CENTRAL EXCISE

1
BASIC CONCEPTS

1. **Does the process of washing of iron ore for removal of foreign materials from such ore amount to manufacture?**

Commissioner v. Steel Authority of India Ltd. 2012 (283) E.L.T. A112 (S.C.)

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

Point of dispute: The Department was of the view that the mined iron ore on being subjected to crushing, grinding, screening and washing becomes iron ore concentrate which was covered by Heading 26.01 of the Central Excise Tariff (iron ore and concentrates, including roasted iron by rites). It had 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.

The assessee contended that the processes undertaken by them did not convert iron ore into iron ore concentrates as no special treatments were undertaken by them nor the iron content increased after the processes undertaken by them. It was the contention of the assessee that the activities of crushing, grinding, screening and washing did not amount to manufacture of any goods attracting levy of central excise duty.

Observations: The Tribunal, when the matter was brought before it, decided the case in favour of assessee and against the Revenue. While deciding the case, the Tribunal reiterated the well settled law that an 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. It 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.

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

The said decision of the Tribunal has been affirmed by the Supreme Court in the instant case.

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

CCE v. Osnar Chemical Pvt. Ltd. 2012 (276) E.L.T. 162 (S.C.)

Facts of the Case: Osnar Chemical Pvt. Ltd. (Osnar) was engaged in the supply of Polymer Modified Bitumen (PMB) and Crumbled Rubber Modified Bitumen (CRMB). It entered into a contract with M/s. Afcons Infrastructure Ltd. (Afcons) for supply of PMB at their work site. As per the agreement, raw materials-base bitumen and certain additives were to be supplied by Afcons to Osnar directly at the site.

At site, Osnar, in its mobile polymer modification plant, was required to heat the bitumen at a certain temperature to which polymer and additives were added under constant agitation for a specified period. Thereafter, stone aggregates were mixed with this hot agitated bitumen. The resultant product-PMB was a superior quality binder with enhanced softening point, penetration, ductility, viscosity and elastic recovery.

Revenue contended that the aforesaid process carried out by the assessee (Osnar) at the work site amounted to manufacture of PMB in terms of section 2(f) of the Central Excise Act, 1944 because the end products [PMB and CRMB] were different from bitumen. Further, bitumen and polymer were classifiable under tariff entries different from the finished products-PMB and CRMB. Moreover, one of the essential conditions for the purpose of levy of excise duty i.e. the test of marketability was satisfied because PMB and CRMB were commercially known in the market for being bought and sold.

Point of Dispute: Whether the addition and mixing of polymers and additives to base bitumen results in the manufacture of a new marketable commodity and as such exigible to excise duty?

Observations of the Court: The Supreme Court opined that "manufacture" could be said to have taken place only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use. It was a well settled principle that mere improvement in quality did not amount to manufacture. It was only when the change or a series of changes take the commodity to a point where commercially it could no longer be regarded as the original commodity but was instead recognized as a new and distinct article that manufacture could be said to have taken place. The Court noted that the said process merely resulted in the improvement of quality of bitumen. Bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely mixing of aggregates for constructing the roads.

The Apex Court further noted that as per section 2(f)(ii) of the Central Excise Act, 1944, the expression manufacture includes any process which is specified in relation to any goods in the Section or Chapter Notes of First Schedule to the Tariff Act. Thus, it is manifest that in order to bring a process within the ambit of said clause, the same is required to be recognised by the legislature as manufacture in relation to such goods in the Section notes or Chapter notes of the First Schedule to the Tariff Act. However, a plain reading of the Schedule to the Act made it clear that the process carried out by the assessee had nowhere been specified in the Section notes or Chapter notes so as to indicate that the said process amounts to manufacture.

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

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

Grasim Industries Ltd. v. UOI 2011 (273) E.L.T. 10 (S.C.)

Facts of the case: The assessee was the manufacturer of the white cement. He repaired his worn out machineries/parts of the cement manufacturing plant at its workshop such as damaged roller, shafts and coupling with the help of welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams, etc. In this process of repair, M.S. scrap and Iron scrap were generated. The assessee cleared this metal scrap and waste without paying any excise duty. The Department issued a show cause notice demanding duty on the said waste contending that the process of generation of scrap and waste amounted to manufacture in terms of section 2(f) of the Central Excise Act.

Observations of the Court: The Apex Court observed that manufacture in terms of section 2(f), inter alia, includes any process incidental or ancillary to the completion of the manufactured product. This ‘any process’ can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient.

However, in the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, had no contribution or effect on the process of manufacturing of the cement, (the end product). The repairing activity can never be called as a part of manufacturing activity in relation to production of end product. Therefore, the M.S. scrap and Iron scrap could not be said to be a by-product of the final product. At the best, it was the by-product of the repairing process.

Decision of the case: The Supreme Court held that the generation of metal scrap or waste during the repair of the worn out machineries/parts of cement manufacturing plant did not amount to manufacture.

4. Are the physician samples excisable goods in view of the fact that they are statutorily prohibited from being sold?

Medley Pharmaceuticals Ltd. v. CCE & C., Daman 2011 (263) E.L.T. 641 (S.C.)

Point of dispute: The question which arose for consideration was whether physician samples of patent and proprietary medicines intended for distribution to medical practitioner as free samples, satisfied the test of marketability. The appellant contended that since the sale of the physician samples was prohibited under the Drugs and Cosmetics Act, 1940 and the rules made thereunder, the same could not be considered to be marketable.

Observations of the Court: Supreme Court observed that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Physician sample was capable of being sold in open market.

Moreover, the Drugs and Cosmetics Act, 1940 (Drugs Act) and the Central Excise Act, 1944 operated in different fields. The restrictions imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss. Prohibition on sale of physician samples under the Drugs Act did not have any bearing or effect on levy of excise duty.

Decision of the case: The Court inferred that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Since physician sample was capable of being sold in open market, the physician samples were excisable goods and were liable to excise duty.

Note*: This case was affirmed in case of Medley Pharmaceuticals Ltd. v. Commissioner - 2011 (269) E.L.T. A20 (S.C.).*

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

Usha Rectifier Corpn. (I) Ltd. v. CCEx., New Delhi 2011 (263) E.L.T. 655 (S.C.)

Facts of the case: The appellant was a manufacturer of electronic transformers, semi-conductor devices and other electrical and electronics equipments. During the course of such manufacture, the appellant also manufactured machinery in the nature of testing equipments to test their final products.

Balance sheet of the appellant stated that the testing equipments had been capitalised. The said position was further substantiated in the Director's report wherein it was mentioned that during the year, the company developed a large number of testing equipments on its own.

However, the assessee contended that such items were assembled in the factory for purely research and development purposes, but research being unsuccessful, same were dismantled. Hence, it would not amount to manufacture.

The appellant further submitted that the said project was undertaken only to avoid importing of such equipment from the developed countries with a view to save foreign exchange.

Decision of the case: The Supreme Court observed that once the appellant had themselves made admission regarding the development of testing equipments in their own Balance Sheet, which was further substantiated in the Director's report, it could not make contrary submissions later on. Moreover, assessee's stand that testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange, confirmed that such equipments were saleable and marketable. Hence, the Apex Court held that duty was payable on such testing equipments.

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

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (260) E.L.T. 338 (S.C.)

Facts of the case: In the instant case, the product had a shelf-life of 2 to 3 days. The appellant contended that since the product did not have shelf-life, it did not satisfy the test of marketability.

Decision of the case: The Supreme Court ruled that short shelf-life could not be equated with no shelf-life and would not ipso facto mean that it could not be marketed. A shelf-life of 2 to 3 days was sufficiently long enough for a product to be commercially marketable. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it was shown that the product had absolutely no shelf-life or the shelf-life of the product was such that it was not capable of being brought or sold during that shelf-life.

7. Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?

Bata India Ltd. v. CCE 2010 (252) ELT 492 (SC)

Facts of the case: The assessee was a well known manufacturer of footwear. During the manufacture of foot wear, it manufactured a product called double textured fabric which was captively used as upper material in the manufacture of foot wear.

Points of dispute: Revenue contended that since this product emerged as a distinct product with specific properties and character other than that of original fabric used as input and the said product was marketable, the assessee was liable to pay duty on it.

However, assessee contended that the intermediate product was not marketable. It produced the certificate from the technical authorities to prove that the product in question had no commercial identity.

Decision of the case: The Apex Court observed that marketability is essentially a question of fact to be decided on the basis of facts of each case and there can be no generalization. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. **The mere theoretical possibility of the product being sold is not sufficient; there has to be sufficient proof that the product is commercially known.** Theory and practice will not go together when one examines the marketability of a product.

The Supreme Court ruled that the burden to show that the product is marketable or capable of being bought or sold is entirely on the Revenue. Without proof of marketability, the intermediate product would not be goods much less excisable goods. Revenue, in the given case, had not produced any material before the Tribunal to show that the product was either being marketed or capable of being marketed, but expressed its opinion unsupported by any relevant materials. Thus, the intermediate product was not marketable and not liable to excise duty.

Note: The above judgment is in conformity with the explanation to section 2(d) of the Central Excise Act, 1944.

8. **Whether the machine which is not assimilated in permanent structure would be considered to be moveable so as to be dutiable under the Central Excise Act?**

CCE v. Solid & Correct Engineering Works and Ors 2010 (252) ELT 481 (SC)

Facts of the case: The assessee was engaged in the manufacture of asphalt batch mix and drum mix/hot mix plant by assembling and installing its parts and components. The Revenue contended that setting up of such plant by using duty paid components amounts to manufacture of excisable goods as the assembled plant was not an immovable property.

Decision of the case: The Court observed that as per the assessee, the machine was fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth, but because a foundation was necessary to provide a wobble free operation to the machine. It opined that an attachment without necessary intent of making the same permanent cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently.

Hence, the Supreme Court held that the plants in question were not immovable property so as to be immune from the levy of excise duty. Consequently, duty would be levied on them.

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

CCE v. Tarpaulin International 2010 (256) E.L.T. 481 (S.C.)

Facts of the case: The assessee was engaged in manufacture of 'tarpaulin made-ups'. The tarpaulin made-ups were prepared by cutting and stitching the tarpaulin cloth into various sizes and thereafter fixing the eye-lets. Department viewed that the "tarpaulin made-ups" so prepared amounted to manufacture and, hence, they were exigible to duty. However, the assessee stated that the process of mere cutting, stitching and putting eyelets did not amount to manufacture and hence, the Department could not levy excise duty on tarpaulin made-ups.

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

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

CCE v. GTC Industries Ltd. 2011 (266) E.L.T. 160 (Bom.)

Facts of the case: A roll of aluminium foil was cut horizontally to make separate pieces of the foil and word 'PULL' was embossed on it. Thereafter, fixed number cigarettes were wrapped in it. Aluminium foil, being resistant to moisture, was used as a protector for the cigarettes and to keep them dry.

Revenue submitted that the process of cutting and embossing aluminium foil amounted to manufacture. Since the aluminium foil was used as a shell for cigarettes to protect them from moisture; the nature, form and purpose of foil were changed.

Decision of the case: The High Court pronounced that cutting and embossing did not transform aluminium foil into distinct and identifiable commodity. It did not change the nature and substance of foil. The said process did not render any marketable value to the foil, but only made it usable for packing. There were no records to suggest that cut to shape/embossed aluminium foils used for packing cigarettes were distinct marketable commodity. Hence, the High Court held that the process did not amount to manufacture as per section 2(f) of the Central Excise Act, 1944. Only the process which produces distinct and identifiable commodity with marketable value can be called manufacture.

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

    CCE v. Sony Music Entertainment (I) Pvt. Ltd. 2010 (249) E.L.T. 341 (Bom.)

    Facts of the case: The appellant imported recorded audio and video discs in boxes of 50 and packed each individual disc in transparent plastic cases known as jewel boxes. An inlay card containing the details of the content of the compact disc was also placed in the jewel box. The whole thing was then shrink wrapped and sold in wholesale. The Department contended that the said process amounted to manufacture.

    Decision of the case: The High Court observed that none of the activity that the assessee undertook involved any process on the compact discs that were imported. It held that the Tribunal rightly concluded that **the activities carried out by the respondent did not amount to manufacture since the compact disc had been complete and finished when imported by the assessee**. They had been imported in finished and completed form.

2

CLASSIFICATION OF EXCISABLE GOODS

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

   Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd. 2012 (278) E.L.T. 581 (S.C.)

   Facts of the Case: The assessee started manufacturing rockwool and slagwool using more than 25% by weight of blast furnace slag in 1993 and classified them under Central Excise Tariff sub-heading 6803.00 chargeable at the rate of 18% (i.e. Slagwool, Rockwool and similar mineral wools). However, another sub-heading 6807.10 was introduced in the Central Excise Tariff subsequently vide one of the Union Budgets covering *'Goods having more than 25% by weight blast furnace slag'* chargeable at the rate of 8%. Accordingly, the assessee classified the goods under new sub-heading.

   Point of Dispute: The Revenue contended that when there was a specific sub-heading, i.e. 6803.00 wherein the goods, such as Slagwool, Rockwool and similar wools were enumerated, that entry was required to be applied and not Chapter sub-heading 6807.10.

   Observations of the Court: The Supreme Court held that there was a specific entry which speaks of Slagwool and Rockwool under sub-heading 6803.00 chargeable at 18%, but there was yet another entry which was consciously introduced by the Legislature under sub-heading 6807.10 chargeable at 8%, which speaks of goods in which Rockwool, Slag wool and products thereof were manufactured by use of more than 25% by weight of blast furnace slag.

   It was not in dispute that the goods in question were those goods in which more than 25% by weight of one or more of red mud, press mud or blast furnace slag was used. If that be the case, then, in a classification dispute, an entry which was beneficial to the assessee was required to be applied. Further, tariff heading specifying goods according to its composition should be preferred over the specific heading. Sub-heading 6807.10 was specific to the goods in which more than 25% by weight, red mud, press mud or blast furnace slag was used as it was based entirely on material used or composition of goods.

   Decision of the Case: Therefore, the Court opined that the goods in issue were appropriately classifiable under Sub-heading 6807.10 of the Tariff.

Note: The description and rate of above relevant entries under sub-heading 6803.00 and sub-heading 6807.10 of the Tariff at the relevant time was as given below:

Heading	*Sub-Heading*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
6803	*6803.00*	*Slagwool, Rockwool and similar mineral wools*	*18%*
6807		*Goods, in which more than 25% by weight of red mud, press mud or blast furnace slag or one or more of these materials have been used; all other articles of stone, plaster, cement, asbestos, mica or of similar materials, not elsewhere specified or included.*	
	6807.10	*Goods, in which more than 25% by weight of red mud, press mud or blast furnace slag or one or more of these materials have been used.*	*8%*

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

CCE v. Wockhardt Life Sciences Ltd. 2012 (277) E.L.T. 299 (S.C.)

Facts of the Case: The assessee manufactured Povidone Iodine Cleansing Solution USP and Wokadine Surgical Scrub. The only difference between these two products was that Wokadine was a branded product whereas Povidone Iodine Cleansing Solution was a generic name. The products were antiseptic and used by the surgeons for cleaning or de-germing their hands and scrubbing the surface of the skin of the patient before operation.

Point of Dispute: The assessee classified its products under Chapter Heading 3003 as medicaments. However, the Revenue contended that the said products were not medicaments in terms of Chapter Note 2(i) of Chapter 30 of the Central Excise Tariff Act* as it neither had "Prophylactic" nor "Therapeutic" usage. The Revenue said that in order to qualify as a medicament, the goods must be capable of curing or preventing some disease or ailment. It was the stand of the Department that since the assessee's products were essentially used as medical detergent, it would be classifiable under Chapter Sub-heading 3402.90.

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

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

**Note* : *"Medicament" means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within heading 30.02 or 30.04 which are either:*

(a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or

(b) unmixed products suitable for such uses put up in measured doses or in packing for retail sale or for use in hospitals.

Further, the Tariff Items under chapter heading 3003 and chapter sub-heading 3402.90, at the relevant time were as follows:

Heading No.	*Sub-heading No.*	*Description of goods*	*Rate of duty*
30.03		*Medicaments (including veterinary medicaments)*	
	3003.10	*Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic.*	*15%*
	3003.20	*Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems. Medicaments, including those in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems.*	*8%*
34.02		*Organic surface active agents (other than soap): surface-active preparations, washing preparations (including auxiliary washing preparations and cleaning preparation, whether or not containing soap).*	
	3402.90	*Other*	*18%*

3. Can the ‘soft serve’ served at McDonalds India be classified as “ice cream” for the purpose of levying excise duty?

CCEx. v. Connaught Plaza Restaurant (Pvt) Ltd. 2012 (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 the Prevention of Food Adulteration Act, 1955 (PFA), the milk fat content of “ice-cream” and “softy ice-cream” shall not be less than 10%. Hence, if the ‘soft serve’, containing 5% milk fat content is classified as “ice-cream”, it would make the assessee liable to prosecution under the PFA.

The SC observed that the definition of one statute (PFA) having a different object, purpose and scheme could not be applied mechanically to another statute (Central Excise Act). The object of the Excise Act is to raise revenue whereas the provisions of PFA are for ensuring quality control. Thus, the provisions of PFA have nothing to do with the classification of goods subjected to excise duty under a particular tariff entry.

(ii) The assessee submitted that “soft serve” could not be considered as “ice-cream” as it was marketed by the assessee world over as ‘soft serve’.

SC rejected this averment on the ground that the manner, in which a product might be marketed by a manufacturer, did not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters was the way in which the consumer perceived the product notwithstanding marketing strategies. An average reasonable person who walked into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', could not be expected to be aware of intricate details such as the percentage of milk fat content, milk 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. Supreme Court, after considering various judgments, concluded that in the absence of a statutory definition or technical description, interpretation ought to be in accordance with common parlance principle and not according to scientific and technical meanings.

(iv) The assessee contended that based on rule 3(a) of the General Rules of Interpretation which stated that a specific entry should prevail over a general entry, 'soft serve' would fall under Heading 04.04 since it was a specific entry.

The Supreme Court rejecting this contention held that in the presence of Heading 21.05 (ice cream), "ice cream" could not be classified as a dairy product under Heading 04.04. Heading 21.05 was clearly a specific entry.

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

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

Note: The description and rate of the relevant entries during the period in question is given below:

Heading	*Sub-Heading*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
21.05	*2105.00*	*Ice-cream and other edible ice, whether or*	*16%*

		not containing cocoa	
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*

Note – *The headings cited in the case laws mentioned above may not co-relate with the headings of the present Excise Tariff as they relate to an earlier point of time.*

3

VALUATION OF EXCISABLE GOODS

1. **In a case where a product is sold below the cost price for penetrating the market, whether such price can be considered as transaction value?**

   CCEx., Mumbai v. Fiat India Pvt. Ltd. 2012 (283) E.L.T. 161 (S.C.)

   Facts of the Case: The Fiat India Pvt. Ltd. (Fiat) was the manufacturer of motor cars. They were selling Fiat UNO model cars below cost and were making losses in wholesale trade. The purpose was penetration of market and competing with other manufacturers of similar goods. The prices were not based on manufacturing cost and profit. The cost of production of the cars was much more than their wholesale price, but they were being sold at loss for a consideration. This was happening over the period of five years.

   Point of Dispute: - The Department disputed that as the extra commercial consideration was involved in this case, an additional consideration should be added to the price for the purpose of duty.

   Observations of the Court: The Supreme Court observed that as per section 4(1)(a) of the Central Excise Act, 1944, duty is paid on the "transaction value" in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale. If any of these ingredients is missing, the price shall not be considered as transaction value.

   Supreme Court opined that there was an extra commercial consideration in artificially depressing the price. Full commercial cost of manufacturing and selling was not reflected in the price as it was deliberately kept below the cost of production. Thus, price could not be considered as the sole consideration for sale. No prudent business person would continuously suffer huge loss only to penetrate market; they are expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. It is immaterial that the cars were not sold to related persons.

   Decision of the Case: The Apex Court therefore held that, in the instant case, the selling price could not be accepted as transaction value.

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 of the case: 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.

4

CENVAT CREDIT

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

   Flex Engineering Ltd. v. Commissioner of Central Excise, U.P. 2012 (276) E.L.T. 153 (S.C.)

   Facts of the Case: The assessee, a manufacturer was engaged in the manufacturing of various types of packaging machines, marketed as Automatic Form Fill and Seal Machines ('F&S machines' in short). The machines were 'made to order', in as much as all the dimensions of the packaging/sealing pouches, for which the F&S machine is required, are provided by the customer. The purchase order contained the following inspection clause:

   "Inspection/trial will be carried out at your works in the presence of our engineer before dispatch of equipment for the performance of the machine."

   The testing material to be used was Flexible Laminated Plastic Film in roll form & Poly Paper which were duty paid. As the machine ordered was customer specific, if after inspection by the customer it was found deficient in respect of its operations for being used for a particular specified packaging, it could not be delivered to the customer, till it was re-adjusted and tuned to make it match with the required size of the pouches as per the customer's requirement. On completion of the above process and when the customer was satisfied, the machine was declared as manufactured, ready for clearance.

   Point of Dispute: The assessee claimed the CENVAT credit of the material used for testing of the packaging machines. However, the Department contended that credit could not be availed on such testing material and denied the CENVAT credit on the same.

   Observations of the Court: The Supreme Court observed that the process of manufacture would not be complete if a product is not saleable as it would not be marketable and the duty of excise would not be leviable on it.

   The Supreme Court was of the opinion that the process of testing the customized F&S machines was inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the afore-extracted covenant in the purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence, not marketable at the factory gate.

Decision of the Case: The Court was, therefore, of the opinion that the manufacturing process in the present case gets completed on testing of the said machines. Hence, the afore-stated goods *viz*. the flexible plastic films used for testing the F&S machines are inputs used in relation to the manufacture of the final product and would be eligible for CENVAT credit.

2. The assessee claimed the CENVAT credit on the duty paid on capital goods which were later destroyed by fire. The Insurance Company reimbursed the amount inclusive of excise duty. Is the CENVAT credit availed by the assessee required to be reversed?

   CCE v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.)

   Facts of the case: The assessee purchased some capital goods and paid the excise duty on it. Since, said capital goods were used in the manufacture of excisable goods, he claimed the CENVAT credit of the excise duty paid on it. However, after three years the said capital goods (which were insured) were destroyed by fire. The Insurance Company reimbursed the amount to the assessee, which included the excise duty, which the assessee had paid on the capital goods. Excise Department demanded the reversal of the CENVAT credit by the assessee on the ground that the assessee had availed a double benefit.

   Decision of the case: The High Court observed that merely because the Insurance Company paid the assessee the value of goods including the excise duty paid, that would not render the availment of the CENVAT credit wrong or irregular. At the same time, it did not provide a reason to the Excise Department to demand reversal of credit or default to pay the said amount.

   The assessee had paid the premium and covered the risk of this capital goods and when the goods were destroyed in terms of the Insurance policy, the Insurance Company had compensated the assessee. It was not a case of double payment as contended by the Department. The High Court, therefore, answered the substantial question of law in favour of the assessee.

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

   CCus. v. Prime Health Care Products 2011 (272) E.L.T. 54 (Guj.)

   Facts of the case: The assessee was engaged in the manufacture of tooth paste. It was sold as a combo pack of tooth paste and a bought out tooth brush. The assessee availed CENVAT credit of central excise duty paid on the tooth brush. Revenue contended that the tooth brush was not an input for the manufacture of the tooth paste and the cost of tooth brush was not added in the M.R.P. of the combo pack and hence, the assessee had availed CENVAT credit of duty paid on tooth brush in contravention of the provisions of the CENVAT Credit Rules, 2004.

Observations of the Court: The High Court noted that the process of packing and re-packing the input that was, toothbrush and tooth paste in a unit container would fall within the ambit of "manufacture" [as per section 2(f)(iii) of the Central Excise Act, 1944].

Further, the word "input" as defined in rule 2(k) of the CENVAT Credit Rules, 2004 also include accessories of the final products cleared along with final product. There was no dispute about the fact that on toothbrush, excise duty had been paid. The toothbrush was put in the packet along with the tooth paste and *no extra amount was recovered from the consumer for the toothbrush**.

Decision of the case: Considering the definition of the "input" and the provisions contained in rule 3 of the CENVAT Credit Rules, 2004, the High Court upheld the Tribunal's decision that the CENVAT credit was admissible on bought out tooth brush.

**Note: The above case is based on the old definition of inputs as it stood prior to 01.03.2011.*

The erstwhile definition, inter alia, stipulated that input includes accessories of the final products cleared along with the final product. It is important to note that the new definition also stipulates that input includes accessories of the final products cleared along with the final product albeit with a condition that the value of such accessory should be included in the value of the final product.

In the aforesaid judgment, since no extra amount was recovered from the customer on the toothbrush, it may be inferred that the value of the toothbrush was included in the value of the final product i.e., toothpaste. Hence, the judgment holds good in terms of the new definition of inputs as well.

4. Whether penalty can be imposed on the directors of the company for the wrong CENVAT credit availed by the company?

Ashok Kumar H. Fulwadhya v. UOI 2010 (251) E.L.T. 336 (Bom.)

Observations of the Court: The Court observed that words "any person" used in rule 13(1) of the erstwhile CENVAT Credit Rules, 2002 [now rule 15(1) of the CENVAT Credit Rules, 2004] clearly indicate that the person who has availed CENVAT credit shall only be the person liable to the penalty. Further, in the instant case, CENVAT credit had been availed by the company and the penalty under rule 13(1) [now rule 15(1)] was imposable only on the person who had availed CENVAT credit [company in the given case], namely the manufacturer.

Decision of the case: The Court held that the petitioners-directors of the company could not be said to be manufacturer availing CENVAT credit and penalty cannot be imposed on them for the wrong CENVAT credit availed by the company.

5. Can CENVAT credit be taken on the basis of private challans?

CCEx. v. Stelko Strips Ltd. 2010 (255) ELT 397 (P & H)

Point of dispute: The issue under consideration before the High Court in the instant case was that whether private challans other than the prescribed documents are valid for taking MODVAT credit under the Central Excise Rules, 1944.

Observations of the Court: The High Court placed reliance on its decision in the case of *CCE v. M/s. Auto Spark Industries CEC No. 34 of 2004 decided on 11.07.2006* wherein it was held that once duty payment is not disputed and it is found that documents are genuine and not fraudulent, the manufacturer would be entitled to MODVAT credit on duty paid on inputs.

The High Court also relied on its decision in the case of *CCE v. Ralson India Ltd. 2006 (200) ELT 759 (P & H)* wherein it was held that if the duty paid character of inputs and their receipt in manufacturer's factory and utilization for manufacturing a final product is not disputed, credit cannot be denied.

Decision of the case: The High Court held that MODVAT credit could be taken on the strength of private challans as the same were not found to be fake and there was a proper certification that duty had been paid.

Note: Though, the principle enunciated in the above judgement is with reference to the erstwhile Central Excise Rules, 1944, the same may apply in respect of the CENVAT Credit Rules, 2004 also.

6. 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 trail batches were removed on payment of excise duty and thus, CENVAT credit of service tax paid in respect of such services could not be denied.

As regards the commission paid to foreign agents, the High Court observed that there was nothing on record to indicate that the foreign agents were actually involved in any sales promotion activities like advertising which was covered in inclusive part of definition of input service. The High Court further elaborated that neither were such services used directly or indirectly, in or in relation to manufacture of final products or clearance of final products from (now upto) place of removal nor were they analogous to illustrative activities mentioned in the Rule 2(l) viz., accounting, auditing, etc.

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

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

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

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

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 its 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 of the case: 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.

8. Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice?

CCE v. Bhuwalka Steel Industries Ltd. 2010 (249) ELT 218 (Tri-LB)

The Larger Bench of the Tribunal held that each case had to be decided according to merits and no hard and fast rule can be laid down for dealing with different kinds of shortages. Decision to allow or not to allow credit under rule 3(1) of the CENVAT Credit Rules, 2004, in any particular case, will depend on various factors such as the following:-

(i) Whether the inputs/capital goods have been diverted en-route or the entire quantity with the packing intact has been received and put to the intended use at the recipient factory?

(ii) Whether the impugned goods are hygroscopic in nature or are amenable to transit loss by way of evaporation etc?

(iii) Whether the impugned goods comprise countable number of pieces or packages and whether all such packages and pieces have been received and accounted for at the receiving end?

(iv) Whether the difference in weight in any particular case is on account of weighment on different scales at the despatch and receiving ends and whether the same is within the tolerance limits with reference to the erstwhile Standards of Weights and Measures Act, 1976 [now Legal Metrology Act, 2009]?

(v) Whether the recipient assessee has claimed compensation for the shortage of goods either from the supplier or from the transporter or the insurer of the cargo?

Tolerances in respect of hygroscopic, volatile and such other cargo have to be allowed as per industry norms excluding unreasonable and exorbitant claims. Similarly, minor variations arising due to weighment by different machines will also have to be ignored if such variations are within tolerance limits.

5

DEMAND, ADJUDICATION AND OFFENCES

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

   Hans Steel Rolling Mill v. CCEx., Chandigarh 2011 (265) E.L.T. 321 (S.C.)

   Observations of the Court: The Apex Court elucidated that compounded levy scheme is a separate scheme from the normal scheme for collection of excise duty on goods manufactured. Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty. Since the compounded levy scheme is a comprehensive scheme in itself, general provisions of the Central Excise Act and rules are excluded.

   The Supreme Court affirmed that importing one scheme of tax administration to a different scheme is inappropriate and would disturb smooth functioning of such unique scheme.

   Decision of the case: Hence, the Supreme Court held that the time-limit under section 11A of the Central Excise Act, 1944 is not applicable to recovery of dues under compounded levy scheme.

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

   Raghunath International Ltd. v. Union of India, 2012 (280) E.L.T. 321 (All.)

   Facts of the Case: The appellant was engaged in the manufacture and clearance of Gutkha and Pan Masala. Search and seizure was conducted at the appellant's premises by the officers of the Directorate General of Central Excise, New Delhi. A show-cause notice was issued by Additional Director General, Directorate General of Central Excise Intelligence, asking the petitioner to show cause to the Commissioner of Central Excise, Kanpur within 30 days as to why the duty, penalty and interest were not to be imposed.

   Point of Dispute: The appellant contended that Additional Director General, Directorate General of Central Excise Intelligence had no jurisdiction to issue the Show Cause Notice. It was contended that he was not a "Central Excise Officer" within the meaning of section 2(b) of the Central Excise Act, 1944. It was further contended that no notification regarding his appointment as Central Excise Officer was published in the Official Gazette as required by the rule 3(1) of the Central Excise Rules, 2002.

Another contention raised by the appellant was that the authority who had issued the show cause notice ought to have obtained prior permission from the adjudicating authority before issuing the Show Cause Notice.

Observations of the Court: The High Court noted that the Board had issued notification dated 26-6-2001*, in exercise of power under section 2(b) of the Central Excise Act, 1944 read with sub-rule (1) of rule 3 of the Central Excise Rules, 2002, appointing the specified officers as Central Excise Officer and investing them with all the powers, to be exercised by them throughout the territory of India. In this notification, Additional Director General, Directorate General of Central Excise Intelligence was specified as Commissioner of Central Excise.

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

The Court further stated that no such provision had been referred to nor shown which may require approval before issuing the show cause notice of the adjudicating authority/officer.

**Note: Central Excise Officer is defined under section 2(b) of the Central Excise Act, 1944. As per the said definition, Central Board of Excise and Customs is empowered to invest any person (including an officer of the State Government) with any of the powers of a Central Excise Officer under this Act. Pursuant to the powers conferred under this section, CBEC vide Notification No. 38/2001-C.E. (N.T) dated 26-6-2001 as amended has invested, inter alia, the Additional Director General, Directorate General of Central Excise Intelligence with the powers of Commissioner of Central Excise.*

3. Whether non-disclosure of a statutory requirement under law would amount to suppression for invoking the larger period of limitation under section 11A?

CC Ex. & C v. Accrapac (India) Pvt. Ltd. 2010 (257) E.L.T. 84 (Guj.)

Facts of the case: The respondent-assessee was engaged in manufacture of various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. The respondent procured Extra Natural Alcohol (ENA) from the local market on payment of duty, to which Di-ethyl Phthalate (DEP) was added so as to denature it and to render the same unfit for human consumption. The addition of DEP to ENA results in the manufacture of an intermediate product i.e. Di-ethyl Alcohol. The Department alleged that the said intermediate product was liable to central excise duty.

Point of dispute: The question which arose before the High Court in the instant case is whether non-disclosure as regards manufacture of Di-ethyl Alcohol amounts to suppression of material facts thereby attracting the extended period of limitation under section 11A.

Decision of the case: The Tribunal noted that denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP) Act. Thus, addition of DEP to ENA to make the same unfit for human consumption was a statutory requirement. Hence, failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement. Further, as similarly situated assessees were not paying duty on Di-ethyl alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

The High Court upheld the Tribunal's judgment and pronounced that non-disclosure of the said fact on the part of the assessee would not amount to suppression so as to call for invocation of the extended period of limitation.

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

Jay Kumar Lohani v. CCEx 2012 (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. The High Court opined that since it was not a case of show cause notice being issued without jurisdiction, adjudicating authority could not be restrained from proceeding further with the SCN.

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

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

C.C.E. & C. v. Gujarat Narmada Fertilizers Co. Ltd. 2012 (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 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 inserting 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 of the case: The High Court held that the assessee was not required to pay interest in case of voluntary payment of time-barred duty.

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

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 within 30 days 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 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 from the date of communication of the order increasing the duty.

Decision of the case: In the light of the aforesaid discussion, the High Court held that Tribunal could not permit 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)].

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 terms of 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 the 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.).*

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

CCEx. v. Balaji Trading Co. 2013 (290) E.L.T. 200 (Del.)

Facts of the case: 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.

Decision of the case: 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.

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

Nanumal Glass Works v. CCEx. Kanpur, 2012 (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 of the case: 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.

6

REFUND

1. **If Revenue accepts judgment of the Commissioner (Appeals) on an issue for one period, can it be precluded to make an appeal on the same issue for another period?**

   Commissioner of C. Ex., Mumbai-III v. Tikitar Industries, 2012 (277) E.L.T. 149 (S.C.)

   Facts of the Case: The assessee was a manufacturer of the 'Bitulux Insulation Board' known as 'TikkiExjo Filler'. The 'TikkiExjo Filler' was obtained by the process of bituminization of the insulation board. The adjudicating authority concluding that the above process amounts to manufacture, levied excise duty on it. Aggrieved by the order, the assessee carried an appeal before the Commissioner (Appeals), who accepted the assessee's stand and held that the above process did not amount to manufacture. Department did not appeal against it and the above order of the appellate authority attained finality.

   In the meantime, the Revenue issued several demand notices to the assessee directing the assessee to pay the duty, but for a time period different from the period covered in the said appeal.

   Decision of the Case: The Supreme Court held that since the Revenue had not questioned the correctness or otherwise of the findings on the conclusion reached by the first appellate authority, it might not be open for the Revenue to contend this issue further by issuing the impugned show cause notices on the same issue for further periods.

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

   CCE v. Techno Rubber Industries Pvt Ltd. 2011 (272) E.L.T. 191 (Kar.)

   Facts of the case: The assessee cleared the goods paying higher rate of excise duty in the month of March, although the rate of duty on the said goods had been reduced in the budget of the same financial year. However, the buyer refused to pay the higher duty which the assessee had paid by mistake. He raised a debit note in the name of seller in the month of June of the same year. The assessee applied for the refund of excess excise duty paid. Revenue rejected his claim on the ground that incidence of the duty had been passed by him to the buyer.

While claiming refund, the assessee relied on the debit note raised by the buyer in his name in the month of June to demonstrate that his customer had not paid the excess duty to him. The adjudicating authority argued that since the debit note was issued in the month of June and not March, it could not be the basis for refund of the duty paid in the month of March.

Decision of the case: The High Court elucidated that once it is admitted that the Department has received excess duty, they are bound to refund it to the person who has paid the excess duty. If the buyer of the goods has paid that excess duty, he would have been entitled to the said refund.

In the instant case, when the buyer had refused to pay excess duty claimed and had raised a debit note, the only inference to be drawn was that the assessee had not received that excess duty which he had paid to the Department. Consequently, Department was bound to refund to the assessee the excess duty calculated. Hence, the substantial question of law raised was answered in favour of the assessee and against the Revenue.

2. **Merely because assessee has sustained loss more than the refund claim, is it justifiable to hold that it is not a case of unjust enrichment even though the assessee failed to establish the non-inclusion of duty in the cost of production?**

CCE v. Gem Properties (P) Ltd. 2010 (257) E.L.T. 222 (Kar.)

Observations of the Court: The Court observed that indisputably, the assessee was not liable to pay the duty and was entitled to the refund of the excise duty wrongly paid by it. The claim of the assessee had been rejected on the ground that if the application was allowed, it would amount to unjust enrichment because all the materials sold by the assessee had been inclusive of the duty. Thus, buyer would have ultimately borne the burden of duty. Therefore, the burden had been heavy on the assessee to prove that while computing the cost of the material; it had not included the duty paid by it.

The Court further observed that merely because the assessee had sustained loss in the relevant year, it could not be held that there had been no unjust enrichment. It was evident from the Chartered Accountant's certificate that the cost of the duty was included while computing the cost of production of the material.

Decision of the Case: Therefore, on facts of the case, the High Court answered the question of law in favour of the Revenue. It ruled that assessee could not be granted relief because it had failed to establish that the cost of the duty was not included while computing the cost of the products.

7

APPEALS

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

   Raja Mechanical Co. (P) Ltd. v. Commissioner of C. Ex., Delhi-I, 2012 (279) E.L.T. 481 (S.C.)

   Facts of the case: The assessee was denied the benefit of the CENVAT credit and was directed to pay the duty as there was a delay in filing the prescribed forms before the assessing authority. Aggrieved by that order, the assessee belatedly filed an appeal before the first appellate authority-CCE (Appeals). Since the delay in filing the appeal was beyond the time within which the appellate authority could have condoned the delay, the appeal was dismissed.

   The assessee appealed to Tribunal to first condone the delay and then to decide the appeal on merits, i.e. to decide whether the adjudicating authority was justified in disallowing the benefit of the CENVAT credit that was availed by the assessee. The Tribunal did not concede to the second request made by the assessee and only accepted the findings and conclusions reached by the Commissioner (Appeals), who had rejected the appeal.

   The learned counsel for the assessee contended that in given case, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal should consider the appeal filed by the assessee.

   It further submitted that the Tribunal ought to have considered the assessee's appeal not only on the ground of limitation but also on merits of the case. Since that has not been done, according to the learned counsel, the Tribunal has committed a serious error. The learned counsel further submitted that the "doctrine of merger" theory would apply in the sense that though the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal ought to have considered the appeal.

   On the other hand, the learned counsel for the respondent submitted that the doctrine of merger would not apply to a case where an appeal was dismissed only on the ground of the limitation.

Point of Dispute: The issue under consideration is that in case the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, whether the orders passed by the original authority would merge with the orders passed by the first appellate authority.

Decision of the Case: The Court observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order (order of adjudicating authority) would not merge with the orders passed by the first appellate authority. The Apex Court opined that the High Court was justified in rejecting the request made by the assessee for directing the Revenue to state the case and also the question of law for its consideration and decision. In view of the above discussion, Supreme Court rejected the appeal.

2. **Can re-appreciation of evidence by CESTAT be considered to be rectification of mistake apparent on record under section 35C(2) of the Central Excise Act, 1944?**

CCE v. RDC Concrete (India) Pvt. Ltd. 2011 (270) E.L.T. 625 (S.C.)

Facts of the case: In this case, certain arguments were submitted before the Tribunal at an earlier stage when appeal was heard. The Tribunal rejected these arguments and decided the appeal. Subsequently, when an application for rectification of mistake apparent from record was filed with Tribunal, these arguments were again submitted. The arguments not accepted at an earlier point of time were accepted by the CESTAT while hearing the application for rectification of mistake and it arrived at a conclusion different from earlier one.

Observations of the Court: The Supreme Court observed that arguments not accepted earlier during disposal of appeal cannot be accepted while hearing rectification of mistake application

The Apex Court elucidated that re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. It is a well settled law that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning.

Decision of the case: The Apex Court held that CESTAT had reconsidered its legal view as it concluded differently by accepting the arguments which it had rejected earlier. Hence, the Court opined that CESTAT exceeded its powers under section 35C(2) of the Act. In pursuance of a rectification application, it cannot re-appreciate the evidence and reconsider its legal view taken earlier.

Note: Section 35C(2) reads as under:-

The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal.

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

CCE v. Gujchem Distillers 2011 (270) E.L.T. 338 (Bom.)

The High Court elucidated that in the instant case, the CESTAT had disposed of the appeal on a ground which was not urged by the respondents before the adjudicating authority. Thereby the CESTAT had disposed of the appeal on a totally new ground which was not laid before the adjudicating authority and which would entail a finding on facts.

The High Court explained that had the CESTAT not been satisfied with the approach of the adjudicating authority, it should have remanded the matter back to the adjudicating authority. However, it could not have assumed to itself the jurisdiction to decide the appeal on a ground which had not been urged before the lower authorities.

4. Whether the construction of pre-fabricated components at one site to be used at different inter-connected metro construction sites in Delhi would get covered under exemption *Notification No. 1/2011-C.E.(N.T.) dated 17-2-2011* which exempts 'goods manufactured at the site of construction for use in construction work at such site' ?

Commissioner of Central Excise v. Rajendra Narayan 2012 (281) E.L.T. 38 (Del.)

Facts of the Case: The respondent-assessees were carrying on construction of the Delhi Metro. They had manufactured pre-fabricated components, which have been used in the construction of the Delhi Metro. The assessee claimed exemption from payment of duty under *Notification No. 1/2011-C.E. (N.T.) dated 17-2-2011* which exempts the goods covered under specified chapter headings for a specified period, *manufactured at the site of construction for use in construction work at such site*. The Department contended that the respondent-assessees were not entitled to claim the exemption as said goods were not manufactured at the site of the construction for use in the construction work at the site.

Observations of the Court: The Court noted that Delhi Metro Rail Corporation Ltd. had contracted and called upon the respondent-assessee to construct pre-fabricated components of different segments to be used in elevated viaducts etc. For the purpose of pre-fabricating the components a specific casting yard, premises was allotted by Delhi Metro Rail Corporation Ltd. The said casting yard constituted the construction site. From the said construction site, components had been moved to different locations where elevated viaducts of the tunnel were being constructed.

Decision of the case: The Court held that keeping in view the facts of the case and that the construction was done virtually all over Delhi and construction sites were interconnected, practically prefabrication was done on construction site only. Therefore, it allowed the appeal in the favour of the respondent- assessee.

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

Mihani Network v. CCus. & CEx. 2012 (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 of the case: The High Court held that the condition of depositing 50% of tax amount for condoning the delay is illegal and that the CESTAT ought not to have mixed the issue with the separate application filed for stay.

8

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. Whether the exempted goods on which duty has been paid by mistake by the assessee and refund thereof has also not been claimed would be excluded for computing value of clearances while claiming SSI exemption?

   Bonanzo Engg. & Chemical P. Ltd. v. CCEx. 2012 (277) E.L.T. 145 (S.C.)

   Facts of the case: The appellant was a manufacturer of goods falling under Chapter headings 32 and 84 of the first schedule to the Central Excise Tariff Act, 1985. The goods falling under Chapter heading 84 were wholly exempt from duty vide an exemption notification, but the appellant by mistake paid the excise duty on it and did not even claim refund of the same. For goods falling under Chapter heading 32, the appellant was eligible to claim SSI exemption and wishes to claim the same.

   For the purposes of computing the value of clearances for SSI exemption, the assessee excluded the goods which were exempted although duty was paid mistakenly on them. However, the Revenue contended that clearances of such goods should be included while computing the value of clearances.

   Decision of the Case: The Supreme Court opined that the value of clearances in the SSI exemption notification needs to be computed after excluding the value of exempted goods. Merely because the assessee by mistake paid duty on the goods which were exempted from the duty payment under some other notification, did not mean that the goods would become goods liable for duty under the Act. Further, merely because the assessee had not claimed any refund on the duty paid by him would not come in the way of claiming benefit of the SSI exemption.

   Accordingly, the appeal was allowed in the favor of the assessee. The Court directed the adjudicating authority to apply the SSI exemption notification in the assessee's case without taking into consideration the excess duty paid by the assessee under the other exemption notification.

2. Can the brand name of another firm in which the assessee is a partner, be considered as the brand name belonging to the assessee for the purpose of claiming SSI exemption?

Commissioner v. Elex Knitting Machinery Co. 2010 (258) E.LT. A48 (P & H)

Facts of the Case: The Elex Knitting Machinery Co., the assessee was engaged in the manufacture of flat knitting machines. They had been availing the SSI exemption. They were found using the brand name "ELEX" on those machines. The said brand name belonged to M/s. Elex Engineering Works. The proprietor of Elex Knitting Machinery Co. was a partner in M/s Elex Engineering Works.

Point of Dispute: The Department denied the benefit of the SSI exemption notification solely on the ground that they had manufactured and cleared the goods (flat knitting machines) under the brand name "ELEX" which belonged to M/s. ELEX Engineering Works.

Decision of the case: The Tribunal, when the matter was brought before it, decided the case in favour of assessee and against the Revenue. It held that the appellant was eligible to claim benefit of the SSI exemption as the proprietor of Elex Knitting Machinery Co. was one of the partners in Elex Engineering Works. Thus, being the co-owner of the brand name of "ELEX", he could not be said to have used the brand name of another person, in the manufacture and clearance of the goods in his individual capacity.

The said decision of the Tribunal has been affirmed by the High Court in the instant case.

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

CCE v. Deora Engineering Works 2010 (255) ELT 184 (P & H)

Facts of the case: The respondent-assessee was using the brand name of "Dominant" while clearing the goods manufactured by it. One more manufacturing unit was also engaged in the manufacture and clearance of the same goods under the same brand name of "Dominant" in the same premises. Both the firms had common partners, the brand name was also common and the machines were cleared from both the units under common serial number having common accounts. Department clubbed the clearance of the goods from both the units for the purposes of SSI exemption because both the units belong to same persons and they had common machinery, staff and office premises etc.

Decision of the case: The High Court held that indisputably, in the instant case, the partners of both the firms were common and belonged to same family. They were manufacturing and clearing the goods by the common brand name, manufactured in the same factory premises, having common management and accounts etc. Therefore, High Court was of the considered view that the clearance of the common goods under the same brand name manufactured by both the firms had been rightly clubbed.

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

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

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 Auto-bake 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 of the case: 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.

9

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

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

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

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

10

SETTLEMENT COMMISSION

1. **Can the Settlement Commission decline to grant immunity from prosecution after confirming the demand and imposing the penalty without placing the burden on the Department to prove the clandestine manufacture and clearances of goods?**

   Maruthi Tex Print & Processors P. Ltd. v. C. & C. Ex. Sett.Comm., Chennai 2012 (281) E.L.T. 509 (Mad.)

   Facts of the Case: M/s. Maruthi Tex Print & Processors Pvt. Limited, Hyderabad, was a concern registered with the Excise Department for manufacture of man-made fabrics (MMF) and also for manufacture of cotton fabrics. During the course of business, search was carried out at various places, including the factory, registered office premises, their godown and dealers' premises, which resulted in recovery of certain records relating to delivery of processed fabrics, and seizure of certain quantities of grey and processed fabrics. The Department issued SCN confirming demand at the higher rate of duty and interest and penalty thereon and seized goods also. However, there was no clear evidence to hold that the fabrics mentioned in all delivery challans were attracting higher rate of duty. The assessee approached the Settlement Commission. The Settlement Commission confirmed the entire demand, penalty, seizure and denied the immunity from the prosecution. The assessee approached the High Court against the order of the Settlement Commission.

   Point of Dispute: Can the Settlement Commission decline to grant immunity from prosecution after confirming the demand and imposing the penalty?

   Decision of the Court: The High Court held that when an allegation of clandestine manufacture and clearances is made, the person making the allegation should establish the complete charge including the nature of the goods and its value involved for determining the appropriate demand of duty. The Court noted that out of four members of the Settlement Commission, minority view showed that there was no clear evidence to hold that all the fabrics mentioned in the delivery challans were manmade fabrics attracting higher rate of duty.

   Further, the High Court stated that if a person, who suffered a show cause notice on the charge of evasion of duty, finally wants to settle the matter (before Settlement Commission), by making full disclosure admitting certain omissions/commissions, the Settlement Commission, should decide the matter only after placing the burden on the

Department to prove the nature of goods cleared without payment of duty. However, in the present case, the Settlement Commission confirmed the demand on the assessee without placing the burden on the Department to prove their case.

The High Court was of the view that the Settlement Commission should not have refused the benefit of immunity from prosecution and accordingly set aside the order relating to non-grant of immunity from prosecution. However, it did not interfere with the Commission's order relating to the demand and penalty.

2. **Whether a consolidated return filed by the assessee after obtaining registration, but for the period prior to obtaining registration, could be treated as a return under clause (a) of first proviso to section 32E(1)?**

Icon Industries v. UOI 2011 (273) E.L.T. 487 (Del.)

Facts of the case: The petitioner got its units registered after few days of the search conducted in its units. Thereafter, it filed consolidated return with the Department for the period prior to search. Subsequently, it filed a settlement application in respect of the proceedings issued by the Commissioner.

Point of dispute: The Settlement Commission rejected the petitioner's application on the ground that no returns as mandated by clause (a) of first proviso to section 32E(1) of the Central Excise Act, 1944 were filed (as the units were registered only after the search was conducted).

The assessee contended that a return filed before enquiry or show cause, even though filed belatedly, would entitle him to put forth his grievance before the Settlement Commission and claim the benefit.

Observations of the Court: The High Court noted that certain riders have been provided in section 32E(1) for entertaining applications for settlement. Clause (a) of first proviso clearly lays down that unless the applicant has filed returns, showing production, clearance and central excise duty paid in the prescribed manner, no such application shall be entertained.

The Court referred to the case of *M/s. Emerson Electric Company India Pvt. Ltd. 2005 (189) ELT 377* wherein it was held *inter alia* that

(i) Although section 32E(1) does not refer to rule 12 of the Central Excise Rules, 2002 under which ER-1/ER-3 returns are prescribed, the said returns can be deemed to be the 'returns' referred to in section 32E(1), as the said returns contain details of excisable goods manufactured, cleared and duty paid in the prescribed manner. Hence, the concept of return has to be understood in context of rule 12 of the Central Excise Rules, 2002.

(ii) 'Returns' are to be filed on monthly/quarterly basis. There is no provision for filing the same in a consolidated manner covering more than one month. However, there is no specific bar against 'belated filing of returns'.

(iii) Even if returns (for pre-registration period) are filed after getting ECC Number, the applicant would not be able to indicate 'duty paid' in the prescribed manner (or even in any manner) and question would continue to agitate about the details of production and clearance to be filled in such belated returns.

The High Court explained that in the above case, the Commission has drawn distinction between monthly/quarterly returns filed belatedly but before inquiry/show cause notice and consolidated returns. Whereas monthly/quarterly returns (for post-registration period) filed belatedly but before inquiry/show cause notice can be taken cognizance of for the purpose of Section 32E(1) of the Central Excise Act, 1944 to allow filing settlement application, consolidated returns (for pre - registration period) have not been treated as returns under clause (a) to Section 32E(1).

Decision of the case: Considering the above discussion, the High Court rejected the submission of the petitioner that filing of consolidated return covering all the past periods would serve the purpose. Hence, it held that the order passed by the Settlement Commission was absolutely justifiable.

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

Ashwani Tobacco Co. Pvt. Ltd. v. UOI 2010 (251) E.L.T. 162 (Del.)

Decision of the case: The Court ruled that benefit under the proviso to erstwhile section 11AC [now section 11AC(1)(c)] could not be granted by the Settlement Commission in cases of settlement.

It elucidated **that the order of settlement made by the Settlement Commission is distinct from the adjudication order made by the Central Excise Officer**. The scheme of settlement is contained in Chapter-V of the Central Excise Act, 1944 while adjudication undertaken by a Central Excise Officer is contained in the other Chapters of the said Act. Unlike Settlement Commission, Central Excise Officer has no power to accord immunity from prosecution while determining duty liability under the Excise Act.

Once the petitioner has adopted the course of settlement, he has to be governed by the provisions of Chapter V. Therefore, the benefit under the proviso to section 11AC, which could have been availed when the matter of determination of duty was before a Central Excise Officer did not attract to the cases of a settlement, undertaken under the provisions of Chapter-V of the Act.

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

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

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

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

SERVICE TAX

IMPORTANT NOTE

The Finance Act, 2012 made a major shift in the service tax regime effective from July 1, 2012. While some of the areas of the taxability changed completely, some other, which were more of procedural in nature were retained as they had been in the old regime (i.e. prior to 1st July, 2012). Broadly, the changes can be summarised as follows:

- In the old regime, about 119 services were taxable as per their respective definition, in the new regime, there is a single definition of service encompassing almost all activities not related to sale or manufacture of goods/ immovable property.
- The rules relating to export and import of services in the old regime have been omitted and a new set of rules namely Place of Provision of Services Rules, 2012 (POP rules) have been introduced.
- There is no major change in the Service Tax Rules, 1994 and the Point of Taxation Rules, 2011.
- There is no fundamental change in the Service Tax (Determination of Value of Services) Rules, 2006. The changes in the rules majorly relate to the change in definition and taxability of works contract service.

In the above background, please note that the judgments discussed in the service tax relate to the law applicable in the old regime. However, these judgments would remain relevant in the new regime also. While the fundamental principles, based on which these judgments have been made remain the same in the new regime, the manner and placement of related provisions may be different in the new regime.

1

BASIC CONCEPTS OF SERVICE TAX

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

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

   Facts of the Case: The appellant was engaged in the manufacture of steel products and pig-iron for sale in the domestic and export markets. The respondent was a partnership firm carrying on the business of clearing and forwarding agents. In the year 1997, the appellant appointed the respondent as the handling contractor in respect of appellant's iron and steel materials from their stockyard. A formal contract was entered into between two of them. One of the terms and conditions of the contract read as follows:-

   "The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the service recipient shall provide the contractor with required tax deduction certificate."

   In the year 2000, liability to pay service tax in case of clearing and forwarding agent's services was shifted from service provider (contractor in the given case) to service receiver (the appellant)retrospectively from 16-7-1997 (refer note below). Consequent thereupon, the appellant deducted the service tax on the bills of the respondent. The respondent, however, refused to accept the deductions saying that the contractual clause could not alter the liability placed on the service recipient (appellant) by law.

   Point of Dispute: Where the law places liability to pay service tax on the service recipient, can the service provider be made liable to pay service tax on account of such clause provided in the contract?

   Decision of the Case: The Supreme Court observed that on reading the agreement between the parties, it could be inferred that service provider (contractor) had accepted the liability to pay service tax, since it arose out of discharge of its obligations under the contract.

   With regard to the submission of shifting of service tax liability, the Supreme Court held that service tax is an indirect tax which may be passed on. Thus, assessee can contract to shift its liability.

The Finance Act, 1994 is relevant only between assessee and the tax authorities and is irrelevant in determining rights and liabilities between service provider and service recipient as agreed in a contract between them. There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under the contract between them.

*Note: Under present position of law, liability to pay service tax does not lie on service recipient under clearing and forwarding agent's services. However, the principle derived in the above judgment that **service tax liability can be shifted by one party to the other by way of contractual clause** still holds good.*

2. **Is the service tax and excise liability mutually exclusive?**

   Commissioner of Service Tax v. Lincoln Helios (India) Ltd. 2011 (23) S.T.R. 112 (Kar.)

   Facts of the case: The assessee undertook not only manufacture and sale of its products, but also erection and commissioning of the finished products. The customer was charged for the services rendered as well as the value of the manufactured products. The assessee paid the excise duty on whole value including that for services, but did not pay the service tax on the value of services on the ground that there could not be levy of tax under two parliamentary legislations on the same transaction.

   Decision of the case: The High Court held that the excise duty is levied on the aspect of manufacture and service tax is levied on the aspect of services rendered. Hence, it would not amount to payment of tax twice and the assessee is liable to pay service tax on the value of services.

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

3. **In case where rooms have been rented out by Municipality, can it pass the burden of service tax to the service receivers i.e. tenants?**

   Kishore K.S. v. Cherthala Municipality 2011 (24) S.T.R. 538 (Ker.)

   Facts of the case: The petitioners entered into agreements with the respondent-Municipality and had taken rooms on rent from it. They were called upon to pay service tax. However, they denied to pay the same.

   The primary contentions of the petitioners were as follows:-

   (a) Under the agreement, there was no provision for payment of service tax. Therefore, the demand for payment of service tax was illegal. Further, service tax was payable by the service provider viz. Municipality and there was no authority with which the Municipality could pass it on to the petitioners.

(b) Since they were small tenants, the Municipality must be treated as units of the State within the meaning of Article 289 of the Constitution of India and, therefore, levy of service tax on the property or on the income of the Municipality was unsustainable.

The Revenue contended that service tax was an indirect tax. Though primarily, the person liable to pay the tax was Municipality, there was nothing in the law which prevented passing of the liability to the tenants.

Observations of the case: The High Court rejected the contentions of the assessee and observed as under:-

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

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

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

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

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

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

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of government.

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

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

   Facts of the Case: The assessee was running guest houses for the pilgrims. The Department issued show cause notice stating that the assessee were liable to get service tax registration under "short term accommodation service" and liable to pay service tax. The assessee, on the other hand, submitted that it was a religious and charitable institution and was running guest houses without any profit motive.

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

   Decision of the Case: Therefore, the High Court held that since the petitioner was running guest houses by whatever name called, whether it was a shelter for pilgrims or any other name, it was providing the taxable services and was thus liable to pay service tax.

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

5. Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?

   Infotech Software Dealers Association (ISODA) v. Union of India 2010 (20) STR 289 (Mad.)

   Observations of the Court: The High Court observed that the law as to whether the software is goods or not is no longer res integra as it has been settled by the Supreme Court ruling in *TCS case [2004 (178) ELT 22 (SC)]*. The High Court reiterated that **software is goods as per Article 366(12) of the Constitution**. A software, whether customized or non-customised, would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed.

   On the issue as to whether the transaction would amount to sale or service, the High Court was of the view that it would depend upon the nature of individual transaction. The High Court stated that as a transaction could be exclusive sale or exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax. The High Court explained that when a statute, particularly a taxing statute is considered with reference to the legislative competence, the nature of transaction and the dominant intention of such transaction would be relevant.

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

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

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

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

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

Facts of the case: The assessee was engaged in the manufacture of sugar. The Central Government directed him to maintain buffer stock of free sale sugar for the specified period. In order to compensate the assessee, the Government of India extended buffer subsidy towards storage, interest and insurance charges for the said buffer stock of sugar.

Revenue issued a show cause notice to the assessee raising the demand of service tax alleging that amount received by the assessee as buffer subsidy was for storage and warehousing services.

Decision of the case: The High Court noted that apparently, service tax could be levied only if service of storage and warehousing was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance with the directions of the Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock.

Hence, the High Court held the act of assessee could not be called as rendering of services.

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

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

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

2

PLACE OF PROVISION OF SERVICE

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

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

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

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

3

VALUATION OF TAXABLE SERVICE

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

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

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

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

4

DEMAND, ADJUDICATION AND OFFENCES

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

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

   Facts of the Case: The assessee had paid both the service tax and interest for delayed payment before issue of show cause notice under the Act. Section 73(3) of the Finance Act, 1994 categorically stated that if the payment of service tax and interest has been intimated to the authorities in writing, the authorities should not serve any notice for the amount so paid. But to the above, the authorities initiated the proceedings against the assessee for recovery of penalty under section 76.

   Point of Dispute: Assessee contested the issue of SCN as they had already paid the service tax along with interest for delayed payment of service tax.

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

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

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

   Facts of the Case: KVR Construction was a construction company rendering services under category of construction of residential complex service and were paying service tax in accordance with the provisions of the Finance Act, 1994. They undertook certain construction work on behalf of a trust and paid service tax accordingly. However, later they filed refund claim for the service tax so paid contending that they were not actually liable to pay service tax as it was exempt. Department also did not dispute the fact that service tax was exempted in the instant case.

However, the refund claim was rejected on the ground that same was filed beyond the limitation period provided in section 11B of Central Excise Act.

Point of Dispute: Is assessee eligible to claim refund on service tax paid on construction activity so done by them?

Observations of the Court: The High Court of Karnataka, distinguishing the landmark judgment by Supreme Court in the case of *Mafatlal Industries v. UOI 1997 (89) E.L.T. 247 (S.C.)* relating to refund of duty/tax, held that service tax paid mistakenly under construction service although actually exempt, is payment made without authority of law. Therefore, mere payment of amount would not make it 'service tax' payable by the assessee.

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

Decision of the Case: In view of the above, the High Court held that refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation under section 11B of the Central Excise Act, 1944.

Note: Under the negative list regime of taxation of services, the service of construction of a residential complex is a declared service under clause (b) of section 66E.

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

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

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

5

OTHER PROVISIONS

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

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

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

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

   Further, section 35L of the Act, inter alia, provides that an appeal shall lie to the Supreme Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

CUSTOMS

1

BASIC CONCEPTS

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

   Commissioner of Customs (Import), Mumbai v. Konkan Synthetic Fibres 2012 (278) E.L.T. 37 (S.C.)

   Facts of the Case: Konkan Synthetic Fibres imported one unit of the equipment which was declared as "Kari Mayer High Speed Draw Warping Machine with 1536 ends along with essential spares". The assessee claimed that these goods were covered under an exemption notification.

   Under the said notification, exemption was available in respect of the High Speed Warping Machine with yarn tensioning, pneumatic suction devices and accessories. However, the machine imported by the assessee had drawing unit and not the pneumatic suction device as prescribed in the notification. The Textile Commissioner-who was well conversant with these machines-had stated that the goods imported by the assessee were covered under the exemption notification as drawing unit was just an essential accessory to the machines imported by assessee.

   The Customs authorities refused to grant the benefit of the exemption notification to the assessee and accordingly, directed the assessee to pay the duty under the provisions of the Customs Act, 1962.

   Point of Dispute: The Revenue contended that the machine imported by the assessee was not in consonance with the exemption notification as it had drawing unit and not the pneumatic suction device and, therefore, the benefit of exemption should not be available under the notification to the assessee.

   Decision of the Case: The Supreme Court stated that it was a settled proposition in a fiscal or taxation law that while ascertaining the scope or expressions used in a particular entry, the opinion of the expert in the field of trade, who deals in those goods, should not be ignored, rather it should be given due importance. The Supreme Court on referring to the case of *Collector of Customs v. Swastik Woollens (P) Ltd. 1988 (37) E.L.T. 474 (S.C.),* held that when no statutory definition was provided in respect of an item in the Customs Act or the Central Excise Act, the trade understanding, i.e. the understanding in the opinion of those who deal with the goods in question was the safest guide.

Thus, the Supreme Court concluded that the imported goods were covered under the exemption notification.

2. **Are the clearance of goods from DTA to Special Economic Zone chargeable to export duty under the SEZ Act, 2005 or the Customs Act, 1962?**

   Tirupati Udyog Ltd. v. UOI 2011 (272) E.L.T. 209 (A.P.)

   Decision of the case: The High Court, on the basis of the following observations, inferred that the clearance of goods from DTA to Special Economic Zone is not liable to export duty either under the SEZ Act, 2005 or under the Customs Act, 1962:-

   - A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.
   - SEZ Act does not contain any provision for levy and collection of export duty for goods supplied by a DTA unit to a Unit in a Special Economic Zone for its authorised operations. In the absence of a charging provision in the SEZ Act providing for the levy of customs duty on such goods, export duty cannot be levied on the DTA supplier by implication.
   - With regard to the Customs Act, 1962, a conjoint reading of section 12(1) with sections 2(18), 2(23) and 2(27) of the Customs Act, 1962 makes it clear that customs duty can be levied only on goods imported into or exported beyond the territorial waters of India. Since both the SEZ unit and the DTA unit are located within the territorial waters of India, Section 12(1) of the Customs Act 1962 (which is the charging section for levy of customs duty) is not attracted for supplies made by a DTA unit to a unit located within the Special Economic Zone.

   Notes:

   1. *Chapter X-A of the Customs Act, 1962, inserted by the Finance Act 2002, contained special provisions relating to Special Economic Zones. However, with effect from 11-5-2007, Chapter X-A, in its entirety, was repealed by the Finance Act, 2007. Consequently, Chapter X-A of the Customs Act is considered as a law which never existed for the purposes of actions initiated after its repeal and thus, the provisions contained in this chapter are no longer applicable.*
   2. *Karnataka High Court in case of CCE v. Biocon Ltd. 2011 (267) E.L.T. 28 has also taken a similar view as elucidated in the aforesaid judgment.*

2

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

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

   CCE v. Decorative Laminates (I) Pvt. Ltd. 2010 (257) E.L.T. 61 (Kar.)

   Facts of the case: The respondent imported resin impregnated paper and plywood for the purpose of manufacture of furniture. The said goods were warehoused from the date of its import. The respondent sought an extension of the warehousing period which was granted by the authorities. However, even after the expiry of the said date, it did not remove the goods from the warehouse. Subsequently, the assessee applied for remission of duty under section 23 of the Customs Act, 1962 on the ground that the said goods had become unfit for use on account of non-availability of orders for clearance.

   Observations of the Court: The High Court, while interpreting section 23, stipulated that **section 23 states that only when the imported goods have been lost or destroyed at any time before clearance for home consumption, the application for remission of duty can be considered.** Further, even before an order for clearance of goods for home consumption is made, relinquishing of title to the goods can be made; in such event also, an importer would not be liable to pay duty.

   Therefore, the expression ***"at any time before clearance for home consumption"*** would mean the time period as per the initial order during which the goods are warehoused or before the expiry of the extended date for clearance and not any period after the lapse of the aforesaid periods. The said expression cannot extend to a period after the lapse of the extended period merely because the licence holder has not cleared the goods within the stipulated time.

   Moreover, since in the given case, the goods continued to be in the warehouse, even after the expiry of the warehousing period, it would be a case of goods improperly removed from the warehouse as per section 72(1)(b) read with section 71.

Decision of the case: The High Court, overruling the decision of the Tribunal, held that the circumstances made out under section 23 were not applicable to the present case since the destruction of the goods or loss of the goods had not occurred before the clearance for home consumption within the meaning of that section. When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not permit the remission of duty under section 23 of the Act.

3
CLASSIFICATION OF GOODS

1. Where a classification (under a Customs Tariff head) is recognized by the Government in a notification at any point of time, can the same be made applicable in a previous classification in the absence of any conscious modification in the Tariff?

   Keihin Penalfa Ltd. v. Commissioner of Customs 2012 (278) E.L.T. 578 (S.C.)

   Facts of the Case: Department contended that 'Electronic Automatic Regulators' were classifiable under Chapter sub-heading 8543.89 whereas the assessee was of the view that the aforesaid goods were classifiable under Chapter sub-heading 9032.89. An exemption notification dated 1-3-2002 exempted the disputed goods by classifying them under chapter sub-heading 9032.89. The period of dispute, however, was prior to 01.03.2002.

   Point of Dispute: The dispute was on classification of Electronic Automatic Regulators.

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

2. Whether classification of the imported product changes if it undergoes a change after importation and before being actually used?

   Atherton Engineering Co. Pvt. Ltd. v. UOI 2010 (256) E.L.T. 358 (Cal.)

   Facts of the case: The importer sought to classify the product imported by him i.e. 'Artemia Cyst (Brine Shrimp eggs)' under heading 2309 which included products used as animal feed. However, Revenue contended that the said product was not "prawn feed" at all and was classifiable under the heading 0511.99 which refers to other products in the category of non edible animal products.

   Revenue claimed that these cysts had to be incubated in controlled temperature and oxygen and hydrated in hatcheries. After this incubation, one would get an organism known as Nauplii which is the food for prawn. Therefore, according to them these imported goods have to undergo some "processes" to become 'prawn feed'. Thus, there was misdeclaration of goods

Observations of the Court: The Court noted that **if a product undergoes some change after importation till the time it is actually used, the classification will not be effected provided it remains the same product and it is used for the purpose specified in the classification.** Therefore, in the instant case, it examined whether the nature and character of the product (Brine Shrimp eggs) remained the same.

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

Decision of the case: Therefore, in the given case the Brine Shrimp eggs containing embryo should be classified as feeding materials for prawns under the heading 2309. These embryos might not be proper prawn feed at the time of importation but could become so, after incubation. Thus, the Court accepted the classification sought by the assessee.

3. (i) Will the description of the goods as per the documents submitted along with the Shipping Bill be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test? (ii) Whether a separate notice is required to be issued for payment of interest which is mandatory and automatically applies for recovery of excess drawback?

M/s CPS Textiles P Ltd. v. Joint Secretary 2010 (255) ELT 228 (Mad.)

Decision of the case: The High Court held that the description of the goods as per the documents submitted along with the Shipping Bill would be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test. The petitioner could not plead that the exported goods should be classified under different headings contrary to the description given in the invoice and the Shipping Bill which had been assessed and cleared for export.

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

Note - The Headings cited in some of the case laws in this chapter may not co-relate with the Headings of the present Customs Tariff as these cases relate to an earlier point of time.

4

VALUATION UNDER THE CUSTOMS ACT, 1962

1. Whether subsequent increase in the market price of the imported goods due to inflation would lead to increase in customs duty although the contract price between the parties has not increased accordingly?

   Commissioner of Cus., Vishakhapatnam v. Aggarwal Industries Ltd. 2011 (272) E.L.T. 641 (S.C.)

   Facts of the Case: On 26th June 2001, assessee entered into a contract with foreign suppliers for import of crude sunflower seed oil at the rate of US $ 435 CIF/metric ton. Under the contract, the consignment was to be shipped in the month of July 2001. However, the mutually agreed time for shipment was extended to 'mid August 2001'. Thus, the goods were actually shipped on 5th August, 2001 at the price prevailing at the contract date.

   Point of Dispute: The Revenue contended that when actual shipment took place, after the expiry of the original shipment period, the international market price of crude sunflower seed oil had increased drastically, and, therefore, the contract price could not be accepted as the 'transaction value' in terms of rule 4 of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 [now rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]. Therefore the duty should be imposed on the increased prices.

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

5

IMPORTATION, EXPORTATION AND TRANSPORTATION OF GOODS

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

   CCus v. Shreeji Overseas (India) Pvt. Ltd. 2013 (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/ transhipped within 30 days of unloading the same at the customs station. The High Court however held that the time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be read into section 46 and it cannot be inferred that section 46 prescribes any time-limit for filing of bill of entry.

   Note: *Section 46 of the Customs Act, 1962 contains the provisions relating to filing of bill of entry in relation to imported goods by the importer with the proper officer. It provides that the bill of entry may be presented at any time after the delivery of the import manifest/import report as the case may be, but does not prescribe any specific time-limit for the presentation of the same.*

   Section 48 provides that if any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped within 30 days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof.

6

WAREHOUSING

1. **Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption?**

   Paras Fab International v. CCE 2010 (256) E.L.T. 556 (Tri. – LB)

   Issue: Following questions arose before the Larger Bench of the Tribunal for consideration:-

   (a) Whether the entire premises of 100% EOU should be treated as a warehouse?

   (b) Whether the imported goods warehoused in the premises of 100% EOU are to be held to have been removed from the warehouse if the same is issued for manufacture/production/processing by the 100% EOU?

   (c) Whether issue for use by 100% EOU would amount to clearance for home consumption?

   Facts of the case: The appellants were 100% EOU in Alwar. They imported the impugned goods namely HSD oil through Kandla Port and filed 'into Bond Bill of Entry' for warehousing the imported goods. The impugned goods were warehoused in their 100% EOU in Alwar and subsequently used in the factory within the premises of the 100% EOU for manufacture of the finished goods. The Department demanded customs duty on the impugned goods.

   The contention of the appellants was that since (i) the entire premises of the 100% EOU had been licensed as a warehouse under the Customs Act; (ii) the impugned goods had been warehoused therein and subsequently utilized for manufacture of finished goods in bond; and (iii) the impugned goods had not been removed from the warehouse, there could not be any question of demanding duty on the same.

   Department contended that the entire premises of the 100% EOU could not be treated as a warehouse. The Appellants had executed a common bond B-17 for fulfilling the requirements under the Customs Act, 1962 and the Central Excise Act, 1944. Under the Central Excise Law, the removal of goods for captive consumption would be treated as removal of goods and the assessee were required to pay duty on such removal.

   Observations of the Court: The Tribunal observed that as per Customs manual, the premises of EOU are approved as a Customs bonded warehouse under the Warehousing provisions of the Customs Act. It is also stated therein that the manufacturing and other operations are to be carried out under customs bond. The goods are required to be imported into the EOU premises directly and prior to undertaking import, the unit is required to get the premises customs bonded. The importer is required to maintain a proper record and proper account of the import, consumption and utilization of all imported materials and exports made and file periodical returns. The EOUs are licensed to manufacture goods within the bonded premises for the purpose of export.

Tribunal held that neither the scheme of the Act nor the provisions contained in the Manual require filing of ex-bond bills of entry or payment of duty before taking the imported goods for manufacturing in bond nor there is any provision to treat such goods as deemed to have been removed for the purpose of the Customs Act, 1962.

Decision of the case: The Tribunal answered the issues raised as follows:-

(a) The entire premises of a 100% EOU has to be treated as a warehouse if the licence granted under to the unit is in respect of the entire premises.

(b) and (c) Imported goods warehoused in the premises of a 100% EOU (which is licensed as a Customs bonded warehouse) and used for the purpose of manufacturing in bond as authorized under section 65 of the Customs Act, 1962, cannot be treated to have been removed for home consumption.

7

DEMAND & APPEALS

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

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

   Facts of the case: The Commissioner of Customs (General), in his order-in-original, dropped the proceedings which were initiated against the appellant. 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 the 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 it was competent for the Tribunal 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).

Consequentially, section 129A(5) also stood incorporated in section 129D(4) by way of legal fiction and must be given effect to. In other words, if the Tribunal was satisfied that there was sufficient cause for not presenting the application under section 129D(4) within prescribed period, it might condone the delay in making such application and hear the same.

Decision of the case: 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:-*

Section129A(5): The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

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

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

   Uniworth Textiles Ltd. vs. CCEx. 2013 (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 it 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 favour 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 of the case: The Supreme Court held that mere non-payment of duties could not be equated with collusion or wilful misstatement or suppression of facts as then there would be no form of non-payment which would amount to ordinary default. The Apex

Court opined that something more must be shown to construe the acts of the assessee as fit for the applicability of the proviso.

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

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

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

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.

Points of dispute: 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 inspite of several opportunities given to produce additional documents, the assessee had failed to produce those documents.

Decision of the case: 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.

8

REFUND

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

   CCus., Chennai v. BPL Ltd. 2010 (259) E.L.T. 526 (Mad.)

   Observations of the Court: The High Court noted that section 27 of the Customs Act mandates the importer to produce such documents or other evidence, while seeking refund, to establish that the burden of duty in relation to which such refund is claimed, has not been passed on by him to any other person.

   However, in the given case, the respondent had not produced any document other than the certificate issued by the Chartered Accountant to substantiate its refund claim. The certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain facts. It would not automatically entitle a person to refund in the absence of any other evidence.

   Decision of the case: Hence, the High Court, overruling the Tribunal's decision, held that the respondent could not be granted refund merely on the basis of Chartered Accountant's certificate acknowledging certain facts as it did not rule out the unjust enrichment.

2. **Can the assessee be denied the refund claim of pre-deposit if he produces the attested copy of TR-6 challan* and not the original TR-6 challan*?**

   Narayan Nambiar Meloths v. CCus. 2010 (251) E.L.T. 57 (Ker.)

   Facts of the case: In the instant case, the refund application for pre-deposit filed by the assessee was not entertained on the ground that the petitioner had not produced original TR-6 Challan* and what was produced was only an attested copy. According to respondents, production of original TR-6 challan* was a mandatory requirement for processing the refund application.

   Decision of the case: The Kerela High Court decided that the petitioner could not be denied the refund claim for pre-deposit on account of following mentioned grounds:-

   Firstly, the Court opined that the only contention raised against the petitioner that TR-6 Challan* produced by him was only an attested copy, was purely a technical contention and could not be accepted.

Secondly, as per clarification issued vide *F.No. 275/37/2K-CX. 8A dated 2-1-2002,* a simple letter from the person who made the deposit, requesting for return of the amount, along with the appellate order and attested Xerox copy of the Challan in Form TR-6* would suffice for processing the refund application. Evidently, in the instant case, the petitioner had fully complied with the requirement laid down in this clarification.

**Note: Now TR-6 challan has been replaced with GAR-7 challan*

9

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

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

   CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)

   Observations of the Court: The question which arose before the Apex Court for consideration was whether goods that were smuggled into the country could be considered as 'imported goods' for the purpose of granting the benefit of the exemption notification.

   The Apex Court held that the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962.

   The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling in the economy.

   Decision of the case: 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.

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

   Wringley India Pvt. Ltd. v. Commr.of Cus.(Imports), Chennai 2011 (274) E.L.T. 172 (Mad.)

   Facts of the Case: The assessee had imported second-hand machinery along with spare parts from its sister concern located at Spain. There was indication in the invoice that the machinery was certified by the load port Chartered Engineer of Spain. However, the certificate issued by the load port Chartered Engineer of Spain 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 a local valuer. During the process of valuation, the local valuer found that value of the machinery had been underestimated by the assessee. On being issued a show cause notice for mis-declaration of the value of the imported goods, assessee paid duty on the value indicated as per the original report of the load port Chartered Engineer of Spain, which was higher than the value declared by it.

Point of Dispute: The Revenue contended that since the appellant had mis-declared the value of the goods imported, the imported goods should be confiscated under section 111(m) of the Customs Act, 1962.

Decision of the 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 the certificate of load port Chartered Engineer. Even after obtaining the valuation certificate from the local valuer, the appellant had no regrets. 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.

The High Court thus inferred that there was clear mis-declaration of value by the appellant and as per section 111(m) of the Customs Act, the Revenue was asked to confiscate the goods so imported.

Note-*With effect from 08.04.2011, self assessment has been introduced in the Customs Law. This case pertains to a period prior to introduction of self-assessment. However, since the proper officer has the power to verify value assessed by the importer under the present law as well, the principle enunciated in this case holds good.*

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

Manish Lalit Kumar Bavishi v. Addl. DIR. General, DRI 2011 (272) E.L.T. 42 (Bom.)

Facts of the case: The assessee sought copies of the documents seized from his office premises under panchanama and print outs drawn from the Laptop during his attendance in DRI. However, Revenue officers replied that the documents would be provided to him on completion of the investigation.

Decision of the case: The High Court held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document or seeking extract, and not the officer.

If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. The denial by the Revenue to make the documents available was clearly an act without jurisdiction.

The High Court directed the Revenue to make available the copies of the documents asked for by the assessee which were seized during the course of the seizure action.

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

O.T. Enasu v. UOI 2011 (272) E.L.T. 51 (Ker.)

The High Court noted that under sub-clause (ii) of clause (a) of section 112, the liability to penalty is determined on the basis of duty sought to be evaded. Therefore, the jurisdictional fact to impose a penalty in terms of section 112(a)(ii) includes the essential ingredient that **"duty was sought to be evaded"**. Being a penal provision, it requires to be strictly construed. "Evade" means, to escape, slip away, to escape or avoid artfully, to shirk, to baffle, elude. The concept of evading involves a conscious exercise by the person who evades. Therefore, the process of "seeking to evade" essentially involves a mental element and the concept of the status "sought to be evaded" is arrived at only by a conscious attempt to evade.

In view of the above discussion, the High Court inferred that unless it is established that a person has, by his omissions or commissions, led to a situation where duty is sought to be evaded, there cannot be an imposition of penalty in terms of section 112(a)(ii) of the Act.

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

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

Textoplast Industries v. Additional Commissioner of Customs 2011 (272) E.L.T. 513 (Bom.)

Observations of the Court: The High Court noted that as per explanation to section 140 of the Customs Act, 1962 the term "Company" includes a firm or an association of individuals and the term "director" in relation to a firm means a partner of the firm. The High Court observed that in case of Apex Court judgment of *Standard Chartered Bank v. Directorate of Enforcement*, there emerged the principle that the deeming fiction is not confined to a criminal prosecution but will also extend to an adjudication proceeding as well. Hence, the High Court, in the instant case, held that the deeming fiction in section 140(2) making Director, Manager, Secretary or other officer of company liable to penalty, would not be confined to criminal prosecution but extends to adjudication proceeding as well.

The High Court explained that had it been otherwise, it would have led to strange situation where, for criminal prosecution, partner as well as person in charge responsible for conduct of business of partnership firm would be liable whereas for adjudication purposes, a narrower construction had to be adopted. There was no reason to exclude penalty on partnership firm, particularly when it was consistent with overall scheme and object of the Act.

Decision of the case: In view of the above discussion, the High Court held that for the purpose of imposing penalty, the adjudicating authority under Customs Act, 1962 might, in an appropriate case, impose a penalty both upon a partnership firm as well as on its partners.

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

CCus. v. Jaya Singh Vijaya Jhaveri 2010 (251) E.L.T. 38 (Ker.)

Decision of the case: In the instant case, the High Court held that in a case of confiscation of goods because of their under valuation, Tribunal could not cancel the confiscation order for the want of evidence from the foreign supplier. The Court considered it be illogical that a person who was a party to undervaluation would give evidence to the Department to prove the case that the invoice raised by him on the respondent was a bogus one and that they had received underhand payment of the differential price. Resultantly, the Court upheld the confiscation order.

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

In Re: Hemal K. Shah 2012 (275) ELT 266 (GOI)

Facts of the Case: Shri Hemal K. Shah, a passenger, who arrived at SVPI Airport, Ahmedabad, had declared the total value of goods as ₹ 13,500 in the disembarkation slip. On detailed examination of his baggage, it was found to contain Saffron, Unicore Rhodium Black, Titan Wrist watches, Mobile Phones, assorted perfumes, Imitation stones and bags. Since, the said goods were in commercial quantity and did not appear to be a bona fide baggage; the same were placed under seizure. The passenger in his statement admitted the offence and showed his readiness to pay duty on seized goods or re-shipment of the said goods. The adjudicating authority determined total value of seized goods; ordered confiscation of seized goods under section 111(d) and 111(m) of the Customs Act, 1962; imposed penalty on Hemal K. Shah; confirmed and ordered for recovery of customs duty on the goods with interest and gave an option to redeem the goods on payment of a fine which should be exercised within a period of three months from date of receipt of the order. On appeal by Hemal K. Shah, the appellate authority allowed re-export of the confiscated goods. Against this order, the Department filed a revision application before the Revisionary Authority under section 129DD of the Customs Act, 1962.

Point of Dispute: The Department questioned the re-export of confiscated goods. They contended that the goods which had been confiscated were being smuggled in by the passenger without declaring the same to the Customs and were in commercial quantity. In view of these facts, the appellate authority had erred in allowing the re-export of the goods on payment of redemption fine.

Decision of the Case: The Government noted that the passenger had grossly mis-declared the goods with intention to evade duty and to smuggle the goods into India. As per the provisions of section 80 of the Customs Act, 1962 when the baggage of the passenger contains article which is dutiable or prohibited and in respect of which the declaration is made under section 77, the proper officer on request of passenger can detain such article for the purpose of being returned to him on his leaving India. Since passenger neither made true declaration nor requested for detention of goods for re-export, before customs authorities at the time of his arrival at airport, the re-export of said goods could not be allowed under section 80 of the Customs Act.

10

SETTLEMENT COMMISSION

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

   Sanghvi Reconditioners Pvt. Ltd. V. UOI 2010 (251) ELT 3 (SC)

   Decision of the case: The Apex Court held that the application under section 127B of the Customs Act, 1962 is maintainable only if the duty liability is disclosed. The disclosure contemplated is in the nature of voluntary disclosure of concealed additional customs duty. The Court further opined that having opted to get their customs duty liability settled by the Settlement Commission, the appellant could not be permitted to dissect the Settlement Commission's order with a view to accept what is favourable to them and reject what is not.

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

   Union of India v. Cus. & C. Ex. Settlement Commission 2010 (258) ELT 476 (Bom.)

   Facts of the case: The above question was the issue for consideration in a writ petition filed by the Union of India to challenge an order passed by the Settlement Commission in respect of a proceeding relating to recovery of drawback. The Commission vide its majority order overruled the objection taken by the Revenue challenging jurisdiction of the Commission and vide its final order settled the case. The aforesaid order of the Settlement Commission was the subject matter of challenge in this petition.

   The contention of the Revenue was that the recovery of duty drawback does not involve levy, assessment and collection of customs duty as envisaged under section 127A(b) of the Customs Act, 1962. Therefore, the said proceedings could not be treated as a case fit to be applied before the Settlement Commission. However, the contention of the respondent was that the word “duty” appearing in the definition of “case” is required to be given a wide meaning. The Customs Act provides for levy of customs duty as also the refund thereof under section 27. The respondent contended that the provisions relating to refund of duty also extend to drawback as drawback is nothing but the return of the customs duty and thus, the proceedings of recovery of drawback would be a fit case for settlement before the Commission.

Observations of the Court: The High Court noted that the Settlement Commission while considering the aforesaid question of its jurisdiction for taking up the cases relating to drawback had considered the definition of "drawback" as defined in rules relating to drawback as also the definition of the word "case" as defined in section 127A(b) and after referring to the various judgments of the Tribunal came to the conclusion that the Commission had jurisdiction to deal with the application for settlement. The High Court stated that the reasons given by the Settlement Commission in support of its order are in consonance with the law laid down by the Supreme Court in the case of *Liberty India v. Commissioner of Income Tax (2009) 317 ITR 218 (SC)* wherein the Supreme Court has observed that **drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India**.

Decision of the case: The High Court, thus, concluded that the duty drawback or claim for duty drawback is nothing but a claim for refund of duty as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act. Thus, the High Court held that the **Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue.**

11

MISCELLANEOUS PROVISIONS

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

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

   Facts of the case: A demand notice was raised against the petitioner in respect of the customs duty payable by a company of which she was a former director. 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 of the company. The petitioner contended that the action of the Department was not justified as the said properties belonged to her and not to 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.

   Observations of the Court: Considering the provisions of section 142 of the Customs Act, 1962 and the relevant rules*, the High Court elucidated that it was only the defaulter against whom steps might be taken for the recovery of the dues. In the present case, it was the company who was the defaulter.

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

   Note:

   1. *As per the provisions of section 179 of the Income-tax Act, 1961 and section 18 of the Central Sales Tax, 1956, in case of a private company in liquidation, where any tax dues of the company under the relevant statutes cannot be recovered, every person who was a director of the said company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of such tax*

unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. Thus, Revenue authorities are empowered to proceed against the directors of the company for recovery of dues from the company under the said statutes.

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