rate of tax:-

- (i) the change in the portion of total value liable to tax in respect of works contract other than original works (from @ 4.8% earlier to @ 12% on 60% of the total amount charged, or effectively @ 7.2% now).
- (ii) exemption granted to certain works contracts w.e.f. 1st July 2012 which were earlier taxable.
- (iii) taxability of certain works contracts which were hitherto exempted.
- (iv) change in the manner of payment of tax for works contracts from composition scheme to payment on actual value under clause (i) of rule 2A of the Service Tax (Determination of Value) Rules, 2006.

However, the following will not constitute the change in effective rate of tax:-

- (i) works contracts paying service tax at the composite rate of 4.8% earlier and now required to pay service tax @12% on 40% of the total amount charged as the effective rate remains the same at 4.8%.
- (ii) non – taxable works contracts (and not merely exempted) which have become now taxable e.g. construction of residential complex comprising of 2 to 12 residential units, construction of buildings meant for use by NGOs etc. Rule 5 of the POTR will apply in such cases.

It has been further clarified that the provisions of partial reverse charge would also be applicable in respect of such services where point of taxation is on or after 01.07.2012 under the applicable rule in respect of the service provider.

[Circular No. 162/13/2012 ST dated 06.07.2012]

3. No service tax on vocational education course if offered by the Central/ State Government/Local Authority

CBEC has clarified that service tax is not leviable on vocational education/training/ skill development courses (VEC) offered by the institution of the Government (Central Government or State Government) or a local authority as in terms of section 66D (a), only specified services provided by the Government are liable to tax and VEC is excluded from the service tax.

However, if the VEC is offered by an institution, as an independent entity in the form of society or any other similar body, service tax treatment would be determined by either sub-clause (ii) or (iii) of clause (l) of section 66D of the Finance Act, 1994.

Sub-clause (ii) refers to “qualification recognized by any law” and sub-clause (iii) refers to “approved VEC”. In the context of VEC, qualification implies a Certificate, Diploma, Degree or any other similar Certificate. The words “recognized by any law” will include such courses as are approved or recognized by any entity established under a central or state law including delegated legislation, for the purpose of granting recognition to any education course including a VEC.

[Circular No.164/15/2012 ST dated 28.08.2012]

4. Accounting codes for payment of service tax under negative list approach of taxation of services

Earlier, under the positive list approach of taxation of services, Department had issued Accounting codes [eight digit numerical codes] in respect of each taxable service to be used by the assessee while paying service tax through GAR-7 challan. Thus, 119 service specific accounting codes were there.

With the introduction of negative list approach of taxation of services, with effect from 01.07.2012, at first service specific old accounting codes were done away with and one Accounting code was prescribed for the purpose of payment of service tax i.e. “All Taxable Services” – 00441089. However, subsequently, for the purpose of statistical analysis, service specific old accounting codes were again restored along with 120th description as “other taxable services”.

Consequently, CBEC has accordingly amended Form ST-1 (Registration Form under Service Tax). The amended form has an annexure containing description of taxable services and accounting codes for payment of service tax. The assessee can choose the description as applicable to him from the annexure.

[Circular No. 165/16/2012 –ST dated 20.11.2012, Circular No. 161/12/2012 –ST dated 06.07.2012 & Notification No. 48/2012 ST dated 30.11.2012]

5. No service tax liability at the time of issue of reminder letters by life insurance companies to policy holders to pay renewal premiums

Issue	Clarification
In terms of practice followed, 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. Whether service tax needs to be paid on the basis of such reminders?	Under the Point of Taxation Rules 2011, the point of taxation generally is the date of issue of invoice or receipt of payment whichever is earlier. The invoice mentioned refers to the invoices as issued under Rule 4A of the Service Tax Rules, 1994. No tax point arises on account of such reminders. Thus, it is clarified that reminder letters / notices for insurance policies not being invoices would not invite levy of service tax. In case of issuance of any invoice, point of taxation shall accordingly be determined.

[Circular No.166/1/2013 – ST dated 01.01.2013]

6. Service tax leviable on the activity by way of erection of pandal or shamiana

Issue: Whether service tax is leviable on the activity of preparation of place for organizing event or function by way of erection/laying of pandal and shamiana or is it a transaction involving “transfer of right to use goods” and hence deemed sale?

Clarification: The activity of providing pandal and shamiana along with erection thereof is generally coupled with other incidental activities like supply of crockery, furniture, sound system, lighting arrangements, etc. It is a reasonably specialized job and is carried out by the supplier with the help of his own labour.

For a transaction to be regarded as “transfer of right to use goods”, the transfer has to be coupled with effective control and possession **[Rashtriya Ispat Nigam Ltd.]**. Moreover, if pandal is given to the customers for use only after having been erected, then it is not transfer of right to use goods **[Harbans Lal vs. State of Haryana]**.

Applying the ratio of these judgments and the test formulated by SC in case of **BSNL v. UOI 2006 (2) S.T.R. 161 (S.C.)**[discussed below], CBEC clarified that pandal/shamiana erection activities do not amount to transfer of right to use goods because effective possession and control over the pandal or shamiana remains with the service provider, even after the erection is complete and the specially made-up space for temporary use handed over to the customer. Hence, the activity by way of erection of pandal or shamiana is a declared service, under section 66E(f).

[Circular No. 168/3/2013-ST dated 15.04.2013]

In order to constitute the transaction for the transfer of the right to use the goods, the transaction must have the following attributes:-

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods and, consequently, all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be the exclusion of the transferor: this is the necessary concomitant or the plain language of the statute, viz., a "transfer of the right to use" and not merely a license to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others **[BSNL v. UOI 2006 (2) S.T.R. 161 (S.C.)]**

C. CUSTOMS

1. Classes of importers liable to pay customs duty electronically notified

First proviso to section 47(2) of the Customs Act, 1962 empowers the Central Government to specify the class or classes of importers who shall pay customs duty electronically. In exercise of such powers, the Central Government hereby specify following classes of importers who shall pay customs duty electronically, namely:-

- (i) Importers registered under Accredited Clients Programme.
- (ii) Importers paying customs duty of ₹ 1 lakh or more per bill of entry.

[Notification No. 83/2012-Cus (N.T.) dated 17.09.2012]

2. Baggage provisions relating to the crew members engaged in the foreign going vessel/aircraft amended [Proviso to Rule 10(1) and rule 10(2) of the Baggage Rules, 1998]

Erstwhile position

A crew member of a vessel/aircraft is allowed to bring items like chocolates, cheese, cosmetics and other petty gift items for their personal or family use while returning from a foreign journey upto a value of **₹ 600**.

New position

With effect from 01.03.2013, the said limit has been increased to **₹ 1,500**.

[Notification No. 25/2013-Cus (N.T.) dated 01.03.2013]

3. Jewellery allowance increased five times for an Indian passenger who had stayed abroad for more than one year

An Indian non-tourist passenger who had stayed abroad for more than one year is allowed an additional jewellery allowance. This allowance has been increased five times.

S.No.	In case of	Jewellery Allowance	
		Till 28.02.2013	With effect from 01.03.2013
1.	Gentleman Passenger	upto ₹ 10,000/-	upto ₹ 50,000/-
2.	Lady Passenger	upto ₹ 20,000/-	upto ₹ 1,00,000/-

[Notification No. 25/2013-Cus (N.T.) dated 01.03.2013]

4. Jewellery allowance increased five times in case of transfer of residence

A passenger, who has been staying abroad for a minimum period of two years and transferring his residence to India, is given a duty free allowance of jewellery as follows:

S.No.	In case of	Jewellery Allowance	
		Till 28.02.2013	With effect from 01.03.2013
1.	Gentleman Passenger	₹ 10,000/-	₹ 50,000/-
2.	Lady Passenger	₹ 20,000/-	₹ 1,00,000/-

Note: The jewellery taken out of India can be brought back without any limit provided necessary export certificate was taken at the time of going out of India. Further, jewellery which is normally worn is treated as “personal effects” and is exempt from duty even if export certificate is not issued.

[Notification No. 25/2013-Cus (N.T.) dated 01.03.2013]

PART – II : JUDICIAL UPDATES

CENTRAL EXCISE

Classification of excisable goods

1. 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.)

Facts of the case: McDonalds India [M/s Connaught Plaza Restaurant (Pvt) Ltd.] manufactured and served ‘soft serves’ dispensed through vending machines at its restaurants. The Department raised a demand for the excise duty on the fast-food restaurant chain. It contended that ‘soft serve’ was classifiable under Heading 21.05, Sub-Heading 2105.00-“ice cream and other edible ice, whether or not containing cocoa” and thus, would attract excise duty @ 16% plus an additional duty (applicable at the

relevant time). However, McDonalds India opposed the classification sought by the Department and claimed that the 'soft serve' was classifiable under Heading 04.04 as "other dairy produce" chargeable to nil rate of duty. Hence, it was not required to pay any duty.

Point of dispute: Revenue claimed that although "ice-cream" had not been defined under Heading 21.05 or in any of the chapter notes of Chapter 21, 'soft serve' was known as "ice-cream" in common parlance. Therefore, 'soft serve' must be classified in the category of "ice-cream" under Heading 21.05 of the Tariff Act.

On the other hand, the assessee contended that 'soft serve' must be classified under Heading 04.04 as "other dairy produce" and not under Heading 21.05.

The Tribunal, rejecting the common parlance principle and considering the technical meaning and specifications of the product "ice cream", concluded that soft serve was classifiable under Heading 2108.91 (edible preparations, not elsewhere specified or included) and thus chargeable to nil rate of duty.

Observations of the Court: 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 Prevention of Food Adulteration Act, 1955 (PFA), the milk fat content of "ice-cream" and "softy ice-cream" shall not be less than 10%. Hence, if the 'soft serve', containing 5% milk fat content is classified as "ice-cream", it would make the assessee liable to prosecution under the PFA.

The SC observed that the definition of one statute (PFA) having a different object, purpose and scheme could not be applied mechanically to another statute (Central Excise Act). The object to Excise Act is to raise revenue for which various goods are differently classified in the Act 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 averred that "soft serve" could not be considered as "ice-cream" as it was marketed by the assessee the 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 non-solid 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. SC, 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 SC rejecting this contention held that in the presence of Heading 21.05 (ice cream), "ice cream" could not be classified as a dairy product under Heading 04.04. Heading 21.05 was clearly a specific entry.

Further, referring to a trade notice issued by the Mumbai Commissionerate relating to classification of softy ice-cream being sold in restaurant etc. dispensed by vending machine, the Apex Court observed that the said trade notice indicated the commercial understanding of 'soft-serve' as 'softy ice-cream'.

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

Note: The headings cited in the aforesaid judgment may not co-relate with the headings of the present Excise Tariff as they relate to an earlier point of time. The description and rate of the relevant entries at the relevant time is given below:

<i>Heading</i>	<i>Sub-Heading</i>	<i>Description of Goods</i>	<i>Rate of Duty</i>
(1)	(2)	(3)	(4)
21.05	2105.00	Ice-cream and other edible ice, whether or not containing cocoa	16%
21.08		Edible preparations, not elsewhere specified or included	
	2108.91	-Not bearing a brand name	Nil

"Chapter 4

Dairy Produce, etc.

Heading	Sub-Heading	Description of Goods	Rate of Duty
(1)	(2)	(3)	(4)
04.04		Other dairy produce; Edible products of animal origin, not elsewhere specified or included - Ghee :	
	0404.11	--Put up in unit containers and bearing a brand name	Nil
	0404.19	--Other	Nil
	0404.90	--Other	Nil

Valuation of excisable goods

2. Can the pre-delivery inspection (PDI) and free after sales services charges be included in the transaction value when they are not charged by the assessee to the buyer?

Tata Motors Ltd. v. UOI 2012 (286) E.L.T. 161 (Bom.)

Facts of the case: The petitioners-Tata Motors Ltd. were the manufacturers of cars. They sold their cars to their subsidiary companies-M/s TMLD which in turn sold cars to the dealers. The petitioners appointed various persons as dealers to sell the car in the market. On selection of a person for being appointed as a dealer, an agreement was entered into between the petitioners and the said dealer. The petitioners notified the maximum amount for which the car could be sold by the dealer. The dealer paid to the petitioners a particular price quoted by them. According to the petitioners, this price was the assessable value and excise duty was paid on it. The amount charged by the dealer to his customer minus the amount charged by the petitioners to such dealer was the dealer's margin.

Further, on account of the dealership agreement, the dealer was required to carry out Pre Delivery Inspection (PDI) before the car was actually delivered to the customer. After the car was delivered to the customer, the dealer was required to conduct specified number of free services of the said car as set out in the Owner's Manual [hereinafter referred to as "said services"].

Moreover, the petitioners gave warranty to the customer provided the customer got the car duly inspected as per the PDI requirements and also availed the said services. If a particular customer did not get the PDI done or did not submit his car for said services, he would not be able to get the benefit of terms of warranty.

Point of dispute: Revenue issued a show cause notice to the petitioners alleging that costs incurred by the dealer towards PDI and said services was also includible in the assessable value on account of Clause 7 of Circular No. 643/34/2002 dated 1st July, 2002.

However, the petitioners contended that *Circular No. 643/34/2002-CX, dated 1-7-2002* and *Circular No. 681/72/2002-CX, dated 12-12-2002* were contrary to the provisions of section 4(1)(a) and section 4(3)(d) of the Central Excise Act, 1944. They further submitted that the dealer had to incur the expenses to conduct PDI and said services without reference to them. The petitioners did not reimburse such expenses incurred by the dealer. They paid the excise duty on the amount charged by them to the dealer while selling the car to the dealer.

Observations of the Court: 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 rejected the Revenue's claim that the expenses incurred for PDI and after sales services must be included in the transaction value for the reason that the warranty given by the petitioners was linked with such expenses. The Court observed that it only implied that petitioner would undertake the responsibility to provide the benefit of warranty to customer only when the customer had availed PDI and after sales services. However, it had no bearing on assessable value.
3. 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). Further, it also opined that the linkage of the expenses incurred for PDI and said services with expenses for advertisement or publicity in the said circular was not correct.
4. The Court noted that the said circular wrongly held that in case where the assessee (manufacturer) sold the motor vehicles to a dealer (buyer) at a given price and the dealer in turn sold the said motor vehicles to a customer at a price with dealers margin which included the PDI charges and after sales service charges, then, the assessable value would include the PDI and after sales service charges even if they were not been charged by the assessee (manufacturer) to the dealer. It was contrary to the provisions of section 4(1)(a) read with section 4(3)(d).

Decision: 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 confirms 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.

Note: Clause 7 of Circular No. 643/34/2002 dated 01.07.2002 reads as follows:-

Point of doubt: *What about the cost of after sales service charges and pre-delivery inspection (PDI) charges, incurred by the dealer during the warranty period?*

Clarification: *Since these services are provided free by the dealer on behalf of the assessee, the cost towards this is included in the dealer's margin (or reimbursed to him). This is one of the considerations for sale of the goods (motor vehicles, consumer items etc.) to the dealer and will therefore be governed by Rule 6 of the Valuation Rules on the same grounds as indicated in respect of Advertisement and Publicity charges. That is, in such cases the after sales service charges and PDI charges will be included in the assessable value.*

Circular No. 681/72/2002-CX dated 12.12.2002, inter alia, affirms the aforesaid circular.

CENVAT credit

3. **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.)

Facts of the case: In the instant case, the assessee was engaged in the manufacture of medicaments. Since, the medicament could be manufactured only upon approval of the regulatory authority after the product undergoes technical testing and analysis, the assessee availed the services of various technical testing and analysis agencies for testing of clinical samples prior to commencement of commercial production. These samples were manufactured in small trial batches and removed after payment of excise duty. The assessee availed CENVAT credit of service tax paid by it on such testing services. However, the department alleged that unless goods reached the commercial production stage, CENVAT credit was not admissible.

Further, the assessee also availed CENVAT credit of service tax paid by it on commission paid to foreign agents for the sale of such medicaments. Credit was taken as per the inclusive part of the definition of input service, which included services in relation to sales promotion. However, the department contended that there was a clear distinction between sales promotion and sale and a commission agent is directly concerned with sales rather than sales promotion. Therefore, service provided by

commission agent would not fall within the purview of the main or inclusive part of the definition of input service.

Observations of the Court: 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.

The High Court did not find any merits in the contention of the department that CENVAT credit was not admissible in respect of the technical testing and analysis services availed in respect of the product at trial production stage as the goods had not reached the commercial production stage. It was more so as the trial 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.

Decision: The High Court held that technical testing and analysis services availed for testing of clinical samples prior to commencement of commercial production were directly related to the manufacture of the final product and hence, were input services eligible for CENVAT credit.

With respect to the services provided by foreign commission agents, the High Court held that since the agents were directly concerned with sales rather than sales promotion, the services provided by them were not covered in main or inclusive part of definition of input service as provided in rule 2(l) of the CENVAT Credit Rules, 2004.

4. **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 registration?**

Sintex Industries Ltd. vs. CCE 2013 (287) ELT 261 (Guj.)

Facts of the case: The assessee, a company incorporated under the Companies Act, 1956, had two divisions namely, textile division and plastic division situated adjacent to each other on a common ground and surrounded by a common boundary wall. Both the units had separate central excise registrations but the assessee, a single entity, had a common PAN under the Income-tax Act.

In order to receive continuous and uninterrupted supply of electricity, the assessee installed DG sets/electricity generation plant to be used in the factory of the textile division and it used furnace oil as fuel in the generation of electricity. The assessee

availed CENVAT credit on furnace oil, used as fuel for the generation of electricity, which was used for captive consumption in their own factory. When the assessee's other unit required electricity, the assessee supplied part of the electricity so generated to its other unit.

The contention of the Revenue was that the assessee ought to reverse the credit taken on furnace oil used in the generation of electricity and supplied to the other unit. However, the assessee contended that since both the units were situated within a common boundary wall, the electricity supplied to the other unit could not be treated as being supplied to a different entity but within its own factory. The assessee further contended that separate registration of the plastic unit would not make it a different factory.

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

Decision: 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 not make them two different factories.

Important Note: The principle enunciated in case of *CCEx. v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.)* on page 102 of the *Select Cases in Direct and Indirect Tax Laws* [Relevant for May, 2013 and November, 2013 examinations] is no more relevant.

General procedures under Central Excise

5. 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.)

Prabhat Zarda Factory was engaged in manufacturing zarda which had the brand name of "Ratna". It clandestinely cleared 'Ratna' zarda and stored them with Balaji Trading Co. (respondents) for further sales. The respondents were allegedly the related concerns of Prabhat Zarda Factory.

Commissioner (Adjudication) imposed a penalty under rule 25 of the Central Excise Rules, 2002 on the respondents. However, in an appeal filed by the respondents to

CESTAT, CESTAT noted that penalty under rule 25 could be imposed only on four categories of persons:-

- (a) producer;
- (b) manufacturer;
- (c) registered person of a warehouse; or
- (d) a registered dealer.

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 (higher of duty payable on excisable goods in respect of which contravention has been committed or ₹ 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 rule 25(1)(c) 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.

***Note:** Rule 25(1)(c) of the Central Excise Rules 2002 provides that in case of manufacture, production or storage of any excisable goods without having applied for the registration certificate, a penalty not exceeding the duty on such excisable goods or ₹ 2,000, whichever is greater is leviable on the producer, manufacturer, registered person of a warehouse or a registered dealer committing such contravention.*

Demand, adjudication and offences

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

Jay Kumar Lohani v. CCEx 2012 (28) S.T.R. 350 (M.P.)

Facts of the case: The assessee was issued a show cause notice by the Commissioner proposing confiscation of seized goods and imposition of penalty. A reply to the said notice was submitted by the assessee. However, before taking any decision on such SCN, another SCN was issued by the Commissioner demanding excise duty and imposing penalty by invoking extended period of limitation of five years on the same allegations.

Point of dispute: The assessee contended that since no decision was taken in respect of first SCN, the Commissioner could not pre-judge the issue involved in the matter and issue another SCN for recovery of duty and penalty. Therefore, the assessee submitted that the second SCN be quashed or an order be passed prohibiting the Commissioner from proceeding further with the said show cause notice till the final adjudication of the question involved in earlier SCN.

Observations of the Court: 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. It was pointed out by the High Court 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.

Decision: The High Court held 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.

7. **Is assessee required to pay interest in case of voluntary payment of time-barred duty before issuance of the show cause notice?**

C.C.E. & C. v. Gujarat Narmada Fertilizers Co. Ltd. 2012 (285) E.L.T. 336 (Guj.)

Point of dispute: The question which arose for consideration before Gujarat High Court was that in a case where before the issuance of the show cause notice, the assessee voluntarily pays the duty short paid recovery of which has become time-barred, can he be required to pay interest on the duty so paid.

Observations of the Court: The High Court observed that in case the recovery of the unpaid or short paid duty has become time-barred, if the manufacturer does not pay it voluntarily, it would not be possible for the Department to recover the same. Thus, if he does it voluntarily despite completion of period of limitation, he should not, further be saddled with the liability to pay statutory interest. The High Court held that while issuing sub-section (2B) in erstwhile section 11A of the Act [now section 11A(1)(b)], intention of the Legislature was not to impose interest on the voluntary payment of time-barred duty.

Decision: The High Court held that the assessee was not required to pay interest in case of voluntary payment of time-barred duty before issuance of show cause notice

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

CCEx. v. Castrol India Ltd. 2012 (286) E.L.T. 194 (Bom.)

Facts of the case: The penalty under section 11AC was imposed on the assessee. The assessee paid the duty sought to be evaded and interest payable thereon before the passing of the adjudication order. However, the assessee did not pay 25% of the penalty imposed under section 11AC within 30 days from the date of the communication of the order of Central Excise Officer determining the duty sought to be evaded under erstwhile section 11A(2) [now section 11A(10)] which was the mandatory requirement under section 11AC for claiming the benefit of reduced penalty. Instead of paying 25% of the penalty within the stipulated time, the assessee chose to file an appeal against imposition of penalty under section 11AC.

Tribunal affirmed that the penalty was leviable under section 11AC. However, it further noted that since the option to pay the reduced penalty under the proviso to erstwhile section 11AC [now section 11AC(1)(c)] had not been given in the adjudication order, the benefit of reduced penalty under section 11AC could not be denied to the assessee. Thus, it permitted the assessee to pay 25% penalty from the date of communication of the order passed by the Tribunal.

Point of dispute: The Revenue contended that Tribunal could not permit assessee to pay reduced penalty of 25% beyond time prescribed under section 11AC.

Observations of the Court: The High Court elucidated that when the liability to pay 25% penalty under the first and the second proviso to erstwhile section 11AC [now section 11AC(1)(c)] was required to be paid within 30 days from the date of communication of the order of the Central Excise Officer determining duty under erstwhile section 11A(2) [now section 11A(10)], it would not be open to the appellate authority or the Court to direct the assessee to pay 25% penalty beyond the stipulated time period.

Further, the Court noted that the third and fourth proviso to erstwhile section 11AC [now section 11AC(1)(d)] made it clear that, it was only when the duty determined as payable under erstwhile section 11A(2) [now section 11A(10)] was increased by the appellate authority/Court in the appellate proceedings, the appellate authority/Court was authorised to permit the assessee to pay 25% of the increased penalty within 30 days of the communication of the order by which such increase in the duty took effect.

Decision: In the light of the aforesaid discussion, the High Court inferred that Tribunal permitting the assessee to pay 25% penalty beyond the time prescribed under the first and second proviso to erstwhile section 11AC [now section 11AC(1)(c)], was not permissible in law.

Notes:

1. *The aforesaid judgment relates to erstwhile section 11AC which existed prior to 08.04.2011. However, the principle enunciated in the said judgment that Appellate Authorities or Courts cannot permit the assessee to pay reduced penalty of 25% beyond time prescribed under section 11AC holds good in the present section 11AC also (applicable with effect from 08.04.2011).*

Further, it is important to note that under present section 11AC(1)(c), in case where there is a short levy/non-levy, short payment/non-payment or erroneous refund of excise duty by fraud, collusion etc., option to pay 25% penalty is available provided:-

- (i) *the default has been found during the course of any audit, investigation or verification and*
- (ii) *the details of such transaction are available in the specified records.*

Under the erstwhile section 11AC, the aforesaid two conditions were not required to be fulfilled.

2. *The Bombay High Court, while deciding the aforesaid case, departed from the view taken by the High Courts in the following cases in the said matter:-*
- *Commissioner v. Bhagyoday Silk Industries 2010 (262) E.L.T. 248 (Guj.)*
 - *Commissioner v. J.R. Fabrics Pvt. Ltd. 2009 (238) E.L.T. 209 (P & H)*
 - *K.P. Pouches Pvt. Ltd. v. Union of India 2008 (228) E.L.T. 31 (Del.)*

Appeals

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

Mihani Network v. CCus. & CEx. 2012 (285) ELT 182 (MP)

Facts of the case: In the instant case, the assessee had filed an appeal along with an application for stay before the CESTAT. However, since there had been a delay in filing the appeal, the assessee also filed an application for condonation of delay. The CESTAT ordered that the delay would be treated as condoned, if the assessee deposits 50% of the amount of tax. By the same order, the CESTAT also finally disposed of the assessee's application for stay.

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

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

Exemption based on value of clearances (SSI)

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

CCEx vs. Australian Foods India (P) Ltd 2013 (287) ELT 385 (SC)

Facts of the case: The assessee was engaged in the manufacture and sale of cookies from branded retail outlets of "Cookie Man". The assessee had acquired this brand name from M/s Cookie Man Pvt. Ltd, Australia (which in turn acquired it from M/s Autobake Pvt. Ltd., Australia). The assessee was selling some of these cookies in plastic pouches/containers on which the brand name described above was printed. No brand name was affixed or inscribed on the cookies. Excise duty was duly paid, on the cookies sold in the said pouches/containers. However, on the cookies sold loosely from the counter of the same retail outlet, with plain plates and tissue paper, duty was not paid.

The retail outlets did not receive any loose cookies nor did they manufacture them. They received all cookies in sealed pouches/containers. Those sold loosely were taken out of the containers and displayed for sale separately. The assessee contended that SSI exemption would be available on cookies sold loosely as they did not bear the brand name.

Observations of the Court: 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.

Decision: 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

11. **Whether it is necessary that the circular must be issued under section 37B in order to be binding on the Department?**

Darshan Boardlam Ltd. v. UOI 2013 (287) E.L.T. 401 (Guj.)

The High Court viewed that any clarification issued by the Board is binding to the Central Excise Officers who are duty-bound to observe and follow such circulars. Whether section 37B is referred to in such circular or not, is not relevant. When other Central Excise authorities of equal and higher rank have followed and acted as per the clarifications, the Commissioner (Surat) [jurisdictional Commissioner in the instant case], could not have taken a contrary view on the assumption that the clarifications are only letters and not orders under section 37B. Central Excise is a central levy and, therefore, such a levy has to be collected uniformly from all similarly situated manufacturers located all throughout the country.

12. **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.)

Facts of the case: The CESTAT, while hearing an appeal filed by the assessee, gave an option to the assessee that if 25% of the penalty amount was paid within 30 days from the date of its order (viz. 22nd July, 2010), the penalty would be reduced to 25%. The counsel (advocate) of the assessee who appeared and argued the case before the Tribunal informed the local counsel of the assessee, but the local counsel could not inform the assessee about the option given by the Tribunal. Resultantly, the assessee deposited 25% penalty on 30th August, 2010 and was denied the benefit of the option as there had occasioned a delay of 9 days.

The assessee submitted that the order could not be said to be tendered to him on 22nd July, 2010 as it was **not received by the assessee** in person and that he had deposited the amount of 25% of penalty within 30 days from the date of communication of the order to him and there had been no delay. However, the Revenue contended that as the advocate of the assessee was present at the time of passing of the order, the order would be deemed to have been communicated to him on the same date (22nd July, 2010) and 30 days time would run from the same date.

Observations of the Court: 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.

Decision: 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.

SERVICE TAX

Basic concepts of service tax

13. 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)

Facts of the case: The petitioner, Mayo College, was a society running internationally renowned schools. It allowed other schools to use the name 'Mayoor School', its logo and motto, and as a consideration thereof received collaboration fees from such schools which comprised of a non-refundable amount and annual fee. The schools were required to observe certain obligations/terms and unimpeachable confidentiality.

Points of dispute: 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 petitioners submitted that they did not provide any franchise services to the said schools, rather they provided their expertise for the establishment and development of these schools. The agreement entered in to between the petitioners and the said schools also did not reveal that any franchise service was provided by the petitioner to these schools. It was contended by the petitioners that they were a non-profit society carrying on non-commercial activities and that their main obligation was to maintain the high standard of the education in the said schools. Further, they did not collect any 'franchise fees' from the said schools and therefore, were not liable to pay service tax.

Decision: 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

14. 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.)

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.

Facts of the case: In the instant case, the appellant rendered IT-enabled services such as technical support services, customer-care services, back-office services etc. to clients outside the country. It involved attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers in respect of the products or services of multinational corporations. For rendering such services, the appellant used input services such as night transportation, recruitment, training, bank charges etc. The appellant claimed rebate of the service tax paid by it on such input services, used in providing the output services which were exported during a particular time period, under the said notification. However, the declaration required under para 3.1 of the notification was filed only after the export of the services i.e., after the particular time period during which the services were exported and for which the rebate claim was filed.

The appellant filed two claims under the said notification claiming rebate in respect of service tax paid on such input services. In respect of the services rendered by the appellant between 16.03.2005 and 30.09.2005, the claim for rebate was filed on 15.12.2005 and in respect of the services rendered between 01.10.2005 and 31.12.2005, the claim was filed on 17.03.2006. The declaration required to be filed in terms of para 3.1 of the Notification was however filed by the appellant only on 05.02.2007.

The rebate claims were rejected by the Department on the ground that the prescribed procedure, as laid down in *Notification No.12/2005*, for obtaining the rebate was not followed by the appellant.

Observations of the Court: The High Court observed that nature of the services was such that they were rendered seamlessly, on continuous basis without any commencement or terminal points. Since the calls were received and attended to in the call centre on a continuous basis, it was impossible for the appellant to not only determine the date of export but also anticipate the call so that the declaration could be filed "prior" to the date of export.

The High Court noted that the appellant was also required to describe, value and specify the amount of service tax payable on input services actually required to be used in providing taxable service to be exported. The High Court opined that except the description of the input services, the appellant could not provide the value and amount of service tax payable as any estimation was ruled out by the use of the word "actually

required” and the bill/invoice for the input services were received by the appellant only after the calls were attended to.

Further, the High Court also observed that one-to-one matching of input services with exported services was impossible since every phone call was export of taxable service but the invoices in respect of the input-services were received only at regular intervals, viz. monthly or fortnightly etc. Thus, the High Court was of the view that in the very nature of things, and considering the peculiar features of the appellant's business, it was difficult to comply with the requirement “prior” to the date of the export.

Furthermore, the High Court elaborated that if particulars in declaration were furnished to service tax authorities within a reasonable time after export, along with necessary documentary evidence, and were found to be correct and authenticated, object/purpose of filing of declaration would be satisfied.

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

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

Value of taxable service

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

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

Observations of the Court: The above question came up for consideration before the Delhi High Court. The High Court noted that as per Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 (hereinafter referred to as Rules), expenditure/costs, such as travel, hotel stay, transportation, etc. incurred by service provider in course of providing taxable service has to be treated as consideration for taxable service and included in value for charging service tax.

The High Court observed that since section 67(1) of Finance Act, 1994 is subject to provisions of Chapter V - which includes section 66 (now section 66B) – the value of taxable services has to be in consonance with section 66 which levies tax only on **taxable service**. Thus, there is an inbuilt mechanism to ensure that only taxable service are evaluated under section 67 which provides that value of taxable service is the gross amount charged by service provider ‘for such service’. The High Court, therefore, opined

that it is only the consideration for the taxable service which is chargeable to tax under the relevant Sections. However, rule 5(1) goes far beyond the charging provisions as it includes the expenditure and costs - which are incurred by the service provider "*in the course of providing taxable service*" - in the value of the taxable service.

The High Court elaborated that power to make rules could not exceed or go beyond the section which provides for charge or collection of service tax. The High Court clarified that even though section 94 prescribes to lay every rule framed by Central Government before each House of Parliament, which have power to modify them; the same cannot add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

The High Court further observed that rule 5(1) may also result in double taxation, if expenses like air travel tickets, had already been subjected to service tax. The High Court was of the view that double taxation can be imposed only when it is clearly provided for and intended. It can never be enforced by implication.

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

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

CUSTOMS

Importation, exportation and transportation of goods

16. 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.)

The aforesaid question came up for consideration before the High Court. The High Court noted that though section 46 does not provide for any time-limit for filing a bill of entry by an importer upon arrival of goods, section 48 permits the authorities to sell the goods after following the specified procedure, provided the same are not cleared for home consumption/ warehoused/ transshipped 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 prescribed for filing of bill of entry.

Demand and appeals

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

Thakker Shipping P. Ltd. v. Commissioner of Customs (General) 2012 (285) E.L.T. 321 (S.C.)

Facts of the case: The proceedings were initiated against the assessee under the Customs Act, 1962. However, Commissioner of Customs (General), in his order-in-original, dropped the said proceedings. The Committee of Chief Commissioners of Customs constituted under section 129A(1B) of the Customs Act, 1962 reviewed his order and directed him to apply to the Tribunal for determination of certain points. The Commissioner, accordingly, made an application under section 129D(4) of the Act before the Tribunal. As the said application could not be made within the prescribed period and was delayed by 10 days, an application for condonation of delay was filed with a prayer for condonation. However, Tribunal rejected the application for condonation of delay on the ground that Tribunal had no power to condone the delay caused in filing application under section 129D(4) by the Department beyond the prescribed period of three months.

Point of dispute: The question which arose for consideration before this Court was whether the Tribunal was competent to invoke section 129A(5) where an application under section 129D(4) had not been made by the Commissioner within the prescribed time and to condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.

Observations of the Court: 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).

Consequently, 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.

Decision: 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.

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

Section 129A(5): The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

Section 129D(4): Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Commissioner of Customs, makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of one month from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, **including the provisions of section 129A(4)** shall, **so far as may be**, apply to such application.

- 18. 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)

Facts of the case: Assessee, an EOU, purchased electricity generated by the captive power plant of its sister unit. The furnace oil required for running the captive power plant was imported by the sister unit and the same was exempt from payment of customs duty under a relevant exemption notification. Later, the sister unit informed the assessee that it could not supply the electricity to the assessee as it would run the captive power plant for its own use only. Consequently, as a temporary measure, for overcoming this difficulty, the assessee imported furnace oil and supplied the same to sister unit for generation of electricity, which it continued to receive as before. The assessee also claimed exemption on import of furnace oil under the same notification as was claimed by its sister unit.

As the assessee was procuring furnace oil for captive power plant of another unit, it sought a clarification from the Development Commissioner seeking as to whether import of furnace oil and receipt of electricity would be liable to duty. The Development Commissioner replied in favour of the assessee quoting letter by Ministry of Commerce

and thereafter, the assessee claimed the exemption. However, irrespective of the clarification from the Development Commissioner, a show cause notice demanding duty was issued on the assessee **more than six months** after he had imported furnace oil on behalf of its sister unit. The contention of the Revenue was that the entitlement of duty free import of fuel for its captive power plant lies with the owner of the captive power plant, and not the consumer of electricity generated from that power plant.

Observations of the Court: 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 Tribunal's finding that the assessee had not brought anything on record to prove their claim of bona fide conduct did not find favor with the Apex Court. The Supreme Court reiterated that the burden of proving any form of mala fide lies on the shoulders of the one alleging it.

Decision: The Supreme Court held that mere non-payment of duties could not be equated with collusion or willful 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.

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

19. 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 Losers Travellers Co. OP. v. C.C.E., Surat-II 2013 (29) STR 352 (Guj.)

Facts of the case: The appellant, a Co-operative Society, rendered rent-a-cab service to M/s. ONGC. The members of the society were essentially agriculturists who formed the society after they lost their land when ONGC plant was being set up. At the time, when the appellant started rendering the service to the ONGC, there was no service tax levy on rent-a-cab service. However, service tax was imposed on rent-a-cab service subsequently. A show cause notice was issued on the appellants proposing to recover service tax with applicable penalty and interest. The appellants paid the entire disputed amount and thereafter regularly paid the service tax. The issue under consideration before the High Court, therefore, was only in relation to the imposition of penalty.

The appellant contended that they did not pay service tax at the relevant point of time as it being a new levy; they were unaware of legal provisions. Also, there were divergent views of different Benches of Tribunal, which had added to the confusion, and the issue was debatable.

Further, it was pointed out by the appellant that since initially there was no condition relating to payment of service tax in the service contract with the ONGC-as there was no levy at that point of time - ONGC denied paying service tax when the same was subsequently imposed on the service rendered by them. However, with due negotiation and arbitration, it was decided that the disputed amount would first be paid by the appellant and the same would be reimbursed by ONGC. Thus, there had also been confusion regarding the liability of the appellant. However, such contention was not accepted by the Department.

Observations of the Court: 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.

Decision: 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.

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

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

Facts of the case: In the instant case, the adjudicating authority had disallowed the refund claim filed by the assessee and called for certain additional documents, although similar refund claims filed by the assessee for the earlier periods had been allowed by the adjudicating authority without these additional documents. The assessee failed to furnish the additional documents despite being given several opportunities to produce the same. The adjudicating authority passed an order rejecting the refund claim but failed to record any reason as to why it differed with the earlier decisions.

The assessee pleaded that since the adjudicating authority has failed to state any reason for differing with the earlier decisions, its order must be quashed. Revenue contended that the adjudicating authority was justified in passing the non-speaking order because in spite of several opportunities given to produce additional documents, the assessee had failed to produce those documents.

Decision: The High Court held that if the assessee had failed to furnish additional information, it had been obligatory on the part of the adjudicating authority to record a finding as to why the documents furnished by the assessee were not sufficient to allow his claim and why additional documents were necessary, especially when on the basis of similar documents furnished by the assessee in the past, the claims had been allowed. Thus, deciding the petition in favour of the assessee, the High Court set aside the order of the adjudicating authority.

Miscellaneous provisions**21. Can the directors of the company be held liable for the recovery of customs dues on the company?**

Anita Goel v. CCEx. 2013 (288) E.L.T. 63 (Del.)

Facts of the case: A demand notice was raised against the petitioner in respect of the excise duty payable by the company- Shri Ram Casting P. Ltd. which she was formerly a director of. She had resigned from the Board of the company long time back. The Customs Department sought to attach the properties belonging to the petitioner for recovery of the dues to the company. The petitioner contended that the action of the Department was not justified as the said properties belonged to her and not the company.

Revenue contended that as director, the petitioner could not distance herself from the company's acts and omissions; she had to shoulder its liabilities. It was in furtherance of such obligation that the authorities acted within their jurisdiction in issuing the impugned notice.

Decision: 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 under Rules. The defaulter was the person from whom dues were recoverable under the Act. In the present case, it was the company who was the defaulter. There was no averment that the company had been or was being wound up.

Thus, juristic personality of an existing company and its former director were certainly separate; 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 defaulters.

Note:

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

- *2. *The Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995.*

PART – III : QUESTIONS AND ANSWERS

Manufacture

1. Bansal Steel Ltd (BSL) extracts iron ore from mines at different places for being used at its various steel plants. Iron ore is excavated from the mines in the form of blasted mass/rocks which are then crushed and screened into small sizes and washed with a view to remove foreign materials. Iron ore extracted from BSL's mines has iron content of 60% or more. By reason of the said washing/sizing activities the iron contents of iron ore do not increase in any way.

The Revenue wants to levy duty on the iron ore excavated by the BSL on the ground that the mined iron ore on being subjected to crushing, grinding, screening and washing becomes iron ore concentrate which is covered by Heading 26.01 of the Tariff. Heading 26.01 of the Central Excise Tariff applies to "Iron Ore and concentrates, including roasted iron by rites." The Revenue has relied on the Explanatory Notes of HSN according to which the term "concentrates" applies to ores which have had part or all of the foreign matter removed by special treatment.

On the other hand the assessee contends that the processes undertaken by them do not convert iron ore into iron ore concentrates as no special treatments are undertaken by them nor the iron content increases after the processes undertaken by them. It is the contention of the assessee that the activities of crushing, grinding, screening and washing do not amount to manufacture of any goods attracting levy of Central Excise duty.

Explain, with the help of a decided case law, whether Department's stand is justified in law.

Valuation of excisable goods

2. Narayan Ltd. is engaged in the manufacture of photographic cameras. Such cameras are notified by the Government for the purpose of section 4A of the Central Excise Act, 1944 and 30% abatement has been prescribed on the same. Narayan Ltd. manufactured 2500 cameras and declared ₹ 3,000 as retail sale price on each package of camera. Determine the assessable value for the purpose of excise duty from the following information provided by Narayan Ltd.-

	₹
Cost of raw material	28,000
Commission payable to dealers	12,000
Advertisement charges	2,000
Packing charges	6,000
Profit element	30,000
Freight charges paid for bringing raw material into the factory	4,000

CENVAT Credit Rules, 2004

3. Raina & Co. is engaged in the manufacture of power generators. From the following information, you are required to compute the amount of CENVAT credit available to Raina & Co. under CENVAT Credit Rules, 2004:

Purchases	Excise duty paid (including cess) (₹)
Raw material	4,80,000
Pollution Control Equipment	1,25,000
Storage Tank	60,000
Grease & Oil	25,000
Light Diesel Oil	15,000
Air Conditioner in the office of Manager	35,000
Food items consumed by the employees	18,000
Inputs used for construction of a building	2,50,000

Raina & Co. is eligible for SSI exemption. State briefly the reasons for treating each item.

4. Mr. Satnarain, a manufacturer having three registered premises, registrations for which has been obtained on the basis of a common Permanent Account Number, wants to transfer unutilized CENVAT credit of additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, lying in balance with one of his registered premises to the other one. Examine whether Mr. Satnarain can do so and if yes, then explain what is the procedure for such transfer.

Advance Ruling and CENVAT credit

5. Examine the validity of the following statements:
- Only public sector companies are notified as the class or category of residents who can apply for advance ruling in case of specified matters relating to central excise.
 - In case of services relating to life insurance, provider of output service is obligated to pay every month an amount equal to 20% of the CENVAT credit availed on inputs and input services in that month.

Interest on delayed refund of central excise duty

6. Mr. Shubh, a manufacturer was unable to determine the value of excisable goods manufactured by him during the month of Januray, 2013. Therefore, he applied for provisional assessment and paid excise duty provisionally. However, subsequently on finalization of the provisional assessment on 15.03.2013 it was found that Mr. Shubh was entitled to a refund. Mr. Shubh filed the refund application on 20.03.2013.

Mr. Shubh received the refund along with interest on 30.04.2013. Interest on delayed refund was computed from 01.02.2013 till 30.04.2013. Discuss the correctness or otherwise of the manner of computation of interest.

SSI exemption

7. P Ltd. manufactures goods 'A' and 'B'. Goods 'A' are wholly exempt from excise duty vide an exemption notification. However, P Ltd. has mistakenly paid excise duty on goods 'A' and has also not claimed refund of the same.

P Ltd. wants to claim SSI exemption for Goods 'B'. For the purposes of computing the eligible turnover for SSI exemption, P Ltd. has excluded Goods 'A' being exempt goods, although duty has been paid mistakenly on them. However, the Revenue contends that clearances of Goods 'A' should be included while computing the eligible turnover. P Ltd. satisfies all the other conditions for claiming the SSI exemption.

Explain, with the help of a decided case law, whether stand taken by P Ltd. is correct in law?

8. Pratiksha Enterprise, a small scale unit, had achieved sales* of ₹ 80 lakh during the year 2011-12. Sales* achieved during 2012-13 was ₹ 1.54 crores. Normal duty payable is 12% plus applicable cess. Calculate the total amount of excise duty paid by the Pratiksha Enterprise during 2012-13 in each of the following independent cases:-
- If the unit has availed CENVAT credit on inputs.
 - If the unit has not availed CENVAT credit on inputs.

*sales represents value of clearances for home consumption computed in accordance of the *Notification No. 8/2003*.

Basic concepts of Service tax

9. Determine the taxability of the following activities as per the provisions of the Finance Act, 1994.
- M/s Omi Limited is engaged in providing service in relation to collection of tolls and for security of the toll road in Gurgaon.
 - A house is given on rent at Paschim Vihar, Delhi on a single rent deed, One floor of the said house will be used as residence and the other for housing a printing press.

Valuation of taxable service

10. Vishnu Electricals Ltd. (VEL) has entered into a contract with Shambhunath Enterprises (SE) in January 2013 for installation of electrical fittings in a building owned by SE. The material required for such installation is also required to be supplied by VEL.

As per the contract, the amount payable (excluding all taxes) by SE to VEL is ₹ 98,00,000 in addition to the electric cables to be supplied by SE for which it charged ₹ 6,00,000 from VEL. Fair market value of the electric cables (excluding VAT) is ₹ 9,00,000.

Whether the foregoing installation services are subject to service tax and if so, how will the service tax liability be computed?

Exemptions under Service tax

11. Examine the applicability of Service tax for the month of April, 2013 in the following cases:-
- A residential unit whose carpet area is less than 2000 sq. ft. and the amount charged is ₹ 1 crore.
 - Vidya Bharti Public School provides transport facility to its students through a fleet of buses and cabs owned by it.

Demand, Adjudication and Offences under Service tax

12. Krishi Sangh, a Co-operative Society, rendered rent-a-cab service to M/s. GPCL. The members of the society were essentially agriculturists who formed the society after they lost their land when GPCL plant was being set up.

At the time, when Krishi Sangh started rendering the service to GPCL, there was no service tax levy on rent-a-cab service. However, service tax was imposed on rent-a-cab service subsequently. There had been a confusion regarding the liability of Krishi Sangh as GPCL denied to pay the service tax for the want of any clause to this effect in the service contract. However, with due negotiation and arbitration, it was decided that the disputed amount would first be paid by Krishi Sangh and the same would then be reimbursed by GPCL.

A show cause notice was issued on Krishi Sangh proposing to recover service tax with applicable penalty and interest. Krishi Sangh paid the entire disputed amount but refused to pay the penalty. Krishi Sangh contended that they did not pay service tax at the relevant point of time as it being a new levy; they were unaware of legal provisions. Also, there were divergent views of different Benches of Tribunal, which had added to the confusion, and the issue was debatable. Further, there had also been confusion regarding their liability as initially GPCL denied to pay service tax.

Discuss, with the help of a decided case law, whether penalty can 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.

13. Examine with the help of a decided case law whether non-filing of additional documents by an assessee despite being given several opportunities to produce the same, could be a sufficient ground for passing a non-speaking order?

Computation of VAT

14. Mr. Ramswaroop Mehta, a registered dealer in Mumbai submits the following information pertaining to the month of April, 2013:

Purchase of raw material (within the State)

Item	Amount (₹)	Rate of VAT
Goods 'P'	20,00,000	1%

Goods 'Q'	16,50,000	Exempt
Goods 'R'	35,00,000	12.5%

Sales

Particulars of finished goods sold	State in which goods are sold	Amount (₹)	Rate of VAT
(i) Produced from goods 'P'	Mumbai	30,00,000	Exempt
(ii) Produced from goods 'Q'	Mumbai	5,00,000	12.5%
	Gujarat	6,00,000	2 %
(iii) Produced from goods 'R'	Mumbai	50,00,000	4%

Raw materials valued at ₹ 5 lakh of goods 'R' have been transferred to the branch in Bhopal during the month. Assume 2% reduction in input credit on account of such transfer.

Compute the amount of value added tax (VAT) payable by Mr. Ramswaroop Mehta for the relevant month. There is no opening or closing inventory.

Input Tax Credit

15. Compute the invoice value and VAT payable by Mr. Mayank who purchases goods within the state for ₹ 4,50,000 (including VAT) and earns 20% profit on sale price. VAT rate on purchases and sales is 12.5%.

VAT procedures

16. "Under VAT, barring the items covered by the negative list and subject to retention rules, the dealers are entitled to set off on capital goods like any other purchases." Examine the validity of the statement and discuss the procedural requirements for claim of set off of capital goods.

Baggage Rules

17. Mr. Ajay, an Indian entrepreneur, went to London to explore new business opportunities on 01.04.2013. His wife also joined him in London on 01.12.2013. The following details are submitted by them with the Customs authorities on their return to India on 30.04.2014.-
- used personal effects worth ₹ 80,000
 - a music system worth ₹ 35,000
 - the jewellery brought by Mr. Ajay for ₹ 48,000 and the jewellery brought by his wife worth ₹ 20,000

Determine their eligibility with regard to duty free allowance.

Duty drawback under Customs

18. Calculate the amount of duty drawback allowable under the Customs Act, 1962 in the following cases:
- (a) Jaggi Mehta imported a car from U.K. for his personal use and paid ₹ 4,50,000 as import duty. However, the car is re-exported immediately without bringing it into use.
 - (b) Meenakshi imported a music player from Dubai and paid Rs.12,000 as import duty. She used it for four months but re-exports the same after four months.
 - (c) XYZ Ltd. exported 1000 kgs of a metal of FOB value of ₹ 1,00,000. Rate of duty drawback on such export is ₹ 60 per kg. Market price of goods is ₹ 40,000 (in wholesale market).

Confiscation of goods under Customs

19. Trostry India Pvt. Ltd. had imported second-hand machinery along with spare parts from its sister concern located at New York. There was indication in the invoice that the machinery was certified by the load port Chartered Engineer. However, the certificate issued by the load port Chartered Engineer was not enclosed along with the Bill of Entry and only the invoice was submitted. Since the appellant didn't submit the valuation report, the Custom authorities referred the matter for valuation to local valuer. During the process of valuation, the local valuer found that the value of the machinery was under estimated. On being issued a show cause notice for misdeclaration of the value of imported goods, Trostry India Pvt. Ltd. paid duty on the value indicated as per the original report of load port Chartered Engineer, which was higher than the value declared by it.

Explain, with the help of a decided case law, whether Trostry India Pvt. Ltd. had misdeclared the value of the imported goods leading to confiscation of the same and imposition of penalty.

Provisions relating to illegal import under Customs

20. Mohammad Sheikh, a resident of Mumbai, deals in import and export of uncut gems like rubies, emeralds. He brought a large quantity of uncut rubies into India clandestinely without payment of duty. During search conducted by customs officer, in the office premises of Mohammad Sheikh, a large quantity of uncut rubies were recovered. Mohammad Sheikh was neither able to offer any satisfactory explanation nor produce any documents in relation to the import of such uncut rubies and therefore, the rubies were seized by the officers. Subsequently, he filed a claim for availing the benefit of exemption meant for such imported goods under the Customs Act, 1962.

However, the department contended that the goods brought by Mr. Mohammad Sheikh, did not come within the purview of imported goods. The department thus, rejected his claim stating that the benefit of exemption is only meant for imported goods and cannot be given to the smuggled goods.

You are required to examine the veracity of the department's contention with the help of a decided case law.

SUGGESTED ANSWERS / HINTS

1. No, the Department's stand is not justified in law.

The facts of the given case are similar to the case of *Commissioner v. Steel Authority of India Ltd.* 2012 (283) E.L.T. A112 (S.C.) wherein the Supreme Court confirmed the order of the Appellate Tribunal as reported in 2003 (154) E.L.T. 65 (Tri.-Kol.) (*Commissioner v. Steel Authority of India Ltd.*).

The Tribunal reiterated that it is a settled law that the activity or process in order to amount to "manufacture" must lead to emergence of a new commercial product, different from the one with which the process started.

The Tribunal did not agree with the Revenue's contention that the processes undertaken by the assessee lead to emergence of a new and different article on which central excise duty can be levied and collected. The Tribunal clarified that even according to HSN the term "concentrates" applied to ores which have had part or all of the foreign matters removed either because such foreign matter might hamper subsequent metallurgical operations or for economical transport.

The Tribunal held that removing of foreign matters would not, in the present case, bring into existence a new and different article having a distinctive name, character or use. The use of iron ore as mined or iron ore after the process undertaken by the assessee remained the same; that is, to be used in metallurgical industry for the extraction of metals.

2. Section 4A of the Central Excise Act, 1944 provides for valuation of excisable goods with reference to retail sale price. It states that notwithstanding anything contained in section 4, valuation of excisable goods will 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.

Thus, the provisions of section 4A of the Central Excise Act, 1944 are overriding provisions, i.e., if a product is covered under provisions of section 4A, valuation will be done on the basis of section 4A.

Hence, in this case, the assessable value of the product will be computed as follows:-

	₹
Retail sale price of 2500 package = 2500 x 3,000	75,00,000
Less: Abatement @ 30%	<u>22,50,000</u>
Assessable Value	<u>52,50,000</u>

The information pertaining to raw material cost, commission, advertisement, packing profit, freight charges etc. are irrelevant for the purpose of determining the Assessable Value.

3. Computation of CENVAT credit available to Raina & Co.

Purchases	Excise duty paid (including cess) (₹)
Raw material (Note-1)	4,80,000
Pollution Control Equipment (Note-2)	1,25,000
Storage Tank (Note-2)	60,000
Grease & Oil (Note-1)	25,000
Light Diesel Oil (Note-3)	-
Air Conditioner in the office of Manager (Note-4)	-
Food items consumed by the employees (Note-3)	-
Inputs used for construction of a building (Note-3)	-
Total CENVAT credit available	<u>6,90,000</u>

Notes :

- Raw material, grease and oil are eligible inputs as per rule 2(k) of CENVAT Credit Rules, 2004.
- Pollution Control Equipment and Storage Tank are eligible capital goods under rule 2(a) of the CENVAT Credit Rules, 2004. Moreover, as per third proviso to rule 4(2)(a) of the CENVAT Credit Rules, 2004, assessee eligible for SSI exemption can avail CENVAT credit of the whole amount of the duty paid on the capital goods in the same financial year in which such goods are received.
- The definition of inputs specifically excludes the following:-
 - light Diesel Oil
 - goods used for construction of a building or a civil structure or a part thereof
 - any goods, such as food items used primarily for personal use or consumption of any employee.[Rule 2(k) of CENVAT Credit Rules, 2004]
- No credit is available on office equipment since the definition of capital goods under Rule 2(a) of the CENVAT Credit Rules, 2004 specifically excludes any equipment/appliance used in an office.
- Yes, Mr. Satnarain can do so. W.e.f. April 01, 2012 Rule 10A has been inserted in CENVAT Credit Rules, 2004 vide *Notification No. 18/2012-CE (NT) dated 17.03.2012*, which provides that a manufacturer or producer of final products, having more than one registered premises, registrations for each of which have been obtained on the basis of a common Permanent Account Number, may transfer unutilised CENVAT credit of additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act(SAD), lying in balance with one of his registered premises at the end of a quarter, to his other registered premises by—

- (i) making an entry for such transfer in the documents maintained under rule 9;
- (ii) issuing a transfer challan containing registration number, name and address of the registered premises transferring the credit and receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (i), and such recipient premises may take CENVAT credit on the basis of the transfer challan.

However, nothing contained in this rule will apply if the transferring and recipient registered premises are availing the benefit of certain specified notifications providing exemption to units located in specified areas.

The manufacturer or producer has to submit the monthly return, as specified, separately in respect of transferring and recipient registered premises.

5. (a) The said statement is not valid. Prior to 01.03.2013, only public sector companies were notified as the class or category of residents who can apply for advance ruling in case of specified matters relating to central excise.

However, the scope of advance ruling has been expanded by additionally notifying resident public limited companies as class or category of residents who can apply for advance ruling in case of specified matters relating to central excise vide *Notification No. 04/2013 (CE) NT dated 01.03.2013*. Thus, resident public limited companies can also now obtain advance ruling in case of central excise matters.

- (b) The said statement is not valid. Earlier, Rule 6(3C) of CENVAT Credit Rules, 2004 provided that in case of services relating to life insurance, provider of output service was obligated to pay every month an amount equal to 20% of the credit availed on inputs and input services in that month. However, w.e.f. April 01, 2012 now Rule 6(3C) of CENVAT Credit Rules, 2004 has been omitted vide *Notification No. 18/2012-(CE) NT dated 17.03.2012* and such obligation has been dispensed with.

6. With effect from 01.03.2013, rule 7(5) of the Central Excise Rules, 2002 has been amended vide *Notification No. 02/2013 (CE) NT dated 01.03.2013* to provide that the interest on refund arising out of finalization of provisional assessment will be computed in accordance with the provisions of section 11BB of the Central Excise Act, 1944 i.e., interest will be computed from the date immediately after the expiry of three months from the date of receipt of refund application till the date of refund of such duty.

However, prior to 01.03.2013, interest on such refund was computed from the first day of the month succeeding the month for which such refund was determined, till the date of refund.

Since in the above case, the refund application is filed on 20.03.2013, the computation of interest will be governed by the amended provisions. Therefore, no interest will be paid on the refund as the refund is paid before the expiry of three months from the date of refund application (30.04.2013).

7. Yes, P Ltd. is correct in excluding the turnover of exempted goods, on which duty has been paid by mistake and refund thereof has also not been claimed while computing turnover for current year for claiming SSI exemption.

The facts of the given case are similar to the case of *Bonanzo Engg. & Chemical P. Ltd. v. CCE*, 2012 (277) E.L.T. 145 (S.C.). In the instant case, the Supreme Court held that SSI exemption would be allowable to the assessee, as they met all the conditions thereof. The Apex Court clarified that the amount of clearances for the purpose of SSI exemption notification needs to be computed after excluding the value of exempted goods. The Supreme Court held that the exempted goods would not become goods liable to duty merely because duty had been mistakenly paid on them and also no refund thereof had been claimed.

8. The units whose value of clearances computed in accordance with *Notification No. 8/2003* is not more than 400 lakh in the previous financial year are eligible for the benefit of the *Notification No. 8/2003*. As per the *Notification No. 8/2003*, exemption from the payment of duty is given to the units upto the value of clearances worth ₹ 150 lakh in a financial year. Further, in respect of units availing the benefits of *Notification No. 8/2003*, (SSI Exemption), no CENVAT credit is available in respect of inputs upto clearances of ₹ 150 lakh.

If the unit has availed CENVAT credit on inputs, it cannot claim exemption under *Notification No. 8/2003* and hence it is required to pay duty at normal rates.

Total Amount of Excise Duty Payable	₹
Excise Duty @12% (1.54 crores X 12%)	18,48,000
Education cess @ 2% on Excise Duty	36,960
Secondary and Higher Education Cess @ 1% on Excise Duty	<u>18,480</u>
Total Duty Liability	<u>19,03,440</u>

If the unit has not availed CENVAT credit on inputs, it can claim SSI exemption and hence duty payable will be computed as under:

Total Amount of Excise Duty Payable	₹
On ₹150 lakhs	-
On subsequent sales (₹ 4,00,000 X 12.36%)	<u>49,440</u>
Total Duty Liability	<u>49,440</u>

9. (a) 'Provision of access to any road or bridge on payment of toll' is a specified entry in the negative list in section 66D of the Finance act, 1994. Any service provided in relation to collection of tolls or for security of a toll road would be in the nature of service used for providing such specified service. As per section 66F of the Act relating to bundled services, reference to the main service does not include reference to a service which is used for providing main service. Hence, the service

provided by M/s Omi Limited being the service used for providing main service will not construed to be included in the negative list and would thus be liable to Service tax.

- (b) As per section 66F of the Finance act, 1994, relating to bundled services, if various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax. In the present case, renting for two different purposes is not naturally bundled in the ordinary course of business. Therefore, if a single rent deed is executed it will be treated as a service comprising entirely of such service which attracts highest liability of service tax. In this case renting for use as residence is a negative list service while renting for non-residence use is chargeable to tax. Since the latter category attracts highest liability of service tax amongst the two services bundled together, the entire bundle would be treated as renting of commercial property and would be taxable.
10. Vishnu Electricals Ltd. (VEL) has agreed to provide materials which are leviable to tax as sale of goods. In addition, it is also required to provide its services to its client. Therefore, its services fall within the scope of term 'works contract' as defined under Section 65B (54) of Finance Act, 1994. As a result, aforestated services of VEL are subject to Service Tax.

As the value of materials transferred in the execution of said works contract has not been separately given, the value of works contract services has to be determined in accordance with Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006 which is effective from 01.07.2012. The present contract will be covered under Rule 2A(ii)(C) of Service Tax (Determination of Value) Rules, 2006, which provides that in case of other works contracts, including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, the value of service portion shall be 60% of the total amount charged for the works contract.

As per Explanation 1(b) to rule 2A, total amount charged means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied for execution of the works contract after deducting the amount charged for such goods or services and the value added tax if any, levied thereon.

Computation of service tax payable

S. No.	Particulars		Amount (₹)
a.	Gross amount charged for the works contract excluding taxes		98,00,000
b.	Add: Fair market value of electric cables supplied by SE excluding taxes	9,00,000	

c.	Less: Amount charged by service receiver for electric cables	<u>6,00,000</u>	<u>3,00,000</u>
d.	Total amount charged (a+b-c)		1,01,00,000
e.	Value of service portion (60% of d)		60,60,000
f.	Service tax payable including education cesses @ 12.36%		7,49,016

11. (a) With effect from March 01, 2013, service tax abatement has been decreased from 75 % to 70 % in case of all industrial construction. However, abatement of 75 % would be available in case of residential units which fulfill the following two conditions **cumulatively**:-

- (i) The carpet area of the unit is less than 2000 square feet; and
- (ii) The amount charged for the unit is **less than ₹1 crore**.

Since in the given case amount charged is ₹1 crore, 70% abatement would be available. Hence, the residential unit is liable to pay service tax @ 12.36% on ₹30 lakh.

- (b) Transport facility provided by a School to its students is an auxiliary educational service. With effect from 01.04.2013, the exemption provided to the auxiliary educational services provided by an educational institution has been withdrawn.[*Mega Exemption Notification No. 25/2012 ST dated 20.06.2012 amended*]. Thus, Vidya Bharti Public School is liable to pay service tax on the transport facility provided by it to its students.

12. No, penalty cannot 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. The facts of the given case are similar to the case of *Ankleshwar Taluka ONGC Land Loosers Travellers Co. OP. v. C.C.E., Surat-II 2013 (29) STR 352 (Guj.)*. In the instant case, 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 when the members of the appellant society were essentially agriculturists.
- (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 service recipient by way of conciliation and arbitration cannot deprive them of the defence of bona fide belief of applicability of service tax.

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 service recipient, 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.

13. The aforementioned question was examined by the High Court in the case of *DBOI Global Service Pvt. Ltd. v. UOI* 2013 (29) S.T.R. 117 (Bom.).

In the instant case, the adjudicating authority had disallowed the refund claim filed by the assessee and called for certain additional documents, although similar refund claims filed by the assessee for the earlier periods had been allowed by the adjudicating authority without these additional documents. The assessee failed to furnish the additional documents despite being given several opportunities to produce the same. The adjudicating authority passed an order rejecting the refund claim but failed to record any reason as to why it differed with the earlier decisions.

The assessee pleaded that since the adjudicating authority had failed to state any reason for differing with the earlier decisions, its order must be quashed. Revenue contended that the adjudicating authority was justified in passing the non-speaking order because in spite of several opportunities given to produce additional documents, the assessee had failed to produce those documents.

The High Court held that if the assessee had failed to furnish additional information, it had been obligatory on the part of the adjudicating authority to record a finding as to why the documents furnished by the assessee were not sufficient to allow his claim and why additional documents were necessary, especially when on the basis of similar documents furnished by the assessee in the past, the claims had been allowed. Thus, deciding the petition in favour of the assessee, the High Court set aside the order of the adjudicating authority.

14. Computation of VAT payable by Mr. Ramswaroop Mehta for the month of April, 2013:-

	Particulars	₹
(A)	Output tax payable	
	(i) On sale of finished goods produced from Goods 'Q' within the State ($\text{₹ } 5,00,000 \times 12.5\%$)	62,500
	(ii) On sale of finished goods produced from Goods 'R' within the State ($\text{₹ } 50,00,000 \times 4\%$)	<u>2,00,000</u>
	Total (A)	<u>2,62,500</u>
(B)	Input tax credit available	
	(i) Goods 'Q' (Exempt)	Nil
	(ii) Goods 'P' (Note-1)	Nil
	(iii) Goods 'R' transferred to branch ($\text{₹ } 5,00,000 \times 10.5\%$)	52,500
	(iv) Remaining Goods 'R' after transfer to the branch [$\text{₹}(35,00,000 - 5,00,000) \times 12.5\%$]	<u>3,75,000</u>
	Total (B)	<u>4,27,500</u>
	Net VAT payable = (A)-(B)	(1,65,000)

CST payable on inter-state sale of goods produced from Goods 'Q' (₹ 6,00,000 × 2%) would be paid from the balance credit of ₹1,65,000. (Note-2)	12,000
Balance of input tax credit carried forward to next month	<u>1,53,000</u>

Notes:

1. Since, there is no opening and closing inventory, it implies that entire purchase of the Goods 'P' is used to manufacture the finished goods (which are exempt from tax). Hence, no input tax credit is available in respect of VAT paid on purchase of Goods 'P' as goods utilized in the manufacture of exempted goods are not eligible for input tax credit.
2. Input tax credit can be used to set off the central sales tax payable on the inter-state sales.

15. Computation of VAT payable by Mr. Mayank :-

	Amount (₹)
Purchase price including VAT	4,50,000
Less: VAT paid (4,50,000 × 12.5)/112.5	<u>50,000</u>
Purchase cost excluding VAT	4,00,000
Add: Profit margin (25% of cost price)	<u>1,00,000</u>
Sale price before VAT	5,00,000
Add: VAT @ 12.5%	<u>62,500</u>
Invoice value	<u>5,62,500</u>
VAT payable on sales	62,500
Less: Input VAT on purchases	<u>50,000</u>
VAT payable by Mr. Mayank	<u>12,500</u>

16. The said statement is valid. Under VAT, barring the items covered by the negative list and subject to retention rules, the dealers are entitled to set off on capital goods like any other purchases. Thus, the dealer will have to bifurcate their purchase into capital goods eligible for set off and capital goods not so eligible.

In respect of eligible capital goods, the dealer will be required to follow the procedural requirements for claiming set off successfully. For example, dealers will be required to support purchase of capital goods with tax invoice. In the absence of such tax invoice set off will be disallowed. If it is subject to certain installments, the dealer will be required to claim set off accordingly in his returns. If the set off is subject to prior permission, the same should be duly obtained.

The allowable set off on capital goods will be, of course, part of normal set off. The dealer will be able to adjust this set off against his other VAT liability. It is generally provided in VAT Acts that the set off on any goods should not exceed the tax received on the same goods in Government Treasury.

Therefore, the purchasing dealer, desirous of claiming set off, should also look into the credentials of the vendor so as to be sure that he will get the set off of tax paid to him.

17. As per the Baggage Rules, 1998, in case of passengers other than tourists, there is no customs duty on used personal effects and general free allowance is ₹ 35,000 per passenger. Thus, their duty liability is nil for the personal effects and a music system.

However, the additional duty free allowance, that is jewellery allowance is applicable to non-tourist passenger of Indian origin who had stayed abroad for period exceeding one year. The additional jewellery allowance is as follows:-

Gentleman Passenger	- ₹ 50,000/-
Lady Passenger	- ₹ 1,00,000/-

Thus, there is no duty liability on the jewellery brought by Mr. Ajay as he had stayed abroad for period exceeding one year. However, his wife is not eligible for this additional jewellery allowance as she had stayed abroad for a period less than a year. Thus, she has to pay customs duty on the amount of jewellery brought by her.

18. (a) As per Section 74 of the Customs Act, 1962, when any identifiable imported goods are re-exported, 98% of the import duty is re-paid as drawback provided the goods are identified to the satisfaction of the Assistant/Deputy Commissioner of Customs as the goods which were imported and the same are entered for export within two years from the date of payment of the import duty.

Thus, Jaggi Mehta can claim duty drawback of ₹ 4,41,000 (98% of ₹ 4,50,000) on the presumption that the car has been identified to the satisfaction of the Assistant/Deputy Commissioner of Customs as the one which was imported.

- (b) As per Section 74 of the Customs Act, 1962 read with *Notification No. 19 Cus. dated 06.02.1965*, 85% of the import duty is allowed to be paid as drawback in respect of goods which are used after their importation and which have been out of customs control for more than 3 months but not more than 6 months. Hence, Meenakshi can claim duty drawback of ₹ 10,200.

- (c) As per Section 76 of the Customs Act, 1962, no drawback is allowed in respect of any goods, the market price of which is less than the amount of drawback due thereon. In this case, the market price of the goods is ₹ 40,000, which is less than the amount of duty drawback, i.e. 1,000 kgs x ₹ 60 = ₹ 60,000. Hence, XYZ Ltd. is not entitled to claim duty drawback in this case.

19. Yes, Trostry India Pvt. Ltd. had misdeclared the value of the imported goods leading to confiscation of the same and imposition of penalty. The facts of the given case are similar to the case of *Wringley India Pvt.Ltd. v. Commr.of Cus.(Imports), Chennai 2011 (274) E.L.T. 172 (Mad.)*.

In the instant case, the High Court held that the appellant had made deliberate misdeclaration of the value of the imported goods and misguided the Customs Department as even after getting direction to get valuation from local chartered engineer,

it was not disclosed that valuation had already been done at load port. Further, it was also not the importer's case that they did not have in their possession that certificate of load port chartered engineer. Even after obtaining the valuation certificate from the local valuer, the appellant had no grievance. In fact the valuation so done by the local Chartered Engineer was readily accepted by the appellant as evident from the letter issued by them to the Customs Department and the subsequent payment made by them.

Hence, the Revenue contended that the appellant had mis-declared the value of the imported goods leading to confiscation of the same and imposition of penalty.

20. Yes, the department's contention is valid in law. The facts of the given case are similar to the case of *CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)*. In the instant case, 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 on the economy. Hence, it held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

Thus, Mohammad Sheikh is not eligible to claim exemption as goods brought by him cannot be treated as imported goods since they were brought into India clandestinely without payment of duty.