

PAPER – 8 : INDIRECT TAX LAWS
PART – III : QUESTIONS AND ANSWERS
QUESTIONS

Basic concepts of central excise

1. With reference to the provisions of Central Excise Act, 1944, explain whether the following items can be considered as excisable goods:
 - (i) Huge metal tanks erected at site for storing petroleum products in oil refineries. Such tanks are not embedded in earth, but once erected they cannot be physically moved and will have to be necessarily dismantled in case of sale/disposal.
 - (ii) Turn key projects

Classification of excisable goods

2. Mr. X manufactures a cream called as 'Moisture-BN' which has certain pharmaceutical contents. The cream is prescribed by dermatologists for curing dry skin conditions and at the same time is also available without prescription of a medical practitioner. Mr. X classifies the cream as a medicament since it has pharmaceutical contents and is being prescribed by dermatologists for treating dry skin conditions.

However, the Central Excise Officer is of the view that the cream should be classified as a cosmetic/toilet preparation as (i) the same is mainly used for 'care' of the skin and (ii) can also be purchased without prescription of a medical practitioner. The Central Excise Officer contends that even if a cosmetic product contains certain subsidiary pharmaceutical contents or even if it has certain subsidiary curative value, it would still be treated as cosmetics only.

What do you think should be the correct classification of the cream; a medicament or a cosmetic/toilet preparation? Support your answer with the help of a decided case law, if any.

Valuation of excisable goods

3. Alpha Ltd., a manufacturer of excisable goods, has two production units-Unit A and Unit B. Unit A of Alpha Ltd. manufactures product 'X'. 80% of such production is consumed captively by Unit B to further manufacture product 'Y' and the remaining 20% is sold to unrelated buyers at ₹ 75 per unit. In March, 2014, Unit A has manufactured 1000 units of product 'X'. Assuming that there is no opening and closing inventory of product X, compute its assessable value for the purpose of central excise duty from the following information provided by Alpha Ltd. in relation to Unit A for the month of March, 2014-

Particulars	₹
Cost of direct materials (inclusive of central excise duty @ 12.36%)*	22,472
Cost of direct salaries (includes house rent allowance of ₹ 12,000)	30,000
Consumable stores and repairs	8,400

Depreciation of machinery	500
Quality control cost	4,300
Research & development cost	2,700
Administrative cost:	
Production related	2,000
Project management related	1,800
Interest and financial charges	2,400
Cost incurred due to break down of machinery	1,300
Amortised cost of moulds and tools received free of cost from the production unit 'B' for being used only in the manufacture of goods to be consumed by unit 'B'	600
Selling and distribution cost	4,600
Scrap value realized	1,500

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

CENVAT credit

4. LMN Ltd. manufactures machinery for sugar and cement plants. It entered into a contract for setting up a sugar manufacturing plant in Mexico. For this purpose, it manufactured certain machines in its own factory and also purchased certain other machinery from other dealers/manufacturers. Both the machineries (manufactured and bought-out) were then put in a container and transported to Mexico for setting up the sugar plant.

LMN Ltd. has availed CENVAT credit on bought-out machinery describing them as eligible capital goods. The Central Excise Officer, however, has disallowed such credit.

Examine whether the action taken by the Central Excise Officer is correct in law, with the help of a decided case law, if any.

SSI exemption

5. PQR & Co. is eligible for exemption in terms of *Notification No. 8/2003 CE dated 01.03.2003* for the year 2013-14. It provides the following particulars with regard to the clearances of goods effected during the said year:

Particulars	₹ (in lakh)
Value of domestic clearance of goods with own brand name	210
Value of clearance of goods with the brand name of others (including ₹ 40 lakh in respect of goods manufactured in a rural area)	100
Value of clearances for exports	120
Value of clearances for captive consumption (Final products are eligible for SSI exemption)	160

Value of clearances of goods exempted under notification other than Notification No. 8/2003 (Assume rate of excise duty at 12%)	40
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Exports made by PQR & Co. are exempt from duty. Determine the total duty payable and duty payable in cash, if any, by PQR & Co. in respect of the year 2013-14.

Additional Information:

Excise duty paid on inputs consumed in exempt and dutiable clearances in the year 2013-14 is ₹ 2,25,000 and ₹ 4,50,000 respectively. Excise duty paid on capital goods purchased in the year 2013-14 is ₹ 6,35,000.

Show your workings with explanations where required.

Basic concepts of service tax

6. Chunni Lal is engaged in the activity of preparation of place for organizing event or function by way of erection/laying of pandal and shamiana. He is of the view that service tax is not leviable on his activity as it is a transaction involving "transfer of right to use goods" and hence, is a deemed sale.

Examine whether the contention of Chunni Lal is valid in law.

Basic concepts of service tax

7. Mr. A owns a residential building in a prime commercial locality. Basement of the building is leased to Mr. B, a wholesaler. One-fourth of the basement is used by Mr. B as his office and remaining portion is used as a godown for storing his merchandise. Ground floor of the building is given on rent to Mr. C who uses the same as a guest house for his business contacts. First floor of the building is occupied by Mr. A. and his family. Second floor is given on rent to Mr. D who uses the same as his residence. There is a large vacant land in the backyard of the building which is also given on rent to a parking contractor, Mr. E who has set up a parking facility on the said land.

Separate rent/lease deeds have been executed in respect of each floor of the building and vacant land given on rent/lease.

Examine the service tax liability of Mr. A with respect to the residential building owned by him.

Place of provision of service

8. With reference to Place of Provision of Services Rules, 2012, answer the following question:
 - (i) A movie-on-demand is provided as on-board entertainment during the Bangalore-Delhi leg of a Singapore-Bangalore-Delhi flight against a charge of ₹ 500 per passenger in addition to the fare of ₹ 25,000 per passenger. What will be the place of provision of service in this case? Will your answer change, if the above service is provided on a Delhi-Bangalore-Singapore-Malaysia flight during the Singapore-Malaysia leg?

- (ii) Mr. Sumit has a permanent residence at Ahmedabad. He has a savings bank account with Ahmedabad Branch of Safe and Sound Bank. On April 1, 2012, Mr. Sumit opened a safe deposit locker with the Ahmedabad Branch of Safe and Sound Bank. Mr. Sumit went to USA for official work in December, 2012 and has been residing there since then. Mr. Sumit contends that since he is a non-resident during the year 2013-14 in terms of the Income-tax Act, service tax cannot be levied on the locker fee charged by Safe and Sound Bank for the year 2013-14.

Examine the correctness of the contention of Mr. Sumit.

Point of taxation

9. Determine whether the following services amount to continuous supply of service in the following independent cases:-
- (i) XYZ & Co., a firm of interior decorators, enters in to a contract with Mr. Mehta on 01.08.2013 for doing up the interiors of his newly constructed home for a total consideration of ₹ 60 lakh. As per the terms of the contract, XYZ & Co. will complete the work by 31.01.2014 and consideration will be paid in six equal instalments on the first day of each month covered during the period of contract.
- (ii) Mr. Kapoor has taken a mobile connection from Cell Two, a telecom service provider, on 10.01.2014. However, on account of poor service, he discontinued the services of Cell Two on 15.03.2014.

Valuation of taxable service

10. Shambhu Pvt. Ltd. was awarded a contract in November, 2013 for providing flooring and wall tiling services in respect of a building located in Delhi by Nath Ltd. As per the terms of contract, Shambhu Pvt. Ltd. was to provide all the required material for execution of the contract. However, a portion of the material was also provided by Nath Ltd.

Whether the services provided by Shambhu Pvt. Ltd. are subject to service tax? If yes, determine the service tax liability of Shambhu Pvt. Ltd. from the following particulars-

Particulars	₹
Gross amount (excluding all taxes) charged by the Shambhu Pvt. Ltd. for the contract	6,00,000
Fair market value of the material supplied by Nath Ltd.	1,00,000
Amount charged by Nath Ltd. for the material (inclusive of VAT)	60,000
Excise duty paid on inputs	12,750
Service tax paid on input services	6,000
Excise duty paid on capital goods, purchased during the year, used in the contract	4,000

Special audit

11. Raman, a service provider, has his operations spread out in multiple locations. His registered premises are situated in Mumbai. The jurisdictional Commissioner is of the view that it is not possible to obtain a true and complete picture of the accounts of Raman from his registered premises. Thus, he has directed Raman to get his accounts audited by Mr. P, a Chartered Accountant, nominated by him for the relevant financial year. However, Raman contests that his accounts have already been audited under Income-tax Act, 1961 by Mr. Y, another Chartered Accountant, and thus, do not require any other audit.

With reference to the provisions of Finance Act, 1994, examine the correctness of the contention of Raman.

Penalties

12. Steft (P) Ltd., a service provider, has availed and utilized credit of excise duty without actual receipt of excisable goods. A personal penalty of ₹ 1,90,000 has been imposed on Mr. Mudit, Manager of Steft (P) Ltd. and ₹ 72,000 on Miss Sneha, an officer of Steft (P) Ltd. who were in charge of, and were responsible to, Steft (P) Ltd. for the conduct of its business at the time of such availment and utilization of the credit.

Discuss whether such penalty can be imposed on Mr. Mudit and Miss Sneha under section 78A of Finance Act, 1994. Can penalty be imposed on manager or officer of a company in any other case? Explain.

Large tax payer

13. BPT Ltd., a service provider, has been granted the acceptance of being a large tax payer unit by the Chief Commissioner of Central Excise, Large Tax payer Unit on 12.12.2013. BPT Ltd. wants to know the procedure to be followed by it as a large tax payer and the facilities available to it under service tax law. You are required to advise BPT Ltd. in this regard.

Best judgment assessment under service tax

14. The best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte assessment procedure. Examine the validity of the statement.

Special provision for payment of service tax

15. Arihant Life Insurance Company Ltd. (ALICL) has started its operations in the year 2013-14. During the year 2013-14, Arihant Life Insurance Company Ltd. (ALICL) has charged gross premium of ₹ 180 lakh from policy holders with respect to life insurance policies; out of which ₹ 100 lakh have been allocated for investment on behalf of the policy holders.

Compute the service tax liability of ALICL for the year 2013-14 under rule 6(7A) of the Service Tax Rules, 1994

- (i) if the amount allocated for investment has been intimated by ALICL to policy holders at the time of providing service.
- (ii) if the amount allocated for investment has not been intimated by ALICL to policy holders at the time of providing of service.
- (iii) if the gross premium charged by ALICL from policy holders is only towards risk cover.

Note: ALICL has not opted for small service provider's exemption available under Notification No. 33/2012 ST dated 20.06.2012.

Types of duty

16. With reference to the Customs Tariff Act, 1975, discuss the validity of the imposition of customs duties in the following cases:-
- (a) Both countervailing duty and anti-dumping duty have been imposed on an article to compensate for the same situation of dumping.
 - (b) Countervailing duty has been levied on an article for the reason that the same is exempt from duty borne by a like article when meant for consumption in the country of origin.
 - (c) Definitive anti-dumping duty has been levied on articles imported from a member country of World Trade Organization as a determination has been made in the prescribed manner that import of such article into India threatens material injury to the indigenous industry.

Valuation of imported goods

17. Compute the assessable value and total customs duty payable under the Customs Act, 1962 for an imported machine, based on the following information:

	US \$
(i) Cost of the machine at the factory of the exporter	20,000
(ii) Transport charges from the factory of exporter to the port for shipment	800
(iii) Handling charges paid for loading the machine in the ship	50
(iv) Buying commission paid by the importer	100
(v) Lighterage charges paid by the importer	200
(vi) Freight incurred from port of entry to Inland Container depot	1,000
(vii) Ship demurrage charges	400
(viii) Freight charges from exporting country to India	5,000

Date of bill of entry	20.01.2014 (Rate BCD 20%; Exchange rate as notified by CBEC ₹ 60 per US \$)
Date of entry inward	25.03.2014 (Rate of BCD 10%; Exchange rate as notified by CBEC ₹ 65 per US \$)
Additional duty payable under section 3(1) of the Customs Tariff Act, 1975	12%
Additional duty payable under section 3(5) of the Customs Tariff Act, 1975	4%

Warehousing of imported goods

18. With reference to section 61 of the Customs Act, 1962, comment on the validity of the following statements:
- Goods, other than capital goods, intended for use in any hundred per cent export-oriented undertaking, can be warehoused till the expiry of five years.
 - Interest free period of ninety (90) days under section 61(2)(ii) in respect of warehoused goods (not intended for being used in 100% EOU) commences from the date on which an into-bond bill of entry in respect of such goods is presented.

Provisions relating to illegal import, penalty etc.

19. Cargo Logistics Pvt. Ltd. (Cargo Logistics) is a duly appointed steamer agent of the vessel Queen Mary Utah. 110 containers of MS Scrap were imported in the said vessel by an Indian importer. Cargo Logistics had affixed the seal on the said containers after stuffing and took charge of the sealed containers. On the entry of the Vessel in India, Cargo Logistics filed the Import General Manifest and also dealt with the Customs Department for appropriate orders that had to be passed in terms of section 42 of the Customs Act, 1962. Section 42 prescribes that no conveyance can leave without a written order.

Customs Department, on finding that 40 of the said containers were empty, levied a penalty on Cargo Logistics under section 116 of the Customs Act, 1962 for short landing of the goods. Cargo Logistics is of the view that penalty for short landing of the goods can only be imposed on the person-in-charge of the vessel and not on a steamer agent.

Discuss with the help of a decided case law, if any, whether penalty for short landing of goods can be imposed on the steamer agent of a vessel.

Foreign Trade Policy

20. Answer the following questions with reference to the provisions of Foreign Trade Policy:
- Bestron Ltd. manufactures goods by using imported inputs and supplies the same under Aid Programme of the United Nations. The payment for such supply is

received in free foreign exchange. Can Bestron Manufacturers seek Advance Authorization in relation to the supplies made by it?

- (ii) LMN Ltd. has imported inputs without payment of duty under Advance Authorization. The CIF value of such inputs is ₹20,00,000. The inputs are processed and the final product is exported. The exports made by LMN Ltd. are subject to general rate of value addition prescribed under Advance Authorization Scheme. No other input is being used by LMN Ltd. in the processing. What should be the minimum FOB value of the exports made by the LMN Ltd. as per the provisions of Advance Authorization?

SUGGESTED ANSWERS

1. As per section 2(d) of Central Excise Act, 1944, excisable goods means goods which are specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Further, for being called goods, items ought to be movable and marketable.

Section 37B Order No. 58/1/2002 CX dated 15.01.2002 issued by CBEC has specifically dealt with the excisability of, *inter alia*, the two given items. Therefore, in the light of the above provisions and the said order, the excisability of the two items are discussed below:

- (i) The afore-mentioned order, *inter alia*, provides that if items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.

The said order clarifies that though such huge metal tanks are not embedded in the earth, they are erected at site, stage by stage, and after completion they cannot be physically moved. Further, on sale/disposal they have to be necessarily dismantled and sold as metal sheets/scrap and it is not possible to assemble the tank all over again. Therefore, such tanks are not moveable and cannot be considered as excisable goods.

- (ii) As per the said order, turn key projects like steel plants, cement plants, power plants etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their assembly/installation/erection/integration/inter-connectivity on foundation/civil structure etc. at site, will not be considered as excisable goods for imposition of central excise duty. However, their components would be dutiable in the normal course.
2. The facts of the given case are similar to the case of *CCEx. v. Ciens Laboratories 2013 (295) ELT 3 (SC)*. In the instant case, the Supreme Court made the following significant observations:
- (i) When a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not

invariably the decisive factor in classification. The relevant factor is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.

- (ii) Though a product is sold without the prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over / across the counter are cosmetics. There are several products that are sold over-the-counter and are yet, medicaments.
- (iii) Prior to adjudicating upon whether a product is a medicament or not, it ought to be seen as to how do the people who actually use the product, understand it to be. If a product's primary function is "care" and not "cure", it is not a medicament. Medicinal products are used to treat or cure some medical condition whereas cosmetic products are used in enhancing or improving a person's appearance or beauty.
- (iv) A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients, even in small quantities, is to be treated as a medicament.

Based upon the above observations, the Supreme Court held that presence of pharmaceutical ingredients in the cream showed that it was used for prophylactic and therapeutic purposes namely, for curing dry skin conditions of the human skin and was not primarily intended to protect the skin; therefore, the same was classifiable as a medicament.

Applying the ratio of the above-mentioned decision to the given situation, it can be concluded that owing to the pharmaceutical constituents present in the cream 'Moisture-BN' and its use for the cure of certain skin diseases, the same would be classifiable as a medicament and not as a cosmetic/toilet preparation.

3. Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, has been amended vide *Notification No. 14/2013 CE (NT) dated 22.11.2013* to provide that where whole or part of the excisable goods are not sold by the assessee but are used for captive consumption, the value of goods meant for captive consumption shall be 110% of the cost of production or manufacture of such goods.

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

Since in the present case, only a part of the excisable goods are used for captive consumption (80% of 1,000 units i.e., 800 units), assessable value of such 800 captively consumed units will be determined in accordance with rule 8 of Valuation Rules. The assessable value of remaining 200 units sold to unrelated buyers will be determined under section 4 of Central Excise Act, 1944 i.e., transaction value.

Computation of cost of production as per CAS-4 and value of product 'X'

S. No.	Particulars	₹
1.	Material consumed:	
	Cost of direct materials ₹ 22,472	
	Less: Central excise duty $\left(\frac{₹ 22,472}{112.36} \times 12.36 \right)$ ₹ <u>2,472</u> (Note 1)	20,000
2.	Direct wages and salaries:	
	Cost of direct salaries (including house rent allowance of ₹ 12,000)	30,000
3.	Works overheads:	
	Consumable stores and repairs	8,400
	Depreciation of machinery	500
4.	Quality control cost	4,300
5.	Research & development cost	2,700
6.	Administrative overheads (relating to production activity):	<u>2,000</u>
	Total	67,900
	Less: Scrap value realized	<u>1,500</u>
	Cost of production of 1,000 units of product 'X'	66,400
	Cost of production for 800 units of product 'X' $\left(\frac{₹ 66,400}{1,000} \times 800 \right)$	53,120
	Add: Amortised cost of moulds and tools received free of cost from unit 'B' for being used only in the manufacture of goods to be consumed by unit 'B'	<u>600</u>
	Cost of production of 'X' produced for captive consumption	53,720
	Value of 800 units of product 'X' consumed captively [₹ 53,720 × 110%]	59,092

Notes:

1. Since CENVAT credit is available on central excise duty paid on direct materials, it has been deducted from the cost of direct materials in accordance with the Cost Accounting Standard-4 [CAS-4].
2. Administrative overheads in relation to activities other than manufacturing activities like project management activities have not been included in cost of production [CAS-4].
3. Interest and financial charge being a financial charge has not been considered to be a part of cost of production [CAS-4].

4. Abnormal cost like break down of machinery does not form part of cost of production [CAS-4].
5. Selling and distribution cost have not been considered while computing the cost of production as they are not in relation to production activity [CAS-4].

Value of 800 units of product 'X' consumed captively for the purpose of excise duty is ₹ 59,092.

Value of 200 units of product 'X' sold to unrelated buyers for the purpose of excise duty is ₹ 15,000 (200 units x ₹ 75) [Section 4 of Central Excise Act, 1944].

4. Yes, the action taken by the Central Excise Officer is correct in law.

One of the basic conditions for availing CENVAT credit on inputs or capital goods is that excise duty must have been levied on final product. Excise duty is levied when manufacture in India results in emergence of excisable goods. Since in the given case, the sugar plant was set up in Mexico, it could not be said to be manufactured in India and thus, no duty would have been levied on the same. Therefore, there could not be any question of availing CENVAT credit of the duty paid on the inputs or capital goods.

Supreme Court in the case of *KCP Ltd. v. CCE*, 2013 (295) ELT 353 (SC) has also taken a similar view and held that CENVAT credit could not be allowed to the assessee as no excise duty was paid under the Central Excise Act, 1944, on sugar plant set up in a foreign country.

5. **Computation of turnover of PQR & Co. eligible for exemption during the year 2013-14**

Particulars	₹ in lakh
Value of domestic clearances with own brand name	210
Value of clearances of goods with brand name of others manufactured in rural area [Note 1.(b)]	<u>40</u>
Total	<u>250</u>

Computation of excise duty payable

Particulars	₹
On 1 st clearance of ₹ 150 lakh duty payable is	Nil
On balance clearance of ₹ 100 lakh i.e. (250-150) @ 12%	12,00,000
On clearances of ₹ 60 lakh with brand name of others (excluding rural area clearances) @ 12% [Note 2]	<u>7,20,000</u>
Total	19,20,000
Add: Education cess and secondary and higher education cess @ 3%	<u>57,600</u>
Total excise duty payable	<u>19,77,600</u>
Less: CENVAT credit available on inputs consumed in dutiable clearances	4,50,000
CENVAT credit available on capital goods [Note 1.(d) and 3]	<u>6,35,000</u>
Excise duty payable in cash	<u>8,92,600</u>

Notes:

1. As per *Notification No. 8/2003 CE dated 01.03.2003*,
 - (a) captive consumption (used in the manufacture of final products which are eligible for SSI exemption) and exempt and export clearances are not included in determining the limit of ₹ 150 lakh for SSI exemption.
 - (b) clearances with brand name of others which are ineligible for SSI exemption has to be excluded while determining the limit of ₹ 150 lakh. However, clearances with the brand name of others manufactured in rural area are eligible for SSI exemption and hence, such clearances are included while determining the limit of ₹ 150 lakh.
 - (c) in respect of units availing SSI exemption, no CENVAT credit is available on inputs consumed in exempt clearances of ₹ 150 lakhs.
 - (d) in respect of units availing SSI exemption, CENVAT credit on capital goods can be availed but utilized only after clearances of ₹ 150 lakh.
2. Duty is not payable on export clearance and exempt clearances. Further, intermediate goods used captively in the manufacture of final products which are eligible for SSI exemption are also exempt from excise duty. Thus, duty will be payable only in respect of the goods manufactured with brand name of others.
3. Further, entire credit on capital goods can be taken in the same financial year by such units (Rule 4 of the CENVAT Credit Rules, 2004).
6. The issue that whether the activity of erection/laying of pandal and shamiana is a service or deemed sale involving transfer of right to use goods has been addressed in Board's *Circular No. 168/3/2013-ST dated 15.04.2013*. The Circular clarified as under:
 - (i) The activity of providing pandal and shamiana along with erection thereof is generally coupled with other incidental activities like supply of crockery, furniture, sound system, lighting arrangements, etc. It is a reasonably specialized job and is carried out by the supplier with the help of his own labour.
 - (ii) For a transaction to be regarded as "transfer of right to use goods", the transfer has to be coupled with effective control and possession. In the case of *Rashtriya Ispat Nigam Ltd. v. CTO 1990 77 STC 182*, the High Court held that since the effective control and possession was with the supplier, there is no transfer of right to use (upheld subsequently by Supreme Court in *2002 126 STC 0114*).
 - (iii) Further, in *Harbans Lal v. State of Haryana 1993 088 STC 0357*, the High Court held that if pandal, is given to the customers for use only after having been erected, then it is not transfer of right to use goods.
 - (iv) In the case of *BSNL v. UOI 2006 (2) S.T.R. 161 (S.C.)*, the Supreme Court held that to constitute the transaction for the transfer of the right to use the goods, the transaction must have the following attributes:-
 - (a) There must be goods available for delivery;

- (b) There must be a consensus ad idem as to the identity of the goods;
- (c) The transferee should have a legal right to use the goods and, consequently, all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- (d) For the period during which the transferee has such legal right, it has to be the exclusion of the transferor: this is the necessary concomitant or the plain language of the statute, viz., a “transfer of the right to use” and not merely a license to use the goods :
- (e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.
- (v) Applying the ratio of these judgments and the test formulated by Supreme Court in the case of *BSNL v. UOI*, the activity of providing *pandal* and *shamiana* along with erection thereof and other incidental activities do not amount to transfer of right to use goods because effective possession and control over the *pandal* or *shamiana* remains with the service provider, even after the erection is complete and the specially made-up space for temporary use handed over to the customer.
- (vi) Hence, services provided by way of erection of *pandal* or *shamiana* is a declared service, under section 66E(f) of Finance Act, 1994 and would attract service tax.

In the light of the above-mentioned Circular, the contention of Chunni Lal is not valid in law.

7. Renting of immovable property (whether residential or commercial) is a declared service under section 66E(a) of Finance Act, 1994. However, services by way of renting of residential dwelling for use as residence are covered in negative list of services and are thus not liable to service tax.

Since, Mr. A has let out different floors of his residential building to different tenants and separate rent/lease deeds have been executed in respect of each floor of such building and vacant land given on rent/lease, principle of bundled service will not apply. In this backdrop, the taxability of each of the floor of the building and vacant land owned by Mr. A is discussed as under:

- (i) *Basement*: As per section 65B(41) of the Act, renting includes letting, leasing, licensing or other similar arrangements in respect of immovable property. Therefore, leasing out of the basement of the building to Mr. B would not be covered under negative list of services as Mr. B uses the basement for commercial purpose. Thus, it would be liable to service tax as declared service.
- (ii) *Ground floor*: Renting of ground floor of the building to Mr. C for being used as a guest house will not be covered under negative list of services since Mr. C uses it for commercial purpose. Thus, it would be liable to service tax as declared service.
- (iii) *First floor*: Since Mr. A uses the first floor of the building himself, it would not be a service and thus, would not be liable to service tax.

- (iv) *Second floor*: Renting of second floor of the building to Mr. D for being used as a residence would not be chargeable to service tax as it is covered in negative list of services under section 66D(m) of Finance Act, 1994.
 - (v) *Vacant land*: Though vacant land is also an immovable property, renting thereof to Mr. E, a parking contractor, will not be covered under negative list of services since Mr. E uses it for commercial purpose. Thus, it would be liable to service tax as declared service.
8. (i) As per rule 12 of Place of Provision of Service Rules, 2012, the place of provision of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey. Hence, in this case the place of provision of this service will be Singapore, which is outside the taxable territory and hence, would not be liable to service tax.

However, if the above service is provided on a Delhi-Bangalore-Singapore-Malaysia flight during the Singapore-Malaysia leg, then the place of provision of this service will be Delhi, which is in the taxable territory and hence, would be liable to service tax.

- (ii) Leviability of service tax is determined in terms of the provisions of Finance Act, 1994 and not in terms of Income-tax Act, 1961. The fact that Mr. Sumit is a non-resident is irrelevant for determining the taxability of services received by him.

As per section 66B of Finance Act, 1994, service tax is levied on the value of all services, other than those services specified in the negative list, *provided or agreed to be provided in the taxable territory* by one person to another.

As per rule 9 of Place of Provision of Service Rules, 2012 [POPS Rules], the place of provision of services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders is the location of the service provider.

Account has been defined under rule 2(b) of POPS Rules to mean an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account. Services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc. are few examples of services that are provided by a banking company or financial institution to an "account holder" in the ordinary course of business.

Since, in the present case, services (safe deposit locker) are provided by Ahmedabad Branch of Safe and Sound Bank to an account holder (Mr. Sumit), rule 9 of POPS Rules will apply. Thus, the place of provision of service would be Ahmedabad and since Ahmedabad falls in taxable territory, locker fee would be liable to service tax.

9. (i) As per rule 2(c) of Point of Taxation Rules, 2011, continuous supply of service, *inter alia*, means any service which is provided, or agreed to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time. Since in the given case, service is provided for a period of six months with the obligation of periodic payment, the same will amount to continuous supply of service.
- (ii) As per rule 2(c) of Point of Taxation Rules, 2011, continuous supply of service, *inter alia*, includes any service where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition.

In this regard, Central Government has notified that provision of, *inter alia*, telecommunication services shall be treated as continuous supply of service.

Since in the given case, service provided is telecommunication service, the provision thereof would amount to continuous supply of service irrespective of the period for which the service has been rendered.

10. The contract entered into by Shambhu Pvt. Ltd. requires the provision of both services and material and is for the purpose of carrying out completion of an immovable property. Therefore, it falls within the scope of term 'works contract' as defined under section 65B(54) of the Finance Act, 1994. As per section 66E(h) of Finance Act, 1994, service portion in the execution of a works contract is a declared service and thus, service provided by Shambhu Pvt. Ltd. would be liable to service tax.

Since, in the given case, the value of the service portion in the execution of the works contract cannot be determined as per the segregation method under rule 2A(i) of Service Tax (Determination of Value) Rules, 2006, the value will have to be determined as per rule 2A(ii)(C).

As per rule 2A(ii)(C), in case of works contracts involving completion and finishing services such as floor and wall tiling of an immovable property, service tax shall be payable on 60% of the total amount charged for the works contract.

Computation of service tax liability as per rule 2A(ii)(C) of the Service Tax (Determination of Value) Rules, 2006

Particulars	(₹)
Gross amount (excluding all taxes) charged by Shambhu Pvt. Ltd. for the contract	6,00,000
Add: Fair market value of the material supplied by Nath Ltd.	1,00,000
Less: Amount charged by Nathu Ltd. for the material (including VAT)	<u>60,000</u>
Total amount charged	<u>6,40,000</u>
Value of service portion in the execution of works contract (60% of 6,40,000)	<u>3,84,000</u>
Service tax on ₹ 3,84,000 @12.36%	47,462.40

Less: CENVAT credit on inputs (Note-1)	-
CENVAT credit on input services	6,000
CENVAT credit on capital goods (50%) (Note-2)	<u>2,000</u>
Service tax payable	<u>39,462.40</u>
Service tax payable (rounded off)	<u>39,462</u>

Notes:

1. CENVAT credit of duties or cess paid on any inputs, used in or in relation to a works contract, is not available [Explanation 2 to rule 2A of the Valuation Rules].
 2. Only 50% of the duty paid on the capital goods is available as CENVAT credit, in the current year [Rule 4(2)(a) of the CENVAT Credit Rules, 2004].
- 11.** Section 72A(1) of the Finance Act, 1994, *inter alia*, provides that if the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner, he may direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant nominated by him, to the extent and for the period as may be specified by him.
- Further, sub-section (3) of section 72A provides that Commissioner may order such special audit even if the accounts of such person have been audited under any other law for the time being in force.
- Therefore, the fact that Raman's accounts have been audited under Income-tax Act, 1961 will not have any bearing on special audit ordered under section 72A of Finance Act, 1994. Thus, the contention of Raman is not correct in law.
- 12.** Section 78A of the Finance Act, 1994 makes a director, manager, secretary or other officer of the company personally liable to a penalty upto ₹ 1 lakh in case of certain specified contraventions committed by the company. Such penalty is leviable if the director, manager, secretary or other officer of the company was in charge of, and was responsible to, the company for the conduct of business of such company at a time when any of the specified contraventions was committed provided the same was within the knowledge of such director, manager, secretary or other officer of the company.

The specified contraventions *inter alia* include availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of Chapter V.

Though in the given case, Mr. Mudit and Miss. Sneha were in charge of, and were responsible to, Steft (P) Ltd. for the conduct of its business at the time of such irregular availment and utilization of the credit, personal penalty could be imposed on both of them only if they are knowingly concerned with such contravention. Further, if it is established

that Mr. Mudit and Miss. Sneha are knowingly concerned with the contravention, the amount of penalty in case of Mr. Mudit will have to be restricted to ₹ 1,00,000.

Yes, penalty can be imposed on manager or officer of a company in other cases as well. As per section 78A, such other cases are-

- (a) evasion of service tax; or
- (b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of Chapter V; or
- (c) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due.

13. Rule 10 of Service Tax Rules, 1994 lays down the procedure and facilities for the large taxpayer. The provisions of this rule as applicable to BPT Ltd. are given hereunder:

- (1) BPT Ltd. shall have to submit the prescribed returns for each of the registered premises. If BPT Ltd. has obtained a centralized registration under rule 4(2) of Service Tax Rules, 1994, it shall submit a consolidated return for all such premises.
- (2) BPT Ltd., on demand, may be required to make available the financial, stores and CENVAT credit records in electronic media, such as, compact disc or tape for the purposes of carrying out any scrutiny and verification, as may be necessary.
- (3) BPT Ltd. may, with intimation of at least 30 days in advance, opt out to be a large taxpayer from the first day of the following financial year.
- (4) Any notice issued but not adjudged by any of the Central Excise Officer administering the Act or rules made thereunder immediately before the date of grant of acceptance by the Chief Commissioner of Central Excise, Large Taxpayer Unit (12.12.2013 in this case), shall be deemed to have been issued by Central Excise Officers of the said unit.
- (5) Provisions of Service Tax Rules, in so far as they are not inconsistent with the provisions of this rule shall mutatis mutandis apply in case of BPT Ltd.

14. The issue as to whether the best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte assessment procedure is decided by the High Court in case of *N.B.C. Corporation Ltd. v. Commissioner of Service Tax 2014 (33) S.T.R. 113 (Del.)* wherein the High Court held that section 72 could *per se* not be considered as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. Thus, said order is not akin to an ex parte order.

Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.

15. Rule 6(7A) of the Service Tax Rules, 1994 provides an option to an insurer carrying on life insurance business to pay service tax:

- (i) on the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service;
- (ii) in all other cases, @ 3% of the premium charged from the policy holder in the first year and @ 1.5% of the premium charged from the policy holder in subsequent years towards the discharge of his service tax liability instead of paying service tax at the rate of 12%.

However, such option is not available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance.

In the light of the aforesaid provisions, service tax liability of ALICL for financial year 2013-14 would be computed as follows:

- (i) If the amount allocated for investment has been intimated by ALICL to policy holders at the time of providing service, ALICL has the option to pay service tax on the gross premium charged from a policy holder reduced by the amount allocated for investment. Thus, service tax liability of ALICL for the year 2013-14 will be computed as under:

$$= ₹ (180-100) \text{ lakh} \times 12.36\% = ₹ 9,88,800$$

- (ii) If the amount allocated for investment has not been intimated by ALICL to policyholders at the time of providing of service, ALICL will have to pay service tax @ 3% of the premium charged from policy holders in the first year and @ 1.5% of the premium charged from policy holders in the subsequent years. Thus, service tax liability of ALICL for the year 2013-14, being first year of its operations, will be computed as under:

$$= ₹ 180 \text{ lakh} \times 3.09\% \text{ (inclusive of 3\% education cesses)} = ₹ 5,56,200$$

- (iii) If gross premium received from policy holders is only towards risk cover, ALICL cannot discharge its service tax liability using aforesaid option. In such a case, it will have to pay service tax @ 12.36% on the entire premium charged from the policy holders. Thus, service tax liability of ALICL for the year 2013-14 will be computed as under:

$$= ₹ 180 \text{ lakh} \times 12.36\% = ₹ 22,24,800$$

16. (a) **Not valid.** As per section 9B of the Customs Tariff Act, 1975, no article shall be subjected to both countervailing and anti-dumping duties to compensate for the same situation of dumping or export subsidization.
- (b) **Not valid.** As per section 9B of the Customs Tariff Act, 1975, countervailing or anti-dumping duties shall not be levied by reasons of exemption of such articles from duties or taxes borne by the like articles when meant for consumption in the country of origin or exportation or by reasons of refund of such duties or taxes.

- (c) **Valid.** As per section 9B of the Customs Tariff Act, 1975, no definitive countervailing duty or anti-dumping duty shall be levied on the import into India of any article from a member country of the World Trade Organisation or from a country with whom Government of India has a most favoured nation agreement, unless a determination has been made in the prescribed manner that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

17. Computation of assessable value and customs duty payable of the imported goods

Particulars	US \$
Cost of the machine at the factory	20,000
Transport charges up to port	800
Handling charges at the port	<u>50</u>
<i>F.O.B.</i>	20,850
Freight charges up to India	5,000
Insurance charges @ 1.125% of F.O.B. [Note 1]	234.56
Ligherage charges paid by the importer [Note 4]	200
Ship demurrage charges on chartered vessels [Note 4]	<u>400</u>
<i>C.I.F.</i>	26,684.56
	(₹)
C.I.F. in Indian rupees @ ₹ 60/- per \$ [Note 5]	16,01,073.60
Add: Landing charges @ 1% of CIF [Note 1]	<u>16,010.736</u>
Assessable value	16,17,084.34
Add: Basic customs duty @ 10% [Note 6] [a]	<u>1,61,708.43</u>
Total	17,78,792.77
Add: CVD @ 12% [b] [EC and SHEC on CVD are exempt]	<u>2,13,455.13</u>
Total	19,92,247.90
Add: Education cesses @ 3% of [(a) + (b)] [2% education cess + 1% secondary and higher education cess] [c]	<u>11,254.91</u>
Total [d]	20,03,502.81
Additional duty u/s 3(5) @ 4% of (d) above [e]	<u>80140.11</u>
Total custom duty payable [(a) + (b) + (c) + (e)]	4,66,558.58
Total custom duty payable (rounded off to nearest rupee)	4,66,559

Notes:

- (1) Insurance charges and landing charges are included @ 1.125% of FOB value of goods and 1% of CIF value of goods respectively [Clauses (iii) and (ii) of first

proviso to rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

- (2) Buying commission is not included in the assessable value [Rule 10(1)(a)(i) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
 - (3) Freight incurred from port of entry to Inland Container depot is not includible in assessable value [Fourth proviso to rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
 - (4) Ship demurrage charges and lighterage charges are included in the assessable value [Explanation to Rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].
 - (5) Rate of exchange notified by CBEC on the date of presentation of bill of entry is considered [Explanation to section 14 of the Customs Act, 1962].
 - (6) Rate of duty is the rate prevalent on the date of presentation of bill of entry or the rate prevalent on the date of entry inwards, whichever is later [Section 15 of the Customs Act, 1962].
- 18. (a) Invalid.** As per section 61 of the Customs Act, 1962, warehousing period for goods other than capital goods intended to be used in 100% EOU is three (3) years and not five (5) years.
- (b) Invalid.** As per section 61(2)(ii) of the Customs Act, 1962, where any warehoused goods (not intended for being used in 100 % EOU) remain in a warehouse beyond a period of ninety days, interest is payable for the period from the expiry of said ninety days till the date of payment of duty on the warehoused goods. Section 2(44) of the Customs Act, 1962 defines 'warehoused goods' as goods deposited in a warehouse.
- Circular No. 39/2013 Cus dated 01.10.2013* has clarified that a harmonious reading of section 61 and section 2(44) of the Customs Act, 1962 indicates that when the goods deposited in a warehouse remain warehoused beyond a period of 90 days, then the interest starts accruing. In other words, the relevant date when the period of 90 days would commence would be the date of depositing the goods in the warehouse and not the date on which into-bond bill of entry in respect of such goods is presented.
- 19.** Section 116 of the Customs Act, 1962 imposes a penalty on the person-in-charge of the conveyance *inter alia* for short-landing of the goods at the place of destination and if the deficiency is not accounted for to the satisfaction of the Customs Authorities. Section 2(31) of the Act defines "person-in-charge" to *inter alia* mean in relation to a vessel, the master of the vessel. Section 148 of the Act provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment in respect of the matter in question of all obligations imposed on such person-

in-charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.

The High Court in the case of *Caravel Logistics Pvt. Ltd. v. Joint Secretary (RA) 2013 (293) ELT 342 (Mad.)* has held that conjoint reading of sections 2(31), 116 and 148 of Customs Act, 1962 makes it clear that in case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him. The High Court observed that if the assessee affixed seal on containers after stuffing and took their charge, he stepped into shoes of/acted on behalf of master of vessel (the person-in-charge).

Therefore, in the given case also penalty for short landing of goods can be imposed on Cargo Logistics Pvt. Ltd., the steamer agent of the vessel, Queen Mary Utah.

20. (i) Advance Authorization can be issued for supplies made to United Nations Organisations or under Aid Programme of the United Nations or other multilateral agencies and such supplies need to be paid for in free foreign exchange. Therefore, Bestron Ltd. can seek an Advance Authorization for the supplies made by it.
- (ii) Advance Authorization necessitates exports with a minimum of 15% value addition (VA).

$$VA = [(A - B)/B \times 100]$$

A = FOB value of export realized, B = CIF value of inputs covered by authorization.

Therefore, the minimum FOB value of the exports made by LMN Ltd. should be ₹ 23,00,000.

**Applicability of Legislative Amendments/Circulars etc.
for November, 2014 – Final Examination**

Paper 7 : Direct Tax Laws & Paper 8 : Indirect Tax Laws

Applicability of the Finance Act, Assessment Year etc. for November, 2014 Examination

The provisions of direct and indirect tax laws, as amended by the Finance Act, 2013, including notifications and circulars issued upto 30th April, 2014. The applicable assessment year for Direct Tax Laws is A.Y. 2014-15.

ANNEXURE

Part I : Statutory Update – Indirect Tax Laws

Significant Notifications and Circulars issued between 01.05.2013 and 30.04.2014

Study Material for Indirect Tax Laws [August, 2013 edition] contains all the relevant amendments made by the Finance Act, 2013 and circulars/notifications issued up to 30.04.2013. However, for students appearing in November, 2014 examination, amendments made by notifications, circulars and other legislations made between 01.05.2013 and 30.04.2014 are also relevant. Such amendments are given hereunder:-

A. CENTRAL EXCISE

I. Amendments in the CENVAT Credit Rules, 2004

1. Procedure, safeguards, conditions and limitations prescribed for refund of CENVAT credit to service providers covered under partial reverse charge

Rule 5B stipulates that a service provider providing services taxed under reverse charge mechanism and unable to utilize the CENVAT credit availed on inputs and input services for payment of service tax on such output services, shall be allowed refund of such unutilized CENVAT credit.

The procedure, safeguards, conditions and limitations to which such refund shall be subject to have been prescribed by CBEC vide *Notification No. 12/2014 CE (NT) dated 03.03.2014* as under:

A. SAFEGUARDS, CONDITIONS AND LIMITATIONS

(a) Refund is admissible, of unutilised CENVAT credit taken on inputs and input services during the half year for which refund is claimed, for providing following output services:

- (i) renting of a motor vehicle designed to carry passengers on non-abated value, to any person who is not engaged in a similar business;
- (ii) supply of manpower for any purpose or security services; or
- (iii) service portion in the execution of a works contract;

(hereinafter above mentioned services will be termed as **partial reverse charge services**). The amount of refund would be computed as follows:

Unutilised CENVAT credit taken on inputs and input services during the half year for providing partial reverse charge services.

(A)-(B)

where

$$A = \text{CENVAT credit taken on inputs and input services during the half year} \times \frac{\text{Turnover of output service under partial reverse charge during the half year}}{\text{Total turnover of goods and services during the half year}}$$

B = Service tax paid by the service provider for such partial reverse charge services during the half year.

- (b) Refund shall not exceed the amount of service tax liability paid/payable by the service receiver with respect to the partial reverse charge services provided during the period of half year for which refund is claimed.
- (c) Amount claimed as refund shall be debited by the claimant from his CENVAT credit account at the time of making the claim. However, if the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and the amount sanctioned.
- (d) The claimant shall submit not more than one claim of refund under this notification for every half year.
- (e) Refund claim shall be filed after filing of service tax return for the period for which refund is claimed.
- (f) No refund shall be admissible for the CENVAT credit taken on input or input services received prior to 01.07.2012.

Half year means a period of six consecutive months with the first half year beginning from the 1st day of April every year and second half year from the 1st day of October of every year.

B. PROCEDURE FOR FILING THE REFUND CLAIM

- (a) The output service provider shall submit an application in Form A, along with specified documents and enclosures, to jurisdictional Assistant Commissioner/Deputy Commissioner, before the expiry of 1 year* from the due date of filing of return for the half year. Copies of return(s) filed for the said half year shall also be filed along with the application.

**In case of more than one return required to be filed for the half year, 1 year shall be calculated from due date of filing of the return for the later period.*

However, last date of filing of application in Form A, for the half year ending on 30.09.2012, shall be 30.04.2014.

- (b) The Assistant Commissioner/Deputy Commissioner, may call for any document in case he has reason to believe that information provided in the refund claim is incorrect or insufficient and further enquiry needs to be caused before the sanction of refund claim, and shall sanction the claim after satisfying himself that the refund claim is correct and complete in every respect.

2. Provisions relating to distribution of credit in case of input service distributor amended [Rule 7]

With effect from 01.04.2014, rule 7 has been amended to simplify the mechanism of distribution of CENVAT credit in case of input service distributor as under:

S. No.	Position as per erstwhile rule 7	Position as per the amended rule 7	
1.	In case of a unit exclusively engaged in manufacture of exempted goods/ providing exempted services, service tax paid on input services used <u>IN</u> such a unit was not allowed to be distributed as CENVAT credit.	In case of a unit exclusively engaged in manufacture of exempted goods/ providing exempted services, service tax paid on input services used <u>BY</u> one or more such units will not be allowed to be distributed as CENVAT credit	With the substitution of word 'IN' with 'BY', credit of services, which have been used by such units though not actually consumed within such units, would also not be distributed.
2.	Credit of service tax attributable to service used wholly <u>IN</u> a unit was to be distributed only to that unit.	Credit of service tax attributable to service used wholly <u>BY</u> a unit shall be distributed only to that unit.	Substitution of word 'IN' with 'BY' would increase the scope of services pertaining to which credit could be distributed to a unit. Resultantly, credit for services like good transport agency services, rent-a-cab service, testing and analysis of the product etc. would now be available to the unit availing them.
3.	Credit of service tax attributable to service used <u>IN more than one unit</u> was to be distributed pro rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of	Credit of service tax attributable to service used <u>BY more than one unit</u> shall be distributed pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all its units, which are operational in	In case of common input services, amount of CENVAT credit attributed to a unit may be reduced as now turnover of all operational units has to be taken in denominator instead of only the units to which the service

	the turnover of all the units to which the service related during the same period.	the current year , during the said relevant period.	relates.
4.	Relevant period was the month/quarter previous to the month/quarter during which the CENVAT credit was distributed. In case of an assessee who did not have any total turnover in the said period, the input service distributor was to distribute any credit only after the end of such relevant period wherein the total turnover of its units was available.	Relevant period shall be the 'financial year' preceding to the year during which credit is to be distributed for month/quarter provided assessee has turnover in such preceding financial year. If the assessee does not have turnover for some/ all the units in the preceding financial year, relevant period shall be the last quarter for which details of turnover of all the units are available, previous to the month/ quarter for which credit is to be distributed.	Distribution of credit is now based on previous financial year's turnover instead of previous month's/quarter's turnover.

[Notification No. 5/2014-CE (NT) dated 24.02.2014]

3. Amendments in rule 3

(i) Duty leviable on transaction value to be paid on removal of capital goods as waste and scrap [Rule 3(5A)]

Rule 3(5A) of the CENVAT Credit Rules, 2004 provides for reversal of CENVAT credit in the event of removal of capital goods after being used, whether as capital goods or as waste/ scrap. Earlier, the quantum of credit that needs to be reversed was higher of the following two amounts:

- (I) CENVAT credit taken on the said capital goods reduced by the specified percentage points calculated by straight line method for each quarter of a year or part thereof from the date of taking the CENVAT credit

or

- (II) Duty leviable on transaction value.

However, with effect from 27.09.2013, if the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.

Thus, a manufacturer removing capital goods as waste and scrap will no longer be required to compare the amount equivalent to the duty leviable on transaction value with the amount equivalent to CENVAT credit taken on the said capital goods reduced by the specified percentage points. However, when capital goods will be removed, after being used, otherwise than as waste and scrap, the higher of the above-mentioned two amounts will be required to be paid.

[Notification No. 12/2013 CE (NT) dated 27.09.2013]

(ii) CENVAT credit taken on input services to be reversed if duty paid on final product remitted [Rule 3(5C)]

Earlier, where on any goods manufactured or produced by an assessee, the payment of duty was ordered to be remitted under rule 21 of the Central Excise Rules, 2002, the CENVAT credit taken on the inputs used in the manufacture or production of said goods was required to be reversed. Thus, earlier, reversal was only required in respect of inputs and not for input services.

Rule 3(5C) has been amended to provide that CENVAT credit taken on input services used in or in relation to the manufacture or production of said goods is also required to be reversed.

[Notification No. 1/2014 CE (NT) dated 08.01.2014]

(iii) Amount payable under sub-rules (5), (5A), (5B) and (5C) of rule 3 to be paid on or before the 5th day of the following month by utilizing CENVAT credit or otherwise

As per explanation 1 inserted after rule 3(5C), the amount payable under following sub-rules of rule 3 shall be paid by the manufacturer of goods or the provider of output service

- | | |
|-------------------------|---|
| (i) Rule 3(5) | Reversal of credit in case of removal of inputs or capital goods as such from the factory/premises of the output service provider |
| (ii) Rule 3(5A) | Reversal of credit in case of removal of capital goods after being used, whether as capital goods or as scrap or waste |
| (iii) Rule 3(5B) | Reversal of credit in case of full or partial writing off of the value of input or capital goods before being put to use |
| (iv) Rule 3(5C) | Reversal of credit in case of remission of duty on final product |
- by debiting the CENVAT credit or otherwise
 - on or before the 5th day of the following month except for the month of March, where such payment shall be made on or before the 31st day of the month of March.

[Notification No. 1/2014 CE (NT) dated 08.01.2014]

(iv) Failure to reverse the credit taken on inputs and input services used in goods on which duty is ordered to be remitted also to attract recovery provisions under rule 14 [Explanation 2 to rule 3(5C)]

Hitherto, as per explanation occurring after proviso to rule 3(5B), recovery provisions under rule 14 of the CENVAT Credit Rules, 2004 were applicable if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A) and (5B) of rule 3.

The said explanation has been omitted and a new explanation 2 has been inserted after rule 3(5C). As per the new explanation 2, in addition to sub-rules (5), (5A) and (5B) of rule 3, recovery provisions under rule 14 will also apply to sub-rule (5C) of rule 3.

In other words, even in a case where the manufacturer of goods or the provider of output service fails to reverse the CENVAT credit taken on inputs and input services used in goods on which duty has been ordered to be remitted, it would be recovered, in the manner provided under rule 14, for recovery of CENVAT credit wrongly taken.

[Notification No. 1/2014 CE (NT) dated 08.01.2014]

II. Amendment in the Central Excise Rules, 2002 – Threshold limit for e-payment of central excise duty reduced from ₹ 10 lakh to ₹ 1 lakh

Third proviso to rule 8(1) of the Central Excise Rules, 2002 has been amended to reduce the threshold limit for e-payment of central excise duty from ₹ 10 lakh to ₹ 1 lakh. Henceforth, with effect from 01.01.2014, where an assessee has paid an excise duty of ₹ 1 lakh or more including the amount paid by utilization of CENVAT credit, in the preceding financial year, he shall deposit the excise duty liable to be paid by him electronically through internet banking.

[Notification No. 15/2013 CE(NT) dated 22.11.2013]

III. Inter-related amendments in the CENVAT Credit Rules, 2004 and Central Excise Rules, 2002

1. Rule 12CCC of Central Excise Rules 2002 & Rule 12AAA of CENVAT Credit Rules, 2004 substituted with new rules-restriction to be imposed, facilities to be withdrawn and procedure for the same amended.

Rule 12CCC of the Central Excise Rules 2002 (hereinafter referred to as CER, 2002) and 12AAA of the CENVAT Credit Rules, 2004 (hereinafter referred to as CCR, 2004) empower the Central Government to provide for certain measures including restrictions on a manufacturer, first stage dealer, second stage dealer and an exporter and specify, by a notification in the Official Gazette, the nature of restrictions to be imposed, types of facilities to be withdrawn and procedure for issuance of such order.

Rule 12CCC of the CER, 2002 is invoked to prevent evasion of or default in payment of excise duty while rule 12AAA of the CCR, 2004 is invoked to prevent the misuse of the provisions of CENVAT credit.

With effect from 21.03.2014, said rules [Rule 12CCC of the CER, 2002 and rule 12AAA of the CCR, 2004] have been substituted with new rules respectively. As per the new rules, only Chief Commissioner of Central Excise can pass an order for imposing the restrictions on manufacturer, first stage dealer, second stage dealer and exporter, and for withdrawing the facilities provided to them. Earlier, any officer authorised by the Board was empowered to pass such an order.

The aforesaid rules empower the Central Government to specify, by a notification in the Official Gazette, the nature of restrictions, types of facilities to be withdrawn and procedure for issue of such order. Earlier, in pursuance of this power, *Notification No. 5/2012-CE(NT) dated 12.03.2012* had been issued. Now, the said notification has been superseded by *Notification No. 16/2014-C.E. (N.T.) dated 21.03.2014*.

A comparison between the erstwhile notification and the new notification is outlined as below:

	Particulars	Notification No. 5/2012	Notification No. 16/2014	
1.	Specified offences	Same under both the notifications		
2.	Who is authorized to order the withdrawal of facilities & imposition of restrictions?	An officer authorized by CBEC	Chief Commissioner of Central Excise	
3.	Time period for which restrictions could be imposed on the commission of specified offences	Earlier, no time – limit was prescribed for which restrictions might be imposed/ facilities might be withdrawn for the offences committed-whether for the first time or subsequently.	Restrictions could be imposed for a period upto	for the offence committed
			(i) 6 months	for the first time
			(ii) 1 year	subsequently

4.	Restrictions that could be imposed on the commission of specified offences for <u>second time or subsequently</u>	Earlier, in such case out of all the specified restrictions, following two restrictions may not be imposed: (i) the assessee may be required to maintain records of receipt, disposal, consumption and inventory of the principal inputs on which CENVAT credit has not been taken. (ii) the assessee may be required to intimate the Superintendent of Central Excise regarding receipt of principal inputs in the factory on which CENVAT credit has or has not been taken, within a period specified in the order and the said inputs shall be made available for verification upto the period specified in the order.	Any of the specified restrictions may be imposed.
5.	Monetary limit	Same under both the notifications	
6.	Procedure	Earlier, proposal to withdraw the facilities and impose restrictions was forwarded by Commissioner of Central Excise (CCE)/Additional Director General of Central Excise Intelligence (ADGCEI) to Chief CCE/ DGCEI who, after giving the defaulter an opportunity of being heard, might forward it to CBEC along with its	Now, proposal to withdraw the facilities and impose restrictions is to be forwarded by CCE/ ADGCEI to Chief CCE who, after giving the defaulter an opportunity of being heard, would pass the order withdrawing facilities and imposing restrictions for the period specified in the order.

		recommendations. Thereafter, an officer authorized by CBEC might pass the order withdrawing facilities and imposing restrictions for the period specified in the order.	
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[Notification No.s 14 to 16/2014-Central Excise (N.T.) all dated 21.03.2014]

2. Importer issuing CENVATable invoices now required to obtain registration and submit quarterly returns

(i) Importer required to obtain registration [Rule 9(1) of the CER, 2002 amended]

Hitherto, every person, who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods, was required to get registration under central excise.

With effect from 01.04.2014, an importer who issues an invoice on which CENVAT credit can be taken is also required to obtain such registration. Thus, such importer will have to obtain registration as a 'registered importer' with the central excise authorities to pass on the credit on the imported goods.

Consequently, Form A [Application for Central Excise Registration] has also been accordingly amended.

(ii) Importer required to file quarterly return [Rule 9(8) of the CCR, 2004 amended]

Earlier, rule 9(8) of the CCR, 2004 required a first stage dealer and a second stage dealer to submit a return (electronically) within 15 days from the close of each quarter of a year to the Superintendent of Central Excise.

With effect from 01.04.2014, said rule has been amended. Thus, now a registered importer is also required to submit such quarterly return.

Consequently, the return form prescribed for the same has also been accordingly amended.

[Notification Nos. 8 to 11/2014-Central Excise (N.T.) dated 28.02.2014]

IV. Amendment in rules 8, 9 and 10 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

Hitherto, literal interpretation of rules 8, 9 and 10 lead to a conclusion that valuation methods prescribed therein will be applicable only in a case where ALL the goods were either captively consumed or sold to a unrelated buyer or to/through an inter-connected undertaking respectively. In other words, these rules did not cover the cases where some goods were captively consumed while others were sold, or a case where goods were partly sold to related buyers and partly to unrelated buyers.

With effect from 01.12.2013, rules 8, 9 and 10 dealing with determination of assessable value in case of captive consumption, sale to related person and sale to/through an inter-connected undertaking respectively have been amended to clearly state that these rules apply irrespective of whether the whole or a part of the clearances of manufactured goods are covered by the circumstances given in these rules. Each clearance is required to be assessed according to section 4(1)(a) or the relevant rule dealing with the circumstances of clearance of the goods, as the case may be.

Thus, now valuation mechanism provided in rules 8, 9 and 10 is applicable in following the cases:

- (i) **Rule 8:** Where whole or part of the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles.
- (ii) **Rule 9:** Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Central Excise Act, 1944.
- (iii) **Rule 10:** Where whole or part of the excisable goods are sold by the assessee to or through an inter-connected undertaking.

For example, if an assessee clears his goods in such a way that first removal of goods is to an independent buyer, second removal is to such a related person who is covered under rule 9 and third removal is to a person who is covered under rule 10, while some goods are captively consumed, then the first removal should be assessed under section 4(1)(a), second removal should be assessed under rule 9 and third removal should be assessed under rule 10, while captively consumed goods should be assessed under rule 8 of these rules. It may be noted that Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are not required to be followed sequentially.

Consequently, clarifications with regard to following issues as contained in Serial no. 5, 12 and 14 of the *Circular no. 643/34/2002-CX dated 1-7-2002* containing reference to rules 8, 9 and 10 have also been deleted:

- (i) How will valuation be done in cases of captive consumption (i.e. consumed within the same factory) including transfer to a sister unit or another factory of the same company/firm for further use in the manufacture of goods?
- (ii) How will valuation be done when goods are sold partly to related persons and partly to independent buyers?
- (iii) How will valuation be done when inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory?

[Notification No. 14/2013 CE (NT) dated 22.11.2013 and Circular No. 975/09/2013-CX dated 25.11.2013]

V. OTHERS**1. Unregistered premises used solely for affixing lower ceiling prices on pharmaceutical products to comply with DPCO, 2013 exempted from obtaining central excise registration**

Unregistered premises used solely for affixing a sticker/re-printing/re-labeling/re-packing of pharmaceutical products falling under Chapter 30 of the Central Excise Tariff Act, 1985 with lower ceiling price to comply with the notifications issued under Drugs (Prices Control) Order, 2013 have been exempted from obtaining registration under central excise. However, the exemption from registration will be available subject to the conditions specified in *Notification No. 22/2013 CE dated 29.07.2013* exempting the pharmaceutical products from payment of central excise duty.

[Notification No. 11/2013 CE (NT) dated 02.08.2013]

Note: Ministry of Chemicals and Fertilizers (Department of Pharmaceuticals) issued the new Drug Price Control Order (DPCO) on May 15, 2013 which required existing manufacturers/traders, selling medicines at a price higher than the ceiling price fixed by the Government to execute downward revision of prices. The Government mandated that the prices of scheduled drugs be changed within 45 days from the date the price notification came into force. For this purpose, the drugmakers had to re-print/re-label/re-pack the medicines which had already been sent out of their factories at sites other than the facilities registered under the Central Excise Act.

As pharmaceutical products falling under Heading 3004 of the Central Excise Tariff (scheduled formulations) are included in the Third Schedule to the Central Excise Act, 1944, labeling or re-labeling of containers including the declaration or alteration of retail sale price on it amounts to manufacture in terms of section 2(f)(iii) of the Central Excise Act, 1944. So, as not to impose any duty liability that may arise on account of re-printing/ re-labeling/ re-packing mandated by the DPCO, the Central Government has exempted scheduled formulations as defined under DPCO, 2013 which are subjected to re-labelling, reprinting, repacking or stickering, in unregistered premises from payment of excise duty.

2. Facility of removal without payment of duty extended to excisable goods stored and sold from Duty Free Shops at International Airports

The facility of removal without payment of duty provided under rule 20(1) of the Central Excise Rules, 2002 has been extended to all excisable goods intended for storage in godown/retail outlet of a Duty Free Shop in the Departure Hall/Arrival Hall of International Airport, appointed/licensed as 'warehouse' under sections 57 or 58 of the Customs Act, 1962 and for sale therefrom, against foreign exchange to passengers going out of India or to the passengers or members of crew arriving from abroad. The facility will be subject to specified limitations, conditions and safeguards *[Notification No. 07/2013 CE (NT) dated 23.05.2013]*.

Consequently, godown or retail outlets of the above-mentioned Duty Free Shops will be deemed to be registered as a warehouse under rule 9 of the Central Excise Rules, 2002 [Notification No. 09/2013 CE (NT) dated 23.05.2013].

CBEC, vide Circular No. 970/04/2013-CX dated 23.05.2013 has specified conditions, limitations, safeguards and procedures for removal of such excisable goods to godowns/retail outlets of Duty Free Shops to which warehousing provisions have been extended vide Notification No. 07/2013 CE (NT) dated 23.05.2013.

Note: Hitherto only foreign goods were sold in Duty Free Shops (DFS) located in the International Airports. A passenger going abroad or coming from a foreign country could buy foreign goods without customs duty and the incoming passenger could clear those goods without duty within his available limits as per the baggage rules.

The Central Government has now allowed excise duty-free sale of goods manufactured in India to international passengers or crew arriving from abroad at the DFS located in the arrival halls of international airports. Such exemption from excise duty is subject to limitations, conditions and safeguards as may be specified by the CBEC. Therefore, now a passenger arriving from abroad shall have the choice to buy either duty-free imported goods or duty-free indigenous goods within his overall permissible baggage allowance.

VI. CLARIFICATIONS

1. Good cleared against specified duty credit scrips not to be treated as exempted goods

Notifications Nos. 29/2012-CE, 30/2012-CE, 31/2012-CE, 32/2012-CE and 33/2012-CE all dated 09.07.2012 provide exemption to certain manufactured goods when cleared against the specified duty credit scrips issued to an exporter. The specified duty credit scrips are:

- ❖ Focus Product Scheme (FPS) duty credit scrip,
- ❖ Focus Market Scheme (FMS) duty credit scrip
- ❖ VKGUY (Special Agriculture and Village Industry Scheme) duty credit scrip
- ❖ Agri Infrastructure Incentive Scrip duty credit scrip
- ❖ Status Holder Incentive Scheme duty credit scrip

One of the conditions for availing of these exemptions is that duties leviable, but for these exemptions, are debited in or on the reverse of said scrip and the scrip holder is permitted to avail of CENVAT credit of the duties debited in the scrip.

In view of these provisions it has been clarified that such debit of duty in these scrips shall be treated as payment of duty for the purpose of determining the applicability of rule 6 of the CENVAT Credit Rules, 2004. The clearance of excisable goods against such specified duty credit scrips cannot be considered as clearances of exempted goods and

therefore, the provisions regarding payment of amount under rule 6(3) of the CENVAT Credit Rules, 2004 will not apply in such a case.

[Circular No. 973/07/2013-CX dated 04.09.2013]

2. Guidelines for arrest and bail under the Central Excise Act, 1944

In view of the amendments made in sections 9A, 20 and 21 of the Central Excise Act, 1944 vide the Finance Act, 2013, certain offences have been made cognizable and non-bailable. The following significant guidelines have been issued by CBEC vide *Circular No. 974/08/2013 CX dated 17.09.2013* with regard to implementation of arrest and bail provisions under the amended central excise law:

- (i) A person can be arrested for both bailable and non-bailable offences. Since arrest takes away the liberty of an individual, the power must be exercised with utmost care and caution and only when the exigencies of the situation demand arrest.
- (ii) Decision to arrest needs to be taken on case-to-case basis considering various factors, such as, nature & gravity of offence, quantum of duty evaded or credit wrongfully availed, nature & quality of evidence, possibility of evidences being tampered with or witnesses being influenced, cooperation with the investigation, etc. Thus, power to arrest has to be exercised after careful consideration of the facts of the case and the above factors.
- (iii) A person can be arrested for non-bailable offence only when the offence committed by him is covered under clause (b) or clause (bbbb) of sub-section 9(1) and the duty involvement exceeds Rs. 50 lakh. Any person arrested for offences under these clauses should be informed of the grounds of arrest and produced before a magistrate without unnecessary delay and within 24 hours of arrest.
- (iv) In respect of the following non-bailable offences, decision to arrest may be taken by the Commissioner:
 - (a) clandestine removal of manufactured goods;
 - (b) removal of goods without declaring the correct assessable value and receiving a portion of sale price in cash which is in excess of invoice price and not accounted for in the books of account;
 - (c) taking CENVAT credit without receiving the goods specified in the invoice;
 - (d) taking CENVAT credit on fake invoices;
 - (e) issuing Cenvatable invoices without delivering the goods specified in the said invoice.
- (v) In all other cases of cognizable and non-bailable offences, not referred above, the decision to arrest shall be taken by the Commissioner only with the approval of the jurisdictional Chief Commissioner. Examples of such cases are:

- (a) removal of inputs as such, without reflecting such removal in records, on which CENVAT credit has been taken, without payment of amount equal to the credit availed on such inputs
 - (b) irregular and wrongful availment of benefit of central excise duty exemption by reason of fraud, collusion, willful misstatement, suppression of facts, or contravention of the provisions of the Act or the rules with intent to evade payment of duty, etc.
 - (vi) Chief Commissioners/ Commissioners of Central Excise are required to ensure that approval for arrest for non-bailable offence is granted only where the intent to evade duty is evident and element of mens rea/guilty mind is palpable.
 - (vii) Any person arrested for non-cognizable and bailable offence shall have to be released on bail, if he offers bail, and in case of default of bail, he is to be forwarded to the custody of magistrate. In terms of Notification no 9/99-C.E.(N.T.) dated 10-2-99, an officer not below the rank of Superintendent of Central Excise can exercise powers under section 21 including powers to grant bail.
 - (viii) Bail should be subject to the condition(s), as deemed fit, depending upon the facts and circumstances of each individual case. It has to be ensured that the amount of bail bond/ surety should not be excessive and should be commensurate with the financial status of the arrested person. Further the bail conditions should be informed by the arresting officer in writing to the person arrested and also informed on telephone to the nominated person of the person(s) arrested. Arrested person should be allowed to talk to the nominated person.
 - (ix) If the conditions of the bail are fulfilled by the arrested person, he shall be released by the officer concerned on bail.
 - (x) The arresting officer may, and shall if such a person is indigent and unable to furnish surety, instead of taking bail, discharge him on executing a bond without sureties to his appearance as provided under section 436 of Cr PC. However, in cases where the conditions for granting bail are not fulfilled, the arrested person shall be produced before the appropriate magistrate within 24 hours of arrest.
 - (xi) Only in the event of circumstances preventing the production of the person arrested before a Magistrate without unnecessary delay, the arrested person may be handed over to nearest Police Station for his safe custody during night, under proper Challan and produced before the magistrate the next day. These provisions shall apply for non-bailable offence also. The nominated person of the arrested person may also be informed accordingly.
- 3. Clarification on implementation of decision of Supreme Court in case of goods sold at a price below the cost**

In case of *M/s Fiat India Ltd. 2012 (283) E.L.T 161 (S.C.)* [reported in Select Cases in Direct and Indirect Tax Laws-An essential reading for Final Course (Relevant for May, 2014 and

November, 2014 examination)], SC had held that in case the goods were sold at a price substantially lower than the cost of the manufacture to achieve market penetration, the transaction value declared under section 4 may be rejected.

CBEC, vide *Circular No. 979/03/20014-CX dated 15.01.2014*, has clarified that the transaction value cannot be rejected in every case where the declared value is lower than the manufacturing cost and profit. Due care will be taken at the level of the Commissioner to see whether the case at hand is similar to the facts and circumstances of the *FIAT* case.

Further, **extended period of limitation** shall apply only if there is a sale in the circumstances similar to the case of *M/s Fiat* and yet transaction value of goods is declared as the correct transaction value after the date of the judgment, ie. 29.08.2012.

4. Extension of warehousing and acceptance of Letter of undertaking in place of Bank Guarantee for export warehousing

Circular No. 976/10/2013-CX dated 12.12.2013 has made following amendments in *Circular No. 579/16/2001-CX. dated 26-6-2001* and *Circular No. 581/18/2001-CX. dated 29-6-2001* which prescribe conditions, procedures and safeguards applicable for storage in a warehouse registered at such places as may be specified by the Board and export therefrom regarding all excisable goods specified in the First Schedule to the Central Excise Tariff Act, 1985:

S.No.	Basis	Circular No. 579/16/2001	Circular No. 976/10/2013
1.	Period of warehousing	Any goods warehoused may be left in the warehouse in which they are deposited, or in any warehouse to which such goods have been removed, till the expiry of 3 years from the date on which such goods were first warehoused.	- Warehousing of goods shall initially be allowed for a period upto 6 months, which may be further extended by Assistant/ Deputy Commissioner, each extension being for a period not exceeding 6 months, subject to verification that the goods have not deteriorated in quality. - The maximum period, for which goods may be left in the warehouse in which they are deposited, or in any warehouse to which such goods have been removed, shall be three years from the date on which such goods were first warehoused. - Excisable goods shall be deemed to be cleared for home consumption on expiry of

			warehousing period including extensions granted, if any. • Duty and interest @ 24% per annum shall be charged on such deemed removal.
2.	Revocation/ suspension of warehouse registration	The excisable goods lodged therein shall either be cleared for home consumption on payment of duty or be removed to another warehouse without payment of duty.	The excisable goods lodged therein shall either be cleared for home consumption on payment of duty and interest @ 24% per annum or shall be removed to another warehouse without payment of duty.
S.No.	Basis	Circular No. 581/18/2001	Circular No. 976/10/2013
3.	Requirement to furnish security equal to 25% of the Bond amount	An exporter is required to furnish security equal to 25% of the Bond amount for availing the facility of export warehousing.	Now, where exporter is a manufacturer and a Status Holder with a clean track record, requirement to furnish security equal to 25% of bond amount shall be replaced by the requirement of furnishing an LUT initially for a period upto 6 months which may be extended by a further period not exceeding 6 months. Further, extensions in the warehousing period as provided in point 1. above shall be allowed to such exporter only on furnishing security of 25% of the bond amount.

5. Clarification regarding levy of the Education Cess and the Secondary and Higher Education Cess on other cesses

Education Cess and the Secondary and Higher Education Cess are not to be calculated on cesses which are levied under Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue) [for instance, Sugar cess levied under the Sugar Cess Act, 1982, Tea Cess levied under Tea Act, 1953] but are only collected by the Department of Revenue in terms of those Acts.

[Circular No. 978/02/2014-CX dated 07.01.2014]

B. SERVICE TAX

I. EXEMPTIONS:**1. Mega exemption notification amended**

Mega exemption *Notification No. 25/2012-ST dated 30.06.2012* has been amended as follows:-

(a) Services in relation to serving of food/ beverages by an air conditioned canteen maintained in a factory exempted

Services provided, in relation to serving of food or beverages, by a canteen have been exempted from service tax provided such canteen:-

- (i) is maintained in a factory covered under the Factories Act, 1948, and
- (ii) has the facility of air-conditioning or central air-heating at any time during the year.

[Notification No. 14/2013-ST dated 22.10.2013]

(b) Services provided by NSDC or by an approved SSC/assessment agency/training partner exempted

Services provided by:-

- (i) the National Skill Development Corporation (NSDC) set up by the Government of India;
- (ii) a Sector Skill Council (SSC) approved by the NSDC;
- (iii) an assessment agency approved by the SSC or the NSDC;
- (iv) a training partner approved by the NSDC or the SSC

in relation to:-

- (a) the National Skill Development Programme implemented by the NSDC; or
- (b) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or
- (c) any other Scheme implemented by the NSDC

have been exempted from service tax.

[Notification No. 13/2013-ST dated 10.09.2013]

Note: Prior to 10.05.2013, courses run by an institute affiliated to NSDC were not liable to service tax as same were included in the definition of approved vocational courses and thus were exempt vide entry (I) of the negative list. With effect from 10.05.2013, the Finance Act, 2013 made the courses run by an institute affiliated to NSDC liable to service tax by amending the definition of approved vocational courses.

With effect from 10.09.2013, said services have been exempted from service tax by incorporating them in the mega exemption notification. Hence, such services were taxable only during the period between 10.05.2013 and 09.09.2013.

(c) Services provided by cord blood banks by way of preservation of stem cells exempted

Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation have been exempted from service tax.

[Notification No. 04/2014-ST dated 17.02.2014]

(d) Loading/unloading/packing/storage/warehousing of rice exempted

Services by way of loading, unloading, packing, storage or warehousing of rice have been exempted from service tax.

[Notification No. 04/2014-ST dated 17.02.2014]

(e) Scope of definition of 'Governmental authority' widened

The definition of "Governmental authority" has been substituted with the following new definition:-

"Governmental authority" means an authority or a board or any other body;

- (i) set up by an Act of Parliament or a State Legislature; or
- (ii) established by Government,

with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution.

Thus, the scope of the definition has been enhanced. Henceforth, an authority or a board or any other body established by Government with 90% or more participation by way of equity or control need not be set up under an Act of Parliament or a State Legislature to qualify as Governmental authority.

[Notification No. 02/2014-ST dated 30.01.2014]

(f) Expansion in the scope of exemption of services provided by way of sponsorship of sports events

Hitherto, services provided by way of sponsorship of sporting events organized by a national sports federation, or its affiliated federations were exempt from service tax where the participating teams or individuals represent any district, State or zone. The said exemption has been extended even in a case where the participating teams or individuals represent any **COUNTRY**.

[Notification No. 01/2014-ST dated 10.01.2014]

2. Exemption to restaurant and accommodation services provided between 17.09.2013 and 31.03.2013 in Uttarakhand

Following taxable services provided, during the period between 17th September, 2013 and 31st March, 2014, to any person in the State of Uttarakhand are exempt from whole of the service tax leviable thereon:-

- (i) Services by way of renting of a room in a hotel, inn, guest house, club, campsite or other commercial place meant for residential or lodging purposes.
- (ii) Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess.

[Exemption Order 1/2013-ST dated 17.09.2013]

3. Revised scheme of service tax exemption in case of services provided to SEZ unit/Developer

Notification No. 40/2012-ST dated 20.06.2012 prescribing the scheme for claiming exemption in respect of the services received by a developer/units of an SEZ has been superseded by Notification No. 12/2013-ST dated 01.07.2013. The new notification has expanded the scope of *ab-initio* exemption and refund available to SEZ unit/developer.

The significant relevant changes in the new notification vis-à-vis erstwhile notification have been outlined as follows:-

Basis	NN 40/2012	NN 12/2013
Services eligible for <i>ab initio</i> exemption	Only specified services wholly consumed within SEZ were eligible for the <i>ab initio</i> exemption. Further, the definition of wholly consumed services, linked with the Place of Provision of Services Rules, 2012, emphasized that the specified services must be provided only within SEZ.	Specified services received by the SEZ Unit or the Developer used exclusively for the authorized operations are eligible for the <i>ab initio</i> exemption. Consequently, any services used exclusively for the authorized operations whether provided within SEZ or outside, will be eligible for upfront exemption.
Refund of service tax paid on the common services shared between authorized operations in SEZ and its DTA operations	Maximum refund was restricted as under:-	The service tax paid on the specified services that are common to the authorized operation in an SEZ and the operation in domestic tariff area [DTA unit(s)] shall be distributed amongst the SEZ Unit/Developer and the DTA unit(s) in the manner as prescribed in rule 7 of the CENVAT Credit Rules, 2004. For the purpose of distribution, the
	Maximum refund $= \frac{ST \times ET}{TT}$	
	where ST stands for service tax paid on services other than wholly consumed services (used for	

	both SEZ and DTA Unit) ET stands for Export turnover of goods and services of SEZ Unit/Developer TT stands for Total turnover for the period	turnover of the SEZ Unit/Developer shall be taken as the turnover of authorized operation during the relevant period. Such amount would be available as refund.
Option not to avail the exemption and instead take CENVAT credit as usual	Earlier scheme did not expressly provide for such an option.	SEZ Unit/the Developer has an option not to avail of this exemption and instead take CENVAT credit on the specified services in accordance with the CENVAT Credit Rules, 2004.
Availability of refund of service tax on the specified services on which <i>ab-initio</i> exemption is admissible but not claimed	Refund of service tax on the specified services on which <i>ab-initio</i> exemption is admissible but not claimed was not expressly provided in the earlier scheme.	The SEZ Unit or the Developer shall be entitled to the refund of service tax on the specified services on which <i>ab-initio</i> exemption is admissible but not claimed.

II. OTHER AMENDMENTS - Threshold limit for e-payment of service tax reduced from ₹ 10 lakh to ₹ 1 lakh

Proviso to rule 6(2) of the Service Tax Rules, 1994 has been amended to reduce the threshold limit for e-payment of service tax from ₹ 10 lakh to ₹ 1 lakh. Henceforth, with effect from 01.01.2014, where an assessee has paid a total service tax of ₹ 1 lakh or more including the amount paid by utilization of CENVAT credit, in the preceding financial year, he shall deposit the service tax liable to be paid by him electronically through internet banking.

[Notification No. 16/2013-ST dated 22.11.2013]

III. CLARIFICATIONS

1. Clarification on issues pertaining to restaurant service

Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year are exempt from service tax vide mega exemption notification.

In this regard, CBEC, vide *Circular No.173/8/2013 – ST dated 07.10.2013*, has clarified the following:-

A. Services provided (in relation to serving of food or beverages) by air-conditioned as well as non-air-conditioned restaurants, eating joints or mess, operating in a complex

In a complex, air conditioned as well as non-air conditioned restaurants are operational. These restaurants are clearly demarcated and separately named, but food is sourced from a common kitchen.

In such a case, services provided in relation to serving of food/beverages restaurant having the facility of air conditioning or central air heating in any part of the establishment, at any time during the year is liable to service tax. However, such services provided in a non air-conditioned or non centrally air- heated restaurant will be treated as exempted service and thus, will not be liable to service tax.

B. Services are provided by a 'specified restaurant' in other areas e.g. swimming pool or an open area attached to the restaurant

Services provided by restaurant having the facility of air conditioning or central air heating in any part of the establishment, at any time during the year, in other areas of the hotel are liable to service tax.

C. Service tax on goods sold on MRP basis across the counter as part of the Bill/invoice

If goods are sold on MRP basis (fixed under the Legal Metrology Act), they have to be excluded from total amount for the determination of value of service portion.

2. Guidelines for arrest and bail in relation to offences punishable under the Finance Act, 1994.

Powers to arrest is introduced under the service tax law by the Finance Act, 2013. Accordingly, a person who has committed any of the offences specified under section 89(1) and the amount involved in the offence exceeds ₹50 lakh, can be arrested.

Circular No. 171/6/2013-ST dated 17.09.2013 outlines post arrest procedure as follows:-

(i) Procedure in case of non-cognizable and bailable offence:

- The Assistant Commissioner/Deputy Commissioner is bound to release a person on bail against a bail bond. The bail conditions should be informed to the arrested person as well as to the nominated person of the person(s) arrested. The conditions will relate to, *inter alia*, execution of a personal bail bond and one surety of like amount given by a local person of repute, appearance before the investigating officer when required and not leaving the country without informing the officer.
- If the conditions of the bail are fulfilled by the arrested person, he shall be released by the officer concerned on bail forthwith. Otherwise, the arrested person shall be produced before the appropriate Magistrate without unnecessary delay and within 24 hours of arrest. The arrested person may be handed over to the nearest police

station for his safe custody, within 24 hours, during the night under a challan, before he is produced before the Court.

(ii) Procedure in case of cognizable offence:

Only in the event of circumstances preventing the production of the arrested person before a Magistrate without unnecessary delay, the arrested person may be handed over to nearest Police Station for his safe custody, within 24 hours, under a proper challan, and produced before the Magistrate on the next day, and the nominated person of the arrested person may be also informed accordingly.

3. Clarification as to whether “agricultural produce” includes rice and benefits available in respect of rice under mega exemption notification

CBEC vide *Circular No.177/03/2014 – ST dated 17.02.2014*, has clarified that the definition of agricultural produce under section 65(5) of the Finance Act, 1994 covers ‘paddy’; but excludes ‘rice’. It implies that benefits available to agricultural produce in the negative list [Section 66D(d)] are not available to rice.

However, many such benefits have been extended to rice by way of appropriate entries in the mega exemption notification as follows:-

- (i) Services by way of transportation of food stuff by rail/vessel/goods transport agency is exempt from service tax. Food stuff includes rice.
- (ii) Services by way of loading, unloading, packing, storage or warehousing of rice are exempt from service tax.
- (iii) Carrying out an intermediate production process as job work in relation to agriculture is exempt from service tax. It is clarified that paddy milled into rice, on job work basis is also exempt from service tax since such milling of paddy is an intermediate production process in relation to agriculture.

4. Clarification regarding exemption available to services provided by a Resident Welfare Association (RWA) to its own members

Mega exemption *Notification No. 25/2012-ST dated 20.06.2012* provides exemption to services provided by an RWA to its own members by way of reimbursement of charges or share of contribution up to ₹ 5,000 per month per member for sourcing of goods or services from a third person for the common use of its members.

Certain doubts have been raised regarding the scope of said exemption. CBEC vide *Circular No.175/01/2014 – ST dated 10.01.2014*, has clarified these doubts as follows:

S.No.	Doubt	Clarification
1.	(i) In a residential complex, monthly contribution collected from members is used by the RWA for the purpose of making payments to	Exemption in mega exemption notification is provided specifically with reference to service provided by an unincorporated body or a non-profit entity registered

	the third parties, in respect of commonly used services or goods [Example: for providing security service for the residential complex, maintenance or upkeep of common area and common facilities like lift, water sump, health and fitness centre, swimming pool, payment of electricity Bill for the common area and lift, etc.]. Is service tax leviable on the same? (ii) If the contribution of a member(s) of a RWA exceeds ₹ 5,000 per month, how should the service tax liability be calculated?	under any law for the time being in force such as RWAs, to its own members. However, a monetary ceiling has been prescribed for this exemption, calculated in the form of ₹ 5,000 per month per member contribution to the RWA, for sourcing of goods or services from third person for the common use of its members. If per month per member contribution of any or some members of a RWA exceeds ₹ 5,000, entire contribution of such members whose per month contribution exceeds ₹ 5,000 would be ineligible for the exemption under the said notification. Service tax would then be leviable on the aggregate amount of monthly contribution of such members.
2.	(i) Is Small Service Provider's (SSP) exemption under <i>Notification No. 33/2012-ST</i> available to RWA? (ii) Does 'aggregate value' for the purpose of threshold exemption, include the value of exempt service?	SSP exemption under <i>Notification No. 33/2012-ST</i> is applicable to a RWA, subject to conditions prescribed in the notification. Under this notification, taxable services of aggregate value not exceeding ₹ 10 lakh in any financial year is exempted from service tax. As per the definition of 'aggregate value' provided in explanation of the notification, aggregate value does not include the value of services which are exempt from service tax.
3.	If a RWA provides certain services such as payment of electricity or water bill issued by third person, in the name of its members, acting as a 'pure agent' of its members, is exclusion from value of taxable service available for the purposes of SSP exemption or exemption provided under mega exemption notification?	In Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, it is provided that expenditure or costs incurred by a service provider as a pure agent of the recipient of service shall be excluded from the value of taxable service, subject to the conditions specified in the said rule. For example, where the payment for an electricity bill raised by an electricity

		transmission or distribution utility in the name of the owner of an apartment in respect of electricity consumed thereon, is collected and paid by the RWA to the utility, without charging any commission or a consideration by any other name, the RWA is acting as a pure agent and hence exclusion from the value of taxable service would be available. However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available.
4.	Is CENVAT credit available to RWA for payment of service tax?	RWA may avail CENVAT credit and use the same for payment of service tax, in accordance with the CENVAT Credit Rules, 2004.

C. CUSTOMS

1. Drawback allowed on milk products and ceasin, caseinates etc. and disallowed on wheat

Earlier, no drawback was allowed on milk products falling under headings 0401, 0402, 0403, 0404, 0405, 0406, rice falling under heading 1006 and casein, caseinates and other casein derivatives; casein glues falling under heading 3501 of the Customs Tariff.

However, **with effect from 21.09.2013**, drawback will not be allowed only in respect of rice falling under heading 1006 and wheat falling under heading 1001 of the Customs Tariff. In effect, drawback will

- be allowed in respect of milk products falling under the above-mentioned headings and ceasin, caseinates etc. falling under heading 3501 (which was not allowed prior to 21.09.2013); and
- not be allowed on wheat falling under heading 1001 (which was allowed prior to 21.09.2013).

Rule 3 of the Central Excise Duties and Service Tax Drawback Rules, 1995 has been amended vide *Notification No. 97/2013 Cus. (NT) dated 14.09.2013* to give effect to this

amendment. Consequential amendments have been made in rule 6(4) and rule 7(5) of the said rules.

2. Import of LCD/LED/Plasma TV as part of free baggage allowance disallowed

With effect from 26.08.2013, Annexure I to the Baggage Rules, 1988 which specifies the items that cannot be allowed duty free clearance as part of free baggage allowance has been amended vide *Notification No. 84/2013 Cus (NT) dated 19.08.2013* to include Flat panel (LCD/LED/Plasma) Television therein.

Therefore, import of flat panel (LCD/LED/Plasma) television as part of free baggage allowance has been disallowed from August 26 and travelers bringing in LCD/LED/Plasma TV as part of baggage will have to pay customs duty at 36.05% (35% + 3% education cesses).

3. Period of 90 days under section 61(2)(ii) of the Customs Act, 1962 commences from the date of deposit of goods in the warehouse

Circular No. 39/2013 Cus dated 01.10.2013 has clarified that the period of 90 days, under section 61(2)(ii) of the Customs Act, 1962 would commence from the date of deposit of goods in the warehouse.

As per section 61(2)(ii) of the Customs Act, 1962 where any warehoused goods (not intended for being used in 100% EOU) *remain in a warehouse beyond a period of ninety days, interest shall be payable for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods.* Section 2(44) of the Customs Act, 1962 defines 'warehoused goods' as 'goods deposited in a warehouse'.

Thus, a harmonious reading of section 61(2)(ii) and section 2(44) indicates that when the goods deposited in a warehouse remain warehoused beyond a period of ninety days, then the interest starts accruing. In other words, the relevant date when the period of 90 days would commence would be the date of depositing the goods in the warehouse.

4. Guidelines for arrest and bail under Customs Act, 1962

In view of the amendments made in section 104 of the Customs Act, 1962 vide Finance Act, 2013, offences punishable under section 135 of the Act have been made as non-bailable. The following significant guidelines have been issued by CBEC vide *Circular No. 974/08/2013-CX dated 17.09.2013* with regard to implementation of arrest and bail provisions under the amended customs law:

- (i) Since arrest takes away the liberty of an individual, the power must be exercised with utmost care and caution in cases where a Commissioner of Customs or Additional Director General has reason to believe on basis of information or suspicion that such person has committed an offence under the Act punishable under the sections 132 or 133 or 135 or 135A or 136 of the Customs Act, 1962.

- (ii) The decision to arrest should be taken in cases which fulfil the requirement of the provisions of section 104(1) of Customs Act, 1962 and after considering the nature of offence, the role of the person involved and evidence available.
 - (iii) Persons involved should not be arrested unless the exigencies of certain situations demand their immediate arrest. These situations may include circumstances:
 - (a) to ensure proper investigation of the offence;
 - (b) to prevent such person from absconding;
 - (c) cases involving organised smuggling of goods or evasion of customs duty by way of concealment;
 - (d) masterminds or key operators effecting proxy/benami imports/ exports in the name of dummy or non-existent persons/IECs, etc.
 - (iv) While the Act does not specify any value limits for exercising the powers of arrest, the same should be effected *in respect of bailable offence only in exceptional situations which may include :*
 - (a) Outright smuggling of high value goods such as precious metal, restricted items or prohibited items or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of offending goods exceeds ₹ 20 lakh.
 - (b) In a case related to importation of trade goods (i.e. appraising cases) involving wilful mis-declaration in description of goods/ concealment of goods/goods covered under section 123 of Customs Act, 1962 with a view to import restricted or prohibited items and where the CIF value of the offending goods exceeds ₹ 50 lakh.
 - (v) In every case of arrest effected in accordance with the provisions of section 104(1) of the Customs Act, 1962, there should be immediate intimation to the jurisdictional Chief Commissioner or DGRI, as the case may be.
 - (vi) A person arrested for a *non-bailable offence* should be produced before concerned Magistrate without unnecessary delay in terms of provisions of section 104(2) of the Act.
 - (vii) However, a Customs officer (arresting officer) is bound to offer release on bail to a person arrested in respect of bailable offence and accept bail bond for bailable offence.
 - (vii) The guidelines relating to bail prescribed under central excise vide *Circular No. 974/08/2013 CX dated 17.09.2013* (given above from nos. (viii) to no. (xi) under point 5 in Central Excise) will apply in relation to granting of bails under customs law as well.
- 5. Exemption from Special Additional Duty of Customs (SAD) is not available on goods cleared from the SEZ / FTWZ into the DTA on stock transfer basis.**

Notification No. 45/2005-Cus. dated 16.05.2005 exempts all goods produced or manufactured in an Special Economic Zone (SEZ) and brought to Domestic Tariff Area (DTA), from the whole of the additional duty of customs leviable under section 3(5) of the Customs Tariff Act,

1975 [hereinafter referred as SAD]. However, such exemption shall not be available if such goods, when sold in DTA, are exempted by the State Government from payment of sales tax or VAT.

Issue: Would the benefit of exemption from SAD under aforesaid notification be available when the goods are cleared in the nature of stock transfer from an SEZ/ FTWZ unit to its DTA unit for self-consumption.

Clarification: The aforesaid notification clearly states that the exemption shall not be available if such goods, when sold in DTA, are exempt from payment of sales tax/VAT. In case of clearances which are in the nature of stock transfer from SEZ/FTWZ unit to the DTA unit for self-consumption i.e. otherwise than for sale as such, no sales tax/VAT is leviable on such a transaction. Since no sales tax/VAT is leviable on the said transaction, SAD is payable.

Hence, the benefit of exemption from SAD under aforesaid notification would NOT be available when a DTA unit imports goods and routes it through SEZ/FTWZ for self-consumption i.e. in the nature of stock transfer from SEZ/FTWZ.

[Circular No. 44/2013 Cus dated 30.12.2013]

6. Classification of various imported items:

CBEC has clarified with regard to the classification issues arising in the following products:-

S.No.	Circular No.	Product	Disputed tariff entries	Clarification
1.	36/2013 dated 05.09.2013	Bluetooth Wireless Headset for mobile phones / cell phones	8517 "...; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network),..." 8518 "...; headphones and earphones, whether or not combined with a microphone,..."	Bluetooth Wireless headsets for mobile phones / cell phones is correctly classifiable in heading 8517.
2.	28/2013 dated 01.08.2013	Cockroach traps and Mosquito Repellent	3506 –"Prepared glues and other prepared adhesives, not elsewhere specified or included; products suitable for use as glues or adhesives, put up for retail sale as glues or adhesives, not exceeding a net weight of 1 kg"; 3822 –"Diagnostic or laboratory	Such products should merit classification under heading 3808.

			reagents on a backing, prepared diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials”; 3926 – “Other articles of plastics and articles of other materials of headings 3901 to 3914”; 3808 – “Insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulphur-treated bands, wicks and candles, and fly-papers)”; 4823 – “Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers.	
3.	20/2013 dated 14.05.2013	Tablet computers	8517- “Telephone sets,.....” 8471- Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included	Tablet Computers are classifiable under heading 8471.
4.	2/2014 dated 09.01.2014.	Transmission shafts / Power takeoff	8432 -Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or	Transmission shafts / PTO shafts are classifiable under

		(PTO) shafts	sports- ground rollers	heading 8483.
			8433 -Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437".	
			8483 -Transmission shafts (including cam shafts and crank shafts) and cranks; bearing housings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints	

Part II : Judicial Update – Indirect Tax Laws

Significant Recent Legal Decisions

“Select Cases in Direct and Indirect Tax Laws – An Essential Reading for the Final Course” is a compilation of the significant decisions of Supreme Court, High Court and Larger Bench of Tribunal. September, 2013 edition of the said publication is relevant for November, 2014 examination. Students may note that in addition to the cases reported in the said publication, following significant recent legal decisions are also relevant for November, 2014 examination:-

CENTRAL EXCISE

Basic concepts of excise

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

Balrampur Chini Mills Ltd. v. Union of India 2014 (300) ELT 372 (All.)

Background: Bagasse is a residue/waste of the sugarcane which is left behind when sugarcane stalks are crushed to extract their juice during the manufacture of sugar. It is currently used as a biofuel and in manufacture of pulp and paper products and building materials and is classified under sub-heading 2303 20 00 of Central Excise Tariff Act, 1985 as 'Beet-Pulp', 'bagasse' and 'other waste of sugar manufacture' with NIL rate of duty.

Section 2(d) of Central Excise Act, 1944 defines excisable goods. An explanation had been inserted in section 2(d) of the Central Excise Act, 1944 vide Finance Act, 2008 to provide that “goods” include any article, material or substance which is *capable of being bought and sold for a consideration and such goods shall be deemed to be marketable*.

Consequent to this amendment, CBEC issued a Circular dated 28-10-2009 clarifying that 'bagasse' and other like materials would be covered under the definition of excisable goods and chargeable to payment of excise duty post Finance Act, 2008. The Circular further clarified that in case, the rate of duty in respect of such products is 'nil' or they are exempted from duty vide any notification and if CENVAT credit has been taken on the inputs which are used for manufacture of dutiable and exempted goods and no separate accounts have been maintained in this regard, then in terms of rule 6(3) of CENVAT Credit Rules, 2004 (CCR), proportionate credit would be reversed or 5% (now 6%) amount would be paid.

However, Supreme Court in the case of *Balrampur Chini Mills Ltd.* in Civil Appeal No. 2791 of 2005, decided on 21-7-2010 held that bagasse is a waste and not a manufactured product.

Point of dispute: Petitioner contended that since rule 6(3) applies when a manufacturer manufacturers both dutiable as well as exempted final products, the same would not apply in their case in view of the above-mentioned Supreme Court's judgment holding bagasse as a non-manufactured final product. Therefore, the petitioner is not liable to reverse 5% (now 6%) of the amount of bagasse sold.

Department, however, contended that by virtue of the amendment made in the definition of excisable goods vide the Finance Act, 2008, bagasse becomes an 'exempted excisable goods' (bagasse is chargeable at NIL rate of duty in Central Excise Tariff) and hence provisions of rule 6(3) of CENVAT Credit Rules, 2004 (CCR) would apply in the petitioner's case.

Observations of the Court: High Court made the following observations:

- (i) Supreme Court in its judgement given vide order dated 21.7.2010 in Civil Appeal No.2791 of 2005 has held that reversal of 8% amount (now 6%) is not applicable in case of bagasse as the same is not a final product, but a waste. Bagasse is never manufactured, but it only emerges as a waste from the crushing of sugarcane for the manufacture of final product, namely, sugar and thus, rule 6(2) and rule 6(3) would not be applicable.
- (ii) Explanation added to section 2(d) deems the goods, which are capable of being bought and sold, to be marketable. Earlier also, bagasse was being bought and sold for a consideration and even after the amendment in 2008 it is being bought and sold for a consideration. Hence, it was marketable earlier also and no difference has been made about the marketability of bagasse on account of addition of explanation to section 2(d) of CEA, 1944 inasmuch as it does not cease to be waste and it does not become a manufactured final product for the purposes of rule 6 of CENVAT Credit Rules.

Decision: The High Court concluded that though bagasse is an agricultural waste of sugarcane, it is a marketable product. However, duty cannot be imposed thereon simply by virtue of the explanation added under section 2(d) of the Central Excise Act, 1944 as it does not involve any manufacturing activity. The High Court quashed the CBEC's Circular dated 28-10-2009.

Classification of excisable goods

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

CCEx. v. Ciens Laboratories 2013 (295) ELT 3 (SC)

Facts of the case: The assessee manufactured a cream called as 'Moisturex' which was prescribed by dermatologists for treating dry skin conditions. However, the same was also available in chemist or pharmaceutical shops without prescription of a medical practitioner. The pharmaceutical content of the cream included urea (10%), lactic acid (10%) and propylene glycol (10%). The assessee classified the cream as medicament under Heading 30.03 of the Central Excise Tariff.

Point of dispute: The Department contended that the product 'Moisturex' is mainly used for **care** of the skin and thus, the same ought to be classified as cosmetic or toilet preparations under Heading 33.04. It was further contended that even if such cosmetic products contained certain subsidiary pharmaceutical contents or even if they had certain

subsidiary curative or prophylactic value, still, they would be treated as cosmetics only. It was also contended that since the product can be purchased without prescription of a medical practitioner, it could not be a medicament.

The assessee on the other hand contended that the very presence of pharmaceutical substances changes the identity of the product since such constituents are not used for **care** of the skin, but for **cure** of certain diseases relating to skin.

Observations of the Court: The Apex Court observed that the cream was not primarily intended to protect the skin but was meant for treating or curing dry skin conditions of the human skin. The Apex Court stated that presence of pharmaceutical ingredients in the cream show that it is used for prophylactic and therapeutic purposes.

The Supreme Court made the following further significant observations:

- (i) When a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably the decisive factor in classification. The relevant factor is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.
- (ii) Though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over / across the counter are cosmetics. There are several products that are sold over-the-counter and are yet, medicaments.
- (iii) Prior to adjudicating upon whether a product is a medicament or not, it ought to be seen as to how do the people who actually use the product, understand it to be. If a product's primary function is "care" and not "cure", it is not a medicament. Medicinal products are used to treat or cure some medical condition whereas cosmetic products are used in enhancing or improving a person's appearance or beauty.
- (iv) A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients, even in small quantities, is to be treated as a medicament.

Decision: The Supreme Court held that owing to the pharmaceutical constituents present in the cream 'Moisturex' and its use for the cure of certain skin diseases, the same would be classifiable as a medicament under Heading 30.03.

Note: The classification discussed in the above-mentioned case relates to the old Central Excise Tariff. However, the ratio of the judgment will hold good under the current Central Excise Tariff as well.

Valuation of excisable goods

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

CCEx v. Super Synotex (India) Ltd. 2014 (301) E.L.T. 273 (S.C.)

Facts: Assessee was a manufacturer of manmade fibre yarns which were chargeable to excise duty. The assessee availed the benefit of Sales Tax New Incentive Scheme for Industries, 1989 ('State Incentive Scheme') whereby he could retain 75% of the total sales tax collected from buyer and pay only remaining 25% to the State Government.

Point of dispute: While computing the 'transaction value' for the purpose of payment of excise duty, assessee claimed 100% deduction of sales tax collected from buyer. Department objected to this as effectively, the assessee did not pay excise duty on the additional consideration received towards sales tax collected but not deposited with the State exchequer.

Observations of the Court: Supreme Court observed that amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded as it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after amendment w.e.f. 01.07.2000 of section 4 of Central Excise Act, 1944, where "actually paid" is significant.

Supreme Court further observed that unless the sales tax is **actually paid** to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value" under section 4(3)(d) of Central Excise Act, 1944, for it is not excludible. As is seen from the facts, 25% of the sales tax collected had been paid to the State exchequer by way of deposit and the remaining amount had been retained by the assessee.

Decision: The Apex Court held that such retained amount has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1.7.2000 and therefore, the assessee is bound to pay excise duty on the said sum.

Note – This case establishes that retention of the specified sales tax amount under the relevant State Sales Tax Incentive Schemes ought to be treated as additional consideration and subjected to central excise duty since deduction of sales tax is available only when it is actually paid to the Sales Tax Department (in terms of the definition of transaction value as introduced from July 1, 2000). In other words, the Apex Court has negated the idea that such amounts are in the nature of a subsidy and do not form part of the sale proceeds.

The issue of includibility, or otherwise, of sales tax collected and retained, in terms of Incentive Schemes, in the assessable value has been dealt in the context of both old (existing prior to July 1, 2000) and new section 4 (effective from July 1, 2000) in the above-mentioned case law. However, in the above summary only the observations and conclusion involving new section 4, based on transaction value, have been discussed and the ones relating to old section 4, based on normal price, have been avoided.

With effect from July 1, 2000 the definition of 'transaction value' reads as under:

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

CENVAT credit

4. **Can CENVAT credit of duties, other than National Calamity Contingent Duty (NCCD), be used to pay NCCD?**

CCEx. v. Prag Bosimi Synthetics Ltd. 2013 (295) ELT 682 (Gau.)

Point of dispute: The assessee contended that though CENVAT credit in respect of NCCD can be utilized only for payment of NCCD duty, NCCD can be paid by using CENVAT credit of basic excise duty also. The Revenue, however, rejected the assessee's contention.

Observations of the Court: The High Court noted that in terms of rule 3(1) of the CENVAT Credit Rules, 2004 [CCR], a manufacturer or producer of a final product is allowed to take CENVAT credit of NCCD. Rule 3(4) of CCR provides that CENVAT credit may be utilized for payment of any duty of excise on any final product. Therefore, CENVAT credit of NCCD may also be utilized for payment of any duty of excise on any final product in terms of rule 3(4) subject to rule 3(7). However, rule 3(7) of CCR limits the utilization of CENVAT credit in respect of NCCD as also other duties mentioned in rule 3(7)(b).

Rule 3(7)(b) provides that CENVAT credit in respect of NCCD and other duties shall be utilized towards payment of duty of excise leviable under various statutes respectively. The High Court stressed upon the importance of the word "respectively" as it confines the utilization of CENVAT credit obtained under a particular statute for payment of duty under that statute only. The High Court, however, categorically added that the converse does not follow from the above discussion.

Decision: The High Court held that merely because CENVAT credit in respect of NCCD can be utilized only for payment of NCCD, it does not lead to the conclusion that credit of any other duty cannot be utilized for payment of NCCD.

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

5. Can CENVAT credit be availed on machineries purchased for being used in setting up a sugar plant in foreign country when (i) the same are not used in the factory premises and (ii) no duty is paid on final product viz., the sugar plant?

KCP Ltd. v. CCEx. 2013 (295) ELT 353 (SC)

Facts of the case: The assessee was a manufacturer of machinery for sugar and cement plants and parts thereof falling under Chapter 84 of the Central Excise Act, 1944. It entered into a contract for setting up a sugar manufacturing plant in Vietnam. For this purpose, the assessee manufactured certain machines in its own factory and also purchased certain other machinery from other dealers/manufacturers. Both the machineries (manufactured and bought-out) were then put in a container and transported to Vietnam for setting up the sugar plant.

Point of dispute: The assessee availed CENVAT credit on bought-out machinery describing them as eligible capital goods. The Department, however, contended that the bought-out machinery was not eligible capital goods as the same had not been used by the assessee in its factory premises.

Observations of the Court: The Supreme Court observed that the objective of the scheme of CENVAT credit is to remove cascading effect of duty imposed on the final product. There are two basic conditions for availing CENVAT credit:

- (i) Duty must have been paid on inputs and such inputs must be used in manufacture of final product in the factory of the manufacturer,
- (ii) Excise duty must have been levied on final product.

The Supreme Court explained that if duty is not levied on the final product, question of grant of any relief would not arise as in that case there would not be any cascading effect on the duty imposed on inputs.

The Supreme Court pointed out that since the sugar plant was set up in Vietnam, it could not be said that the plant was manufactured in the factory of the assessee. Thus, no duty was paid by the assessee on the final product i.e., on sugar plant which had been set up in Vietnam. Therefore, there would not be any question of availing credit of the duty paid on the inputs.

The Supreme Court further observed that the bought-out machinery was not used by the assessee in the manufacture of the machinery (which had been transported along with bought-out machinery to Vietnam for setting up the sugar plant) as the same was not even unpacked or tested, and transported in exact condition along with machinery manufactured by the assessee. The assessee, therefore, merely acted as a trader or as an exporter in relation to the machinery purchased by it, which had been exported and used for setting up a sugar plant in a foreign country.

Decision: The Supreme Court held that CENVAT credit could not be allowed to the assessee as no duty was paid on sugar plant set up in a foreign country. Further, since the bought-out machinery was not used in the assessee's factory premises, the necessary condition for availing CENVAT credit on capital goods could not be fulfilled.

Note: Although the above-mentioned case is based on old MODVAT provisions, the principle enunciated therein will hold good in context of CENVAT Credit Rules, 2004 also. For the sake of simplicity and better understanding, the term MODVAT has been referred to as CENVAT wherever applicable.

6. **Whether wrongful availment of 100% CENVAT credit on capital goods in the year of purchase be upheld if wrongly availed credit of 50% is not utilized in the said year?**

CCE v. Satish Industries 2013 (298) E.L.T. 188 (Bom.)

Facts of the case: In the instant case, the assessee availed 100% CENVAT credit on capital goods in the year of purchase, i.e. in first year itself. However, he utilized only 50% of the CENVAT credit so availed in the first year. As per Revenue, assessee was entitled to avail 50% of the credit of duty paid on capital goods in the first financial year and avail the balance 50% credit in subsequent financial year.

Decision: The High Court held that if 50% CENVAT credit on capital goods pertaining to subsequent financial year which had been wrongly availed in the first year had not been not utilized till the commencement of the subsequent financial year, no prejudice was caused to the Revenue and thus, the same could be upheld.

Export procedures

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

UM Cables Limited v. Union of India 2013 (293) ELT 641 (Bom.)

Observations of the Court: The High Court observed that the objective of the procedure laid down in *Notification No. 19/2004 CE (NT) dated 06.09.2004* and CBEC's Manual of Supplementary Instructions 2005 is to facilitate the processing of a rebate claim and to enable the authority to be duly satisfied that the two fold requirement of goods (i) having been exported and (ii) being duty paid is fulfilled.

The High Court referred to the decision of Supreme Court in the case of *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner 1991 (55) E.L.T. 437 (SC)* wherein the Apex Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim. However, it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they intend to serve, as some requirements may merely relate to procedures.

Decision: The High Court, therefore, held that the procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations subject to which a rebate can be granted and the procedure governing the grant of a rebate. It was held by the High Court that while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.

The High Court ruled that non-production of ARE-1 forms *ipso facto* cannot invalidate rebate claim. In such a case, exporter can demonstrate by cogent evidence that goods

were exported and duty paid and satisfy the requirements of rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE (NT).

Note: Where any goods are exported, rule 18 of the Central Excise Rules, 2002 empowers the Central Government to grant by way of a notification a rebate of duty paid on such excisable goods or on materials used in the manufacture or processing of such goods. The rebate is subject to such conditions or limitations, if any, and the fulfilment of such procedure as may be specified in the notification. Notification No. 19/2004 CE (NT) dated 06.09.2004 as amended has been issued by the Central Government to grant rebate under rule 18.

The procedure prescribed under the said notification in relation to preparation of ARE-1, its distribution and filing of rebate claim is summarized below:

- (i) For the purpose of sealing of goods intended for export, at the place of dispatch, the exporter has to present the goods along with four copies of an application in form ARE-1 to the Superintendent or Inspector of Central Excise having jurisdiction over the factory or the warehouse.*
- (ii) The Superintendent/Inspector has to verify the identity of the goods mentioned in the application and the particulars of the duty paid or payable, and if found in order, he has to seal each package or the container and endorse each copy of the application.*
- (iii) The original and duplicate copies of the application are returned to the exporter by the Superintendent of Central Excise. The triplicate copy is sent to the officer with whom a rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in the official records.*
- (iv) On arrival of goods at the place of export, the goods have to be presented together with the original and duplicate copies of the application (the quadruplicate copy being optional) to the Commissioner of Customs or a duly appointed officer.*
- (v) The Commissioner of Customs or his officer examines the consignment with the particulars cited in the application and upon finding them to be correct and exportable in accordance with the law for the time being in force, he is required to allow the export of the goods and to certify on the copies of the application that the goods have been duly exported, citing the shipping bill number, date and other particulars of export.*
- (vi) The Commissioner of Customs or his officer shall return the original copy of the application to the exporter and forward the duplicate copy, either by post or by handing over to the exporter in a tamper proof sealed cover, to the officer specified in the application from whom the exporter wants to claim rebate.*
- (vii) The exporter has to lodge a claim of rebate of duty paid on all excisable goods along with the original copy of the application to the jurisdictional Assistant/Deputy Commissioner or Maritime Commissioner, as the case may be.**

(viii) The rebate sanctioning officer is required to compare the duplicate copy of the application received from the Commissioner of Customs or his officer (or from the exporter in a tamper proof sealed cover) with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if he is satisfied that the claim is in order, he has to sanction the rebate.

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

Rajasthan Textile Mills v. UOI 2013 (298) E.L.T. 183 (Raj.)

Facts of the case: The petitioner manufactured M.M. Yarn by using duty paid inputs and cleared the same for export on payment of duty. It claimed rebate of duty paid by it on inputs as well as of duty paid on finished goods under rule 18 of the Central Excise Rules, 2002. The Department rejected the rebate claims on the ground that rule 18 does not permit grant of rebate of duty paid on exported finished goods simultaneously with the rebate of duty paid on inputs.

The petitioner contended that it should be allowed the rebate of the duty paid on both the manufactured goods as well as on materials used in the manufacture of such goods. He submitted that word “or” used in rule 18 should be read as “and” as there is a combined form-Form ARE-2 for claiming the rebate on the manufactured goods as well as rebate on materials used in the manufacture or processing of such goods. Further, since whole of the duty paid on manufactured goods is exempted under rule 19 of the Central Excise Rules, 2002, the petitioner opting for rule 18 cannot be put at a disadvantageous situation in the matter of claiming such rebate.

Observations of the Court: The High Court considering the contentions of the petitioner observed as under:-

- (i) On plain reading of rule 18, it is apparent that if the word “or” is taken to be disjunctive, the intention manifested in rule 18 can be given full effect to, i.e. to give the benefit admissible on one of the item, either on finished goods or inputs used in the manufacture or processing of such goods.
- (ii) Rule 19 provides benefit on the finished goods i.e. any excisable goods can be exported without payment of duty from the factory of producer. However, it does not provide for rebate of duty paid on the materials used in manufacture or processing of such goods. Thus, the intention of rule 19 is to provide benefit on finished goods and not on raw materials. Merely with the aid of different provision of rule 19, interpreting the word “or” used in rule 18 as “and” to provide benefit for both, would not be permissible.
- (iii) It is important to note that *Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004* provides rebate of the whole of the duty paid on all “excisable goods” while *Notification No. 21/2004-C.E. (N.T.) dated 06.09.2004* provides the rebate of whole of the duty paid on ‘materials’ i.e. inputs used in the manufacture or

processing of export goods. Issuance of two difference notifications further makes it clear that both the benefits cannot be claimed simultaneously.

- (iv) Merely by the fact that Form ARE-2 can be used either to claim the rebate on finished goods or on inputs used in manufacture of such goods, it cannot be culled out that the rebate is available on both i.e., finished goods as well as on the inputs. Merely by preparation of any combined form for both the benefits, the word “or” cannot be construed as “and” to be used conjunctively.

Decision: Under rule 18 of the Central Excise Rules, 2002, grant of rebate of duty paid is available either on excisable goods or on materials used in the manufacture or processing of such goods i.e. on raw material. Thus, it is open to claim the benefit of rebate either on manufactured/finished goods or on raw material, but not on both.

Note: Rule 18 of the Central Excise Rules, 2002 provides that where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods OR duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.

Demand, adjudication and offences

9. Can penalty under section 11AC of the Central Excise Act, 1944 be imposed in a case where there are divergent judicial pronouncements on an issue and the assessee chooses to follow one of those pronouncements?

CCEx. v. Delphi Automotive Systems Ltd. 2013 (292) E.L.T. 189 (All.)

The High Court held that *mens rea* (guilty mind) is an essential part for levy of penalty under section 11AC of the Central Excise Act, 1944. Where a provision of statute is not clear and there are divergent judicial pronouncements, it cannot be said that there is *mens rea* on the part of the assessee if he chooses to follow his course of action in the light of one of the judicial pronouncements.

10. Can a former director of a company be held liable for the recovery of the excise dues of such company?

Delhi High Court in case of *Anita Grover v. CCEx. 2013 (288) E.L.T. 63 (Del.)* [reported on page 184 of Select Cases in Direct and Indirect Tax Laws-Relevant for May, 2014 and November, 2014 Examinations (September, 2013 edition)] had elucidated that a former director of a company cannot be held liable for the recovery of the customs dues of such company.

Bombay High Court has taken a similar view in case of ***Vandana Bidyut Chatterjee v. UOI 2013 (292) E.L.T. 6 (Bom.)***. In this case, Department alleged that the petitioner was liable to pay the arrears of the excise duty and penalty of a company of which her late father was a director and sought to attach the property belonging to the petitioner for recovery of such dues. The said property was gifted to the petitioner by her late father during his lifetime. The company was jointly controlled by Mukherjee Brothers (the petitioner) and Kapoor family. They entered into agreement wherein the latter

transferred their shares to Mukherjee Brothers and placed the responsibility to discharge the excise duty liability of the company on them.

The High Court observed that duty and penalty were the arrears of the company because company was the person engaged in the manufacture of goods and registered as manufacturer. As per section 142 of the Customs Act, 1962 read along with the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995*, Central Government could recover dues belonging only to a defaulter. Thus, the recovery proceedings could be taken only against the company, as it alone was the defaulter. There was no provision to recover the arrears of the company from its directors and or shareholders under the Customs Act.

Further, there was no provision in the Customs Act as was found under section 179 of the Income Tax Act, 1961 or under section 18 of the Central Sales Tax Act, 1956 where the dues of a private limited company could be recovered from its directors when the private limited company was under liquidation, in specific circumstances. Since a company was a separate person having a distinct identity, independent from its shareholders and directors, company's dues could not be recovered from the directors and/or individual shareholder of the company.

Furthermore, the Department's reliance upon the agreement entered into between Mukherjee Brothers and Kapoor family to fasten the liability of excise duty and penalty arrears of the said company upon the petitioners' father was not sustainable.

Hence, the Court held that in the instant case, the attachment notices issued on the former late director and his daughter were without jurisdiction.

Note: Section 12 of the Central Excise Act, 1944 empowers the Central Government to apply specified provisions of the Customs Act to central excise subject to some modifications. Consequently, section 142 of the Customs Act, 1962 has been made applicable to the Central Excise Act by virtue of Notification No. 68/63-CE dated 4th May, 1963 issued under section 12 of the Central Excise Act.

- 11. Can Appellate Authorities or Courts permit the assessee to pay reduced penalty of 25% beyond 30 days of the communication of the order of the adjudicating authority as prescribed under section 11AC?**

CCEx. V. Ratnamani Metals and Tubes Ltd. 2013 (296) ELT 327 (Guj.)

The High Court answered the aforesaid question of law in affirmative. It held that an option can also be granted to the assessee to deposit the entire dues along with 25% interest and penalty within a period of 30 days of communication of the order of Tribunal.

Note: The Bombay High Court has taken a view contrary to the abovementioned opinion of Gujarat High Court in case of CCEx. v. Castrol India Ltd. 2012 (286) E.L.T. 194 (Bom.). The said case is reported on page 128 of Select Cases in Direct and Indirect Tax Laws - Relevant for May, 2014 and November, 2014 Examinations [September, 2013 edition].

Refund**12. Can refund of an amount mistakenly paid as excise duty be rejected on the ground of limitation under section 11B of the Central Excise Act, 1944?**

Karnataka High Court in case of *CCE (A) v. KVR Construction 2012 (26) STR 195 (Kar.)* [reported on page 157 of Select Cases in Direct and Indirect Tax Laws-Relevant for May, 2014 and November, 2014 Examinations (September, 2013 edition)] had 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 (as made applicable in case of service tax vide section 83 of the Finance Act, 1994).

Gujarat High Court has taken a similar view in case of *Swastik Sanitarywares Ltd. v. UOI 2013 (296) E.L.T. 321 (Guj.)*. In this case, the assessee had erroneously deposited the excise duty twice on the clearance of same goods. However, the burden of the duty paid the second time was not passed on to the consumer. When it applied for the refund of the second deposit of the same amount, the refund claim was rejected on the ground of limitation under section 11B of the Central Excise Act, 1944.

The High Court held that payment made by the assessee the second time could not be considered as duty deposited or paid. Hence, repayment of such amount could not be seen as a refund claim made under section 11B. Consequently, such amount is repayable to the assessee by the Department.

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

ICMC Corporation Ltd.v CESTAT, CHENNAI 2014 (302) E.L.T. 45 (Mad.)

The High Court held that this process involves only an account entry reversal and factually there is no outflow of funds from the assessee by way of payment of duty. Thus, filing of refund claim under section 11B of the Central Excise Act, 1944 is not required. Further, it held that on a technical adjustment made, the question of unjust enrichment as a concept does not arise.

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

CCEx v. Superintending Engineer TNEB 2014 (300) E.L.T. 45 (Mad.)

The High Court relied on the decision of the Constitution Bench of the Apex Court rendered in the case of *Mafatlal Industries Ltd. v. Union of India 1997 (89) E.L.T. 247 SC*. The Supreme Court in the said case held as under:

“The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however,

inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.”

Decision: The High Court followed the decision of the Apex Court and held that the concept of unjust enrichment is not applicable as far as State Undertakings are concerned and to the State.

Appeals

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

Khanapur Taluka Co-op. Shipping Mills Ltd. v. CCEx. 2013 (292) E.L.T. 16 (Bom.)

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

Point of dispute: The assessee filed a writ petition to the High Court challenging the correctness of the order-in-original. It further contended that although the appeal filed by it had been dismissed by the appellate authorities on the ground that same had been time-barred, it was entitled to challenge the correctness of the order-in-original in a writ petition.

Decision: The High Court referred to the case of *Raj Chemicals v. UOI 2013 (287) ELT 145 (Bom.)* wherein it held that where the appeal filed against the order-in-original was dismissed as time-barred, the High Court in exercise of writ jurisdiction could neither direct the appellate authority to condone the delay nor interfere with the order passed by the adjudicating authority. Consequently, it refused to entertain the writ petition in the instant case.

Note: Gujarat High Court has taken a contrary view in case of Texcellence Overseas v. Union of India 2013 (293) ELT 496 (Guj.) as reported below:-

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

Texcellence Overseas v. Union of India 2013 (293) ELT 496 (Guj.)

Facts of the case: The petitioner was granted a refund by way of order-in-original and the same was also upheld by the CESTAT. However, a fresh show cause notice was issued on the ground that refund was erroneously granted. The show cause notice, this time was adjudicated in favour of the Department. The petitioner challenged this order before Commissioner (Appeals) five months after the said order was passed. As per section 35 of the Central Excise Act, 1944, an appeal needs to be filed with the Commissioner (Appeals) within 60 days from the date of the communication of the order sought to be appealed against. However, the Commissioner (Appeals) is empowered to

condone the delay for a period of 30 days if he is satisfied with the sufficiency of the cause of the delay. Therefore, the Commissioner (Appeals) and Tribunal (when the matter was brought before it) rejected the appeal on the grounds of limitation as the same was filed beyond three months from the date of the impugned order.

Observations of the Court: The High Court observed that none of the appellate authorities decided the question on merit after the second round of litigation began and therefore, the question of merger* would not arise until the matter is decided on merits. Treating these circumstances as extraordinary, the High Court sought to uphold the petitioner's challenge to the impugned order.

The High Court noted that Department did not dispute the fact that the petitioner had extremely good case on merit. Further, the petitioner, while challenging the impugned order before the Commissioner (Appeals), had also preferred an application for condonation of delay and substantiated the same with sufficient and acceptable grounds. The High Court, thus, concluded that the petitioner had sufficiently explained the delay from the very beginning, though the appellate forums were bound by the law on the issue.

Decision: The High Court opined that since the total length of delay was very small and the case had extremely good ground on merits to sustain, its non interference at that stage would cause gross injustice to the petitioner. Thus, the High Court, by invoking its extraordinary jurisdiction, quashed the order which held that refund was erroneously granted. The High Court held that such powers are required to be exercised very sparingly and in extraordinary circumstances in appropriate cases, where otherwise the Court would fail in its duty if such powers are not invoked.

Note: The principle enunciated in the afore-mentioned case is that the High Court has extraordinary powers to interfere in appropriate cases even while upholding the contention that there is statutory limitation to which delay can be condoned by the authorities. If an aggrieved person knocks the door of the High Court seeking redressal under writ jurisdiction to obviate extraordinary hardship and injustice, such plea can be entertained even beyond the period of limitation.

***What is Doctrine of Merger?**

The doctrine of merger is neither a doctrine of constitutional law nor a doctrine which is recognised statutorily. It is the fusion or absorption of a lesser right with a greater right; or merger of the order of lower appellate authority [e.g. Commissioner (Appeals)] with the order of a higher appellate authority [e.g. CESTAT]. Since, there cannot be more than one operative order governing the same subject-matter at one and the same time, the judgment of a lower appellate authority, if subjected to an examination by the higher appellate authority, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the higher appellate authority. In other words, the judgment of the lower appellate authority loses its identity by its merger with the judgment of the higher appellate authority.

However, the doctrine of merger cannot be applied universally. It cannot be said that wherever there are two orders, one by the lower appellate authority and the other by a higher appellate authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revision order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revision order in each case and the scope of the statutory provisions.

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

Habib Agro Industries v. CCEx. 2013 (291) E.L.T. 321 (Kar.)

Facts of the case: In this case, the application for filing appeal to CESTAT was filed with a delay of 45 days. The reason for the delay was that the authorised representative who dealt with the case had gone abroad for about a month. On his return, his mother had expired. After attending obsequies, the appeal was filed. However, the Tribunal dismissed the said application holding that there was no sufficient cause shown for condonation of delay.

Decision: The High Court observed that there did not appear to be any deliberate latches or neglect on the part of the authorised representative to file the appeal. It held that the reason for delay in filing appeal to CESTAT, that the person dealing with the case went on a foreign trip and on his return his mother expired, could not be considered as unreasonable for condonation of delay.

18. Which remedy is available against a pre-deposit order passed by CESTAT under section 35F of Central Excise Act, 1944/section 129E of Customs Act, 1962; is it an appeal to High Court under section 35G of Central Excise Act, 1944/section 130 of Customs Act, 1962 or a writ petition before High Court?

Metal Weld Electrodes v. CESTAT 2014 (299) ELT 3 (Mad.)

As per section 35G(1)/130(1) of the relevant Acts, an appeal lies 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/customs 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. Sub-section (2) of section 35G/130 *inter alia* provides that the Commissioner of Central Excise or the other party aggrieved by **any order** passed by the Appellate Tribunal may file an appeal to the High Court.

The assessee contended that only a writ petition, and not an appeal, can be filed against the pre-deposit orders of CESTAT on account of following reasons:

- (i) Only an order determining the **final issues** arising between the parties in the appeal before the Appellate Tribunal is appealable before the High Court. However, a pre-deposit order is an **interim order not passed in appeal** but in appeal proceedings.

The term "**every order**" (as mentioned above) does not include interim order under section 35F/129E.

- (ii) A substantial question of law cannot arise out of an interlocutory order that deals only with *prima facie* nature of the case; it can arise only from the order, which finally decides the rights of the parties in controversy.
- (iii) A period of 180 days have been granted in the statute for filing an appeal. However, very short time is granted to comply with the pre-deposit orders and therefore, such order cannot be construed as an order to be appealed against.

The assessee submitted that when a remedy is not available under the Act, remedy under Article 226 of the Constitution of India (writ petition) has to be permitted.

Observations of the Court: The High Court made the following significant observations:

- (i) There is a vital difference between sub-sections (1) and (2) of section 35G/130. While sub-section (1) reads that an appeal shall lie to the High Court from "**every order passed in appeal by the Appellate Tribunal**", sub-section (2) further contemplates that the Commissioner of Central Excise or the other party aggrieved may file an appeal to the High Court against "**any order passed by the Appellate Tribunal**". The words "**in appeal**" is conspicuously absent under sub-section (2).
- (ii) The legislature at its wisdom thought fit to enlarge the scope of appeal by providing sub-section (2) with a specific expression "any order passed by the Appellate Tribunal". The words "in appeal" cannot be confined to mean only final orders passed in appeal. Interim orders are also orders passed in appeal; they are not passed outside the scope of appeal or as independent or parallel orders.
- (iii) Unless the statute specifically prohibits the filing of an appeal against interlocutory orders or there is an express provision saying only a final order of the Tribunal is appealable, the scope of filing appeal contemplated under sections 35G and 130 cannot be narrowed down or restricted.
- (iv) Whether a substantial question of law would arise in case of interim orders would depend upon facts/circumstances of each case and there cannot be any uniform presumption that no substantial question of law would arise in all pre-deposit orders.
- (v) The contention of the petitioners that granting of short time to comply with the pre-deposit orders would prevent them from filing an appeal before the High Court cannot be countenanced. Prescribing a period of limitation for filing an appeal does not mean that within such period of limitation, the said order cannot be put into operation unless a statutory bar is provided against doing so. Further, the party intending to file appeal need not wait till the last date of limitation to file appeal.

Decision: Finally, the High Court held that the order passed by the CESTAT in terms of section 35F of the Central Excise Act, 1944 or section 129E of the Customs Act, 1962 is appealable in terms of section 35G of the Excise Act, 1944 or section 130 of the Customs Act, 1962.

Note: Supreme Court in the case of Raj Kumar Shivare's v. Assistant Director, Directorate of Enforcement 2010 (253) ELT 3 SC had held that writ petition is not ordinarily maintainable to challenge an order of the Tribunal. Though the said decision was rendered in context of Foreign Exchange Management Act, 1999 (FEMA), the High Court in the above case clarified that the ratio laid down in the said case would apply in respect of the cases covered under Central Excise Act and Customs Act also. Recently the Andhra Pradesh High Court in M/s Patel Engineering Ltd v. CCEx Cus & ST 2013-TIOL-997-HC-AP-ST has also followed the Madras High Court decision and has held that an order passed under section 35F is appealable under section 35G and that a writ petition against the same is not maintainable.

Exemption based on value of clearances (SSI)

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

CCEx v Xenon 2013 (296) ELT 26 (Jhar.)

Facts of the case: In the instant case, the Department found that the assessee had set up a dubious company of another company to mis-utilize the benefits of SSI exemption notification. It was established that the dubious company did not manufacture and clear any goods and that all the transactions shown by it were, in fact, the transactions undertaken by the original company. Thus, the manufacture and clearances shown by the two units separately were clubbed together as manufacture and clearances of a single unit viz. original company in terms of the applicable SSI exemption notification and the differential duty and penalty was imposed on such original company. At the same time, penalty was also imposed on the dubious company.

Point of dispute: The issue which came up before the High Court was whether separate penalty could be levied on the dubious company, as the same was, in fact, a non-existent company. The Department contended that since there existed two companies, which had different registrations and availed separate SSI exemptions, the dubious company could not be said to be a non-existent company. Therefore, the said dubious company should also be liable to penalty for taking wrong benefits of the SSI exemption.

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

Decision: The High Court held that when it had been established that dubious company did not undertake any transactions, penalty could not be levied on the same for the transactions undertaken by the original company. The High Court emphasized that penalty could not be imposed upon the company who did not undertake any transaction.

Note: Though the above-mentioned case relates to the old provisions of law, the ratio of the judgment will also hold good in the context of present position of law as applicable to SSI exemption.

Notifications, departmental clarifications and trade notices

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

S & S Power Switch Gear Ltd. v. CCEx. Chennai-II 2013 (294) ELT 18 (Mad.)

Observations of the Court: The High Court observed that similar issue had been considered by the Supreme Court in the case of *H.M. Bags Manufacturer v. Collector of Central Excise 1997 (94) ELT 3 (SC)* wherein the Apex Court held that a demand under section 11A of the Act cannot be raised for any date prior to the date of the Board Circular and the time-limit as provided under section 11A of the Act is not available to the Department.

Decision: The High Court, thus, held that once reclassification Notification/Circular is issued, the Revenue cannot invoke section 11A of the Act to make demand for a period prior to the date of said classification notification/circular.

Note: The principle enunciated in this judgment is that a Departmental Circular, issued under section 37B of the Central Excise Act, 1944, which clarifies a classification issue, can only apply prospectively from the date of the Circular and that the same cannot be applied retrospectively. In other words, demands cannot be raised for mis-classification i.e., not following the classification specified by the said Circular, for a period prior to the date of the Circular.

Section 37B – Instructions to Central Excise Officers: The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :

Provided that no such orders, instructions or directions shall be issued—

- a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or
- b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

Settlement Commission

21. (i) Where a settlement application filed under section 32E(1) of the Central Excise Act, 1944 (herein after referred to as 'Act') is not accompanied with the additional amount of excise duty along with interest due, can Settlement

Commission pass a final order under section 32F(1) rejecting the application and abating the proceedings before it ?

- (ii) In the above case, whether a second application filed under section 32E(1), after payment of additional excise duty along with interest, would be maintainable?

Vadilal Gases Limited v Union of India 2014 (301) E.L.T. 321 (Guj.)

Observations of the Court: The High Court observed as under:

- (i) Clause (d) of the first proviso to sub-section (1) of section 32E of the Act clearly lays down that no application under section 32E(1) shall be made unless the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB. Therefore, if an application is made without complying with the first proviso, it would be defective and not maintainable.
- (ii) Settlement Commission in its discretion may allow time to the applicants to remove the defects or may direct that the applications be returned. Such discretionary power must be deemed to have been conferred on Settlement Commission.
- (iii) Under section 32F(1) only valid applications which do not suffer from any bar created by the first proviso to section 32E(1) can be considered and decided according to the procedure provided in the section. Therefore, the applications which are defective and non-maintainable in terms of the first proviso to section 32E(1) cannot be decided or rejected or declared to have abated under section 32F(1).
- (iv) Rejection of application cannot be taken as amounting to a final order, as that would render the mandatory bar created by clause (d) of proviso to section 32E(1) nugatory, redundant and otiose. Order rejecting the application for non-compliance with clause (d) of proviso to section 32E(1) would amount to administrative/technical order and it would not bar the second application filed by the petitioner. In other words, principle of *res judicata* would not apply as matter was not determined on merits.
- (v) Moreover, second application would not be barred under section 32-O as no direction had been issued under section 32L (the application was rejected as not entertainable).

Decision: High Court held that since the earlier application was dismissed on technical defect for non-compliance of the provisions of clause (d) of the proviso to section 32E(1) of the Act and the same was not considered and decided on merits, the second application filed after depositing the additional excise duty and interest would be maintainable.

Notes: Res judicata means the principle that a matter may not, generally, be relitigated once it has been judged on the merits.

The relevant extracts of provisions of section 32-O and 32L of the Act are given hereunder:

Section 32-O: Bar on subsequent application for settlement in certain cases

Where,

- (i) an order of settlement passed under sub-section (5) of section 32F provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability; or
- (ii) after the passing of an order of settlement under the said sub-section (5) of section 32F in relation to a case, such person is convicted of any offence under this Act in relation to that case; or
- (iii) the case of such person is sent back to the Central Excise Officer having jurisdiction by the Settlement Commission under section 32L,

then, he shall not be entitled to apply for settlement under section 32E in relation to any other matter.

Section 32L: Power of Settlement Commission to send a case back to the Central Excise Officer

The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made.

SERVICE TAX**Basic concepts of service tax****22. Can service tax be levied on the services rendered in connection with a chit fund business?*****Delhi Chit Fund Association v. UOI 2013 (30) S.T.R. 347 (Del.)***

In this case, the petitioner is an association of chit fund companies based in Delhi. As per the petitioner, services rendered in connection with chit fund business are not taxable. As per the definition of service under section 65B(44), transaction in money is not a service. Further, the exclusionary part of the said definition excludes a transaction in money. Since, a provision cannot exclude something from the definition unless it is included in the definition, the intention of legislature would have been to exclude services rendered in relation to transaction in money. Therefore, the chit fund business being a transaction in money, the services rendered in connection with the said business are excluded from the definition.

Explanation 2 in the said section further provides that the only service in relation to a transaction in money or actionable claim, which is taxable, is the activity relating to the use of money or its conversion from one form, currency or denomination to another for which a separate consideration is charged. Resultantly, all other services rendered in connection with a transaction in money or actionable claim, including the services rendered by the foreman of a chit business, stand excluded from the definition.

It further submitted that since chit fund business is not a service, *Notification No. 26/2012 dated 30.06.2012* granting an abatement of 30% to services provided in relation to chit should be quashed as question of exempting a part of the consideration received for the services in chit fund business could not arise when the law provided that such services were not taxable at all.

Observations of the Court: The High Court observed that as per the opening words of the definition of 'service', an activity cannot be charged with service tax unless following four aspects or characteristics are present:-

- (i) the person who provides the service,
- (ii) the person who receives the service,
- (iii) the actual rendering of the service and
- (iv) the consideration for the service.

A 'mere transaction in money' cannot be considered as 'service' as it lacks the above four constituent elements. The High Court elucidated that even though 'mere transaction in money' is not service in the first place, the intention of the legislature in excluding it from the definition might be that the legislature deemed it fit, *ex abundanti cautela*, to exclude it.

A clue to proper interpretation of the exclusionary part of the definition is embedded in Explanation 2 which provides that except an activity for which a separate consideration is charged and which relates to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination, all other cases of transaction in money shall stand excluded from the charge of service tax, including the consideration charged for the services of a foreman in a chit business.

Decision: The High Court inferred that since in a chit fund business, the subscription is tendered in any one forms of money as defined under section 65B(33), it would be a transaction in money and would fall in the exclusionary part of the definition. Otherwise also, in view of Explanation 2 read along with the exclusionary part, the services rendered by the foreman of the chit business for which a separate consideration is charged would be out of the clutches of the definition. Thus, either way, the services of a foreman of a chit business do not constitute a taxable service.

Consequently, the High Court quashed *Notification No. 26/2012-S.T. dated 20.06.2012* to the extent of the entry in serial No. 8 thereof.

Note: A brief account of the operations of a chit fund business is provided hereunder:-

Lets suppose 50 persons, each contributing ₹ 1,000/- per month, have come together to organize a chit for a period of 50 months. Number of subscribers should be equal to number of months for which chit would operate. At the end of each month, an amount of ₹ 50,000/- (₹ 1,000/- × 50) would be available in the kitty of the chit fund. The said

amount is put to auction and those subscribers who are interested in drawing the money early because of their needs may participate in the auction.

The auction is organized by a foreman who conducts its proceedings. The successful bidder who is normally the person who offers the highest discount is given the chit amount. From this discount amount, after deducting a fixed amount representing the commission payable to the "foreman", balance becomes the dividend which is to be distributed to all the subscribers. The auction would be repeated in the subsequent months and the same procedure is followed. Any subscriber who delays the bidding or does not bid at all stands to gain the maximum discount.

Service tax procedures

- 23. Whether tax is to be deducted at source under section 194J of the Income-tax Act, 1961 on the amount of service tax if it is paid separately and is not included in the fees for professional services/technical services?**

CIT v. Rajasthan Urban Infrastructure 2013 (31) STR 642 (Raj.)

The High Court held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and is not included in the fees for professional services or technical services, the service tax component would not be subject to TDS under section 194J of the Income-tax Act, 1961.¹

Note: Section 194J of the Income-tax Act, 1961 provides for deduction of income tax equal to 10% of any sum paid as fees for professional services/technical services, by any person, not being an individual or HUF, who is responsible for paying such sum to a resident, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.

- 24. Is rule 5A(2) of the Service Tax Rules, 1994 ultra vires the Finance Act, 1994?**

A.C.L. Education Centre (P) Ltd. v. UOI 2014 (33) S.T.R. 609 (All.)

Facts of the case: Central Excise Department issued intimation under rule 5A(2) of the Service Tax Rules, 1994, demanding necessary documents from the petitioners for making a reference to conduct an audit. The petitioners objected and also challenged the vires of rule 5A(2), *inter alia*, on the ground that the provisions of rule 5A(2) are contrary to the provisions of section 72A of the Finance Act, 1994.

The petitioner further submitted that as per rule 5A(2), assessee is required to provide record for audit to the audit party deputed by Commissioner or by CAG for carrying out audit of the records of assessee. However, there is no provision in the Finance Act, 1994 which empowers Central Government to frame rules in respect of the audit of the accounts of private person or companies or firms who are paying service tax by self assessment. Thus, rule 5A(2) empowering the departmental officers as auditor is arbitrary, illegal and *ultra vires* to the provisions of the Finance Act, 1994.

¹ Students may note that the view taken in the said judgment has been incorporated by CBDT in Circular No. 1/2014 dated 13.01.2014.

Observations of the Court: The High Court observed that in case of private assessee, the Commissioner will refer the matter to an officer or Chartered Accountant, to collect the material for the purpose of audit. Thus, the material can be collected either by the officer authorized by the Commissioner or by the auditor himself, but audit will be conducted by the audit party headed by the Chartered Accountant/Cost Accountant, as deputed by the Commissioner. The manner for conducting the audit is as per the accounting standards provided by the Institute of Chartered Accountant of India and the audit report will be made available to the assessee, as per law.

So, it is pious duty of every assessee to make available, to the authorized officer/ audit party, the records, trial balance and income-tax audit report, if any, for the scrutiny of the officer or the audit party.

Decision: In the light of the aforesaid discussion, the High Court held that section 5A(2) is not *ultra vires*. It is in consonance with section 72A of the Finance Act, 1994.

Note: Rule 5A(2) of the Service Tax Rules, 1994 stipulates that every assessee shall, on demand, make available to an officer authorised by the Commissioner or the audit party deputed by the Commissioner or CAG, within a reasonable time not exceeding 15 working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be, -

- (i) the records as mentioned in rule 5(2);
- (ii) trial balance or its equivalent; and
- (iii) the income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961, for the scrutiny of the officer or audit party, as the case may be.

Further, as per section 72A, the Commissioner of Central Excise may direct a person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by him in certain specified cases. Chartered accountant or cost accountant would submit an audit report duly signed and certified by him to the said Commissioner and shall give an opportunity of being heard to such person (whose accounts are being audited) in respect of any material gathered on the basis of the audit.

Demand, adjudication and offences

25. Is it justified to recover service tax during search without passing appropriate assessment order?

Chitra Builders Private Ltd. v. Addl. Commr. of CCEx. & ST 2013 (31) STR 515 (Mad.)

Facts of the case: A search was conducted at a branch office of the petitioner company and at the residence of director wherein a sum of ₹ 2 crores was collected by the Department from the petitioner. The petitioner filed a writ petition requesting the Court to direct the Department to return the money so collected.

Points of dispute: The petitioner's major contentions were as follows:-

- (i) Since the petitioner was not liable to pay service tax, collection of said amount from the petitioner, was arbitrary and illegal.
- (ii) Department had no jurisdiction to search the premises of the petitioner, or of its Directors, as it was neither carrying on its business nor was not registered, within the jurisdiction of the Commissionerate who had issued the search warrant.
- (ii) The petitioner further alleged that as per a deposition recorded under coercion on the date of search, the sum of ₹ 2 crores had been paid to the Department, voluntarily, as part of the arrears of service tax due from the company. However, tax could not be collected from the petitioner without a proper assessment order being passed, in accordance with the procedures established by law.

The Department counterargued that since the petitioner was actually liable to pay a larger amount of service tax, it could not claim for return of the said amount which was paid by him during the search as the said amount was paid by it voluntarily and not under coercion to mitigate the offence committed by it, under section 73(3) of the Finance Act, 1994.

Observations of the Court: The Court observed that it is a well settled position in law that no tax can be collected from the assessee, without an appropriate assessment order being passed by the authority concerned and without following the procedures established by law. However, in the present case, no such procedures had been followed.

Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability; it had failed to show that the petitioner was actually liable to pay service tax.

Decision: Thus, the High Court held that the amount collected by Department, from the petitioner, during the search conducted, could not be held to be valid in the eye of law, and directed the Department to return to the petitioner the sum of ₹ 2 crores, collected from it, during the search conducted.

26. Can extended period of limitation be invoked for mere contravention of statutory provisions without the intent to evade service tax being proved?

Infinity Infotech Parks Ltd. v. UOI 2013 (31) STR 653 (Cal.)

The High Court observed that as per proviso to section 73(1), extended period of limitation can be invoked if the service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provision of Chapter V or of rules made thereunder with the intent to evade the payment of service tax.

Decision: It held that mere contravention of provision of Chapter V or rules framed thereunder does not enable the service tax authorities to invoke the extended period of

limitation. The contravention necessarily has to be with the intent to evade payment of service tax.

27. Would service tax collected but not deposited prior to 10.05.2013 be taken into consideration while calculating the amount of ₹50 lakh as contemplated by clause (ii) of section 89(1) of the Finance Act, 1994?

Kandra Rameshbabu Naidu v. Superintendent (A.E.), S.T., Mumbai-II 2014 (34) S.T.R. 16 (Bom.)

Facts of the case: The assessee was arrested on 22.01.2014 on the ground that he had collected service tax of ₹ 2.59 crores during the period between financial years 2010-11 and 2013-14, but had deposited only ₹ 15 lakh with the Government.

The assessee did not dispute the liability to pay the service tax to the Government. However, he contended that only the amount collected between 10.05.2013 and 21.07.2013 (six months prior to his arrest) should be considered while calculating the amount of ₹ 50 lakh as contemplated by clause (ii) of section 89(1) of the Finance Act, 1994. He submitted that since penal provisions could not be made effective retrospectively, amended section 89(1) and newly introduced sections 90 and 91 of the Finance Act, 1994 (as introduced by the Finance Act, 2013) could not be made effective for a period prior to 10.05.2013 [i.e. the date on which Finance Act, 2013 came into effect]. Assessee further submitted that since the amount collected between 10.05.2013 and 21.07.2013 was much less than ₹ 50 lakh, provisions of amended clause (ii) of section 89(1) were not applicable in his case.

Revenue contended that since failure to deposit service tax with Central Government after collecting it from the customers was a continuing offence, entire amount of arrears of service tax was required to be construed as liable to be deposited with the Central Government when it became due and it being a continuing offence, the assessee was liable to deposit the entire arrears which was more than ₹ 50 lakh.

Decision: The High Court held that since the said offence is a continuing offence, entire amount of service tax outstanding [which is required to be deposited with the Central Government] as on 10.05.2013, would be taken into consideration while calculating the amount of ₹ 50 lakh as contemplated by section 89(1)(ii) of the Finance Act, 1994.

Note: In the aforesaid case law, the assessee collected service tax but did not deposit it for a period between financial years 2010-11 and 2013-14. The relevant legal provisions pertaining to said default during this period are as follows:-

Prior to 08.04.2011, in case of failure to pay service tax to the credit of the Central Government, only interest and penal provisions were attracted.

With effect from 08.04.2011, prosecution provisions were introduced in service tax law by the Finance Act, 2011 vide section 89 whereby, inter alia, said offence (where the amount involved exceeded ₹ 50 lakh) was also made punishable with a maximum imprisonment of 3 years. Further, it was a non-cognizable and bailable offence.

With effect from 10.05.2013, section 89(1) of the Finance Act, 1994 was amended by the Finance Act, 2013 to enhance the punishment for said offence (where the amount involved exceeds ` 50 lakh) from a maximum imprisonment of 3 years to 7 years. Further, new sections 90 and 91 were introduced to make said offence cognizable and liable to arrest provisions.

28. Whether best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte* assessment procedure?

N.B.C. Corporation Ltd. v. Commissioner of Service Tax 2014 (33) S.T.R. 113 (Del.)

The High Court held that section 72 could per se not be considered as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. Thus, said order is not akin to an ex parte order.

Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.

**Note: The term ex-parte means of the one part; from one party. This term is applied in law to a proceeding by one party in the absence of, and without notice to, the other.*

Other provisions

29. Can the Committee of Commissioners review its decision taken earlier under section 86(2A) of the Finance Act, 1994, at the instance of Chief Commissioner?

C.C.E. & S.T. (LTU), Bangalore v. Dell Intl. Services India P. Ltd. 2014 (33) S.T.R. 362 (Kar.)

The Karnataka High Court held that once the Committee of Commissioners, on a careful examination of the order of the Commissioner (Appeals), did not differ in their opinion against the said order of the Commissioner (Appeals) and decide to accept the said order, the matter ends there. The said decision is final and binding on the Chief Commissioner also. The Chief Commissioner is not vested with any power to call upon the Committee of Commissioners to review its order so that he could take decision to prefer an appeal. Such a procedure is not contemplated under law and is without jurisdiction.

Note: The aforesaid case law analyses sub-section (2A) of section 86 of the Finance Act, 1994, which provides that a Committee of Commissioners may, if it objects to any order passed by the Commissioner of Central Excise (Appeals) under section 85, direct any Central Excise Officer to appeal on its behalf to the Appellate Tribunal against the order. Further, where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner who shall, after considering the facts of the order, if is of the opinion that the order passed by the

Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.

30. Whether the question of chargeability or levy of service tax on a particular activity would be covered within the term “determination of any question having relation to rate of service tax or value of a service for the purpose of assessment” as contemplated under sections 35G and 35L of the Central Excise Act, 1944?

Commissioner of Service Tax v. Ernst & Young Pvt. Ltd. 2014 (34) S.T.R. 3 (Del.)

Point of dispute: The precise and significant issue which arose for consideration of the High Court was whether chargeability or levy of service tax on a particular activity would be covered within the term ‘determination of any question having relation to rate of duty of excise (or service tax) or value of goods (or service) for the purpose of assessment’ as contained in sections 35G and 35L of the Central Excise Act, 1944, so as to decide whether the order of Tribunal relating to such issue is appealable to High Court or Supreme Court.

Observations of the Court: The High Court observed that determination of any question relating to rate of tax would necessarily directly and proximately involve the question, whether activity falls within the charging section and service tax is leviable on the said activity. The reason for the same is that in case service tax is not to be leviable under the charging section, rate of tax will be nil.

Further, all assessments necessarily have to determine and decide the rate of tax after determining and deciding whether or not activity is chargeable to tax or tax can be levied. Assessment of the assessee would decide the rate of tax applicable once it is held that the activity is chargeable to service tax. The words ‘rate of tax’ would include the question whether or not the activity is exigible to tax under a particular or specific provision.

Decision: Thus, the High Court held that question of chargeability or levy of service tax on a particular activity would be covered within the term “determination of any question relating to rate of service tax or value of a service for the purpose of assessment”.

Note: Section 35G of the Central Excise Act, 1944 containing the provisions in respect to appeals to High Court and section 35L of the Act containing the provisions in respect to appeals to Supreme Court are applicable in case of service tax vide section 83 of the Finance Act, 1994. Section 35G read along with section 35L provides that an appeal against “an order of Tribunal relating to the determination of any question having a relation to the rate of duty of excise/service tax or to the value of goods/service tax for purposes of assessment” shall not lie to High Court. Appeal against such an order can be filed to Supreme Court.

The High Court, in the aforesaid case, has interpreted as to whether the question of chargeability or levy of service tax on a particular activity would be covered within the said term so as to determine if the order of Tribunal relating to such issue would be appealable to High Court or Supreme Court.

CUSTOMS

Demand and Appeals

31. Is the adjudicating authority required to supply to the assessee copies of the documents on which it proposes to place reliance for the purpose of re-quantification of short-levy of customs duty?

Kemtech International Pvt. Ltd. v. CCus. 2013 (292) E.L.T. 321 (S.C.)

The Apex Court elucidated that for the purpose of re-quantification of short-levy of customs duty, the adjudicating authority, following the principles of natural justice, should supply to the assessee all the documents on which it proposed to place reliance. Thereafter the assessee might furnish their explanation thereon and might provide additional evidence, in support of their claim.

32. Can delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant, be condoned?

Margara Industries Ltd. v. Commr. of C. Ex. & Cus. (Appeals) 2013 (293) E.L.T. 24 (All.)

In this case, CESTAT rejected the appellant's application for condonation of delay in filing the appeal before CESTAT on the ground that the reasons given for filing the appeal beyond stipulated time were not convincing. The Counsel of the appellant filed his personal affidavit stating that the appeal had been filed with a delay due to his mistake.

Decision: The High Court held that the Tribunal ought to have taken a lenient view in this matter as the appellant was not going to gain anything by not filing the appeal and the reason for delay in filing appeal as given by the appellant was the mistake of its counsel who had also filed his personal affidavit.

33. Can a writ petition be filed against an order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975?

Rishiroop Polymers Pvt. Ltd. v. Designated Authority 2013 (294) E.L.T. 547 (Bom.)

Facts of the case: In the instant case, the CESTAT upheld a notification issued by the Central Government imposing definitive anti-dumping duty on certain products originating from specified countries pursuant to the findings recorded by the Designated Authority in a review of anti-dumping duty. The assessee filed a writ petition under Article 226 of the Constitution to challenge the said order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975.

Point of dispute: The Department contended that an appeal, and not a writ petition, would lie against the order passed by the CESTAT.

Observations of the Court: The High Court observed that section 9A(8) of the Customs Tariff Act, 1975 specifically incorporates all the provisions of the Customs Act, 1962 relating to appeal as far as may be, in their application to the anti-dumping duty chargeable under section 9A. The order of the CESTAT passed in appeal would, therefore, clearly be subject to appeal, either to this Court under section 130 or to the

Supreme Court under section 130E of the Customs Act, 1962 if the appeal relates to the rate of duty or to valuation of goods for the purposes of assessment.

The assessee submitted that under section 130(2), an appeal can be filed by the Commissioner of Customs or the other party. However, in case of anti-dumping duty, Commissioner of Customs would have no occasion to file an appeal since proceedings are against the designated authority.

Against this submission, the High Court clarified that since appellate provisions of the Customs Act, 1962 have been incorporated in section 9A(8) of the Customs Tariff Act, 1975, they necessarily apply in a manner that would make the same intelligible and workable.

Decision: The High Court, therefore, held that it would not be appropriate for it to exercise the jurisdiction under Article 226 of the Constitution, since an alternate remedy by way of an appeal was available in accordance with law. The High Court thus, dismissed the petition leaving it open to the assessee to take recourse to the appellate remedy.

Note: The statutory provisions discussed in the above case law are given hereunder:

Section 9C(1) provides that an appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the CESTAT constituted under section 129 of the Customs Act, 1962.

Section 9A(8) of the Customs Tariff Act, 1975 provides that the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

Under section 130 of the Customs Act, 1962, an appeal can be filed to the High Court from every order passed in appeal by the Tribunal on a substantial question of law (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment). Section 130E(b) of the Customs Act provides that an appeal shall lie to the Supreme Court from an order passed by the Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment.

The afore-mentioned case reaffirms the settled position of law that writ petitions should not be entertained by the High Court under Article 226 of the Constitution of India when alternate remedies are available under the relevant statute. Courts have held that where a hierarchy of appeals is provided under the relevant statutes, taxpayers must exhaust the statutory remedies before resorting to writ jurisdiction.

A writ is a directive from a higher court ordering a lower court or government official to take a certain action in accordance with the law. Writs are usually considered to be extraordinary remedies which are permitted only when there is no other adequate remedy, such as an appeal. In other words, a writ can be filed to contest a point that cannot be raised in an appeal.

Since, writ petitions are heard more quickly than appeals, the same are preferred by the assesseees to secure a speedy review of some issue when the matter is urgent. Writ petition can also be filed when a final judgment has not yet been made in the lower court, but the party seeking the writ needs relief at once to prevent an injustice or unnecessary expense.

- 34. Can customs duty be demanded under section 28 and/or section 125(2) of the Customs Act, 1962 from a person dealing in smuggled goods when no such goods are seized from him?**

CCus. v Dinesh Chhajer 2014 (300) E.L.T. 498 (Kar.)

Facts of the case: Department's investigation revealed that the assessee was dealing in smuggled goods though no smuggled goods were seized from the assessee. Duty was demanded from the assessee under section 28 and 125(2) of the Customs Act, 1962.

The Tribunal, when the matter was brought before it, held that duty can be demanded under section 28 only from the person chargeable with duty, who is the importer as defined under section 2(26) of the Act. Further, it held that if the smuggled goods are seized, confiscated and then an option to pay fine is given to the person from whose possession the goods were seized or to the owner of the goods, duty could be demanded from such person under section 125(2) of the Act, apart from fine and penalty. However, since in the instant case, the assessee was not the importer and goods were also not confiscated, the demand of duty on the assessee was unsustainable in law. The matter was then taken before the High Court.

Observations of the Court: The High Court observed as under:

- (i) Section 28 applies to a case where the goods are imported by an importer and the duty is not paid in accordance with law, for which a notice of demand is issued on the person. In case of notice demanding duty under section 125(2), firstly the goods should have been confiscated and the duty demandable is in addition to the fine payable under section 125(1) in respect of confiscated goods. Thus, notices issued under sections 28 and 125(2) are not identical and fall into completely different areas.
- (ii) The material on record disclosed that the assessee did not import the goods. He was not the owner of the goods but only a dealer of the smuggled goods and therefore, there was no obligation cast on him under the Act to pay duty. Thus, the notice issued under section 28 of the Act to the assessee is unsustainable as he is not the person who is chargeable to duty under the Act.

- (ii) Since no goods were seized, there could not be any confiscation and in the absence of a confiscation, question of payment of duty by the person who is the owner of the goods or from whose possession the goods are seized, does not arise.

Decision: The High Court held that Tribunal was justified in holding that no duty is leviable against the assessee as he is neither the importer nor the owner of the goods or was in possession of any goods.

Refund

35. **Whether interest is liable to be paid on delayed refund of special CVD arising in pursuance of the exemption granted vide Notification No. 102/2007 Cus dated 14.09.2007?**

KSJ Metal Impex (P) Ltd. v. Under Secretary (Cus.) M.F. (D.R.) 2013 (294) ELT 211 (Mad.)

Facts of the case: Section 3(5) of the Customs Tariff Act, 1975 (CETA) provides for levy of special additional duty (special CVD) in addition to duty leviable under section 3(1) of the CETA to counterbalance sales tax, value added tax, local tax or any other charges. Notification No. 102/2007 Cus dated 14.09.2007, issued under section 25(1) of the Customs Act, 1962, grants exemption in respect of such special CVD subject to certain conditions. The exemption under the said notification is being granted by way of refund of the special CVD. In other words, exemption is not given *ab initio* but duty has to be paid first and thereafter, refund for the same needs to be claimed.

The assessee paid the special CVD and applied for the refund of the same under section 27 of the Customs Act, 1962 along with interest in pursuance of the above-mentioned notification. The Department, however, rejected the assessee's claim for the interest in view of paragraph 4.3 of CBEC Circular No. 6/2008 Cus. dated 28.04.2008 which stipulated that interest could not be granted as Notification No. 102/2007-Cus. did not have any specific provision for payment of the same on refund of duty. The Department was of the view that since such refund of special CVD was an automatic refund by virtue of Notification No. 102/2007 Cus, it could not be considered as a refund under section 27 of the Customs Act, 1962 so as to claim interest under section 27A of the Customs Act, 1962.

Observations of the Court: The High Court was of the view that paragraph 4.3 of Circular No. 6/2008 Cus was totally inconsistent with the provisions of the Customs Act, 1962 and the CETA. The High Court observed that grant of exemption under section 25(1) of the Customs Act, 1962 is an independent exercise of power by the Central Government. Notification No. 102/2007 Cus., issued in exercise of such powers, provides exemption by way of refund of special CVD and imposes certain conditions for seeking refund. However, the procedure for such refund will be governed in terms of section 3(8) of the CETA. Therefore, provisions of section 27 of the Customs Act, 1962 in relation to refund of duty [made applicable to refund of special CVD vide section 3(8) of CETA] would be applicable to such refund of special CVD also.

The High Court further stated that a conjoint reading of section 25(1) and section 27 of

the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest.

Decision: The High Court, therefore, held that :

- (i) It would be a misconception of the provisions of the Customs Act, 1962 to state that notification issued under section 25 of the Customs Act, 1962 does not have any specific provision for interest on delayed payment of refund.
- (ii) When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.
- (iii) Paragraph 4.3 of the *Circular No. 6/2008 Cus. dated 28.04.2008* being contrary to the statute has to be struck down as bad.

Note: This case clarifies that refund of special CVD arising as a result of exemption granted by way of exemption notification is governed under section 27 of the Customs Act, 1962 and thus, the provisions relating to payment of interest on delayed refund of duty as contained in section 27A of the Customs Act also become applicable in respect of delayed refunds of special CVD which is granted to give effect to the exemption contained in an exemption notification. Thus, it appears that the provisions applicable to normal refunds of duty/tax may apply to refunds of duty/tax arising as a result of exemption granted by way of exemption notifications as well.

Provisions relating to illegal import, illegal export, confiscation, penalty & allied provisions

- 36. Can penalty for short-landing of goods be imposed on the steamer agent of a vessel if he files the Import General Manifest, deals with the goods at different stages of shipment and conducts all affairs in compliance with the provisions of the Customs Act, 1962?**

Caravel Logistics Pvt. Ltd. v. Joint Secretary (RA) 2013 (293) ELT 342 (Mad.)

Facts of the case: In the instant case, the steamer agent (assessee) authored Import General Manifest and acted on behalf of the master of the vessel (the person-in-charge) before Customs Authorities to conduct all affairs in compliance with the Customs Act, 1962. The assessee filed Import General Manifest, affixed the seal on the containers and took charge of the sealed containers. It also dealt with the customs department for appropriate orders that had to be passed in terms of section 42 of the Customs Act. Penalty under section 116 of the Customs Act was imposed by the Department on the steamer agent for short landing of goods.

Observations of the Court: The High Court noted that section 116 of the Act imposes a penalty on the **person-in-charge** of the conveyance *inter alia* for short-landing of the goods at the place of destination and if the deficiency is not accounted for to the

satisfaction of the Customs Authorities. Section 2(31) defines “person-in-charge” to *inter alia* mean in relation to a vessel, the master of the vessel. Section 148 provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment in respect of the matter in question of all obligations imposed on such person-in-charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.

The High Court observed that if assessee affixed seal on containers after stuffing and took their charge, he stepped into shoes of/acted on behalf of master of vessel, the person-in-charge.

Decision: The High Court held that conjoint reading of sections 2(31), 116 and 148 of Customs Act, 1962 makes it clear that in case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him. Hence, duly appointed steamer agent of a vessel, would be liable to penalty. However, steamer agent, if innocent, could work out his remedy against the shipper for short-landing.

The High Court also clarified that in view of section 42 under which no conveyance can leave without written order, there is an automatic penalty for not accounting of goods which have been shown as loaded on vessel in terms of Import General Manifest. There is no requirement of proving *mens rea* on part of person-in-charge of conveyance to fall within the mischief of section 116 of the Customs Act.

Note: Steamer agent is a person who undertakes, either directly or indirectly,-

- (i) *to perform any service in connection with the ship's husbandry or dispatch including the rendering of administrative work related thereto; or*
- (ii) *to book, advertise or canvass for cargo for or on behalf of a shipping line; or*
- (iii) *to provide container feeder services for or on behalf of a shipping line.*

The statutory provisions discussed in the case law are given hereunder:

Section 42 - No conveyance to leave without written order: (1) *The person-in-charge of a conveyance which has brought any imported goods or has loaded any export goods at a customs station shall not cause or permit the conveyance to depart from that customs station until a written order to that effect has been given by the proper officer.*

(2) *No such order shall be given until –*

- (a) *the person-in-charge of the conveyance has answered the questions put to him under section 38;*
- (b) *the provisions of section 41 have been complied with;*
- (c) *the shipping bills or bills of export, the bills of trans-shipment, if any, and such other documents as the proper officer may require have been delivered to him;*

- (d) *all duties leviable on any stores consumed in such conveyance, and all charges and penalties due in respect of such conveyance or from the person-in-charge thereof have been paid or the payment secured by such guarantee or deposit of such amount as the proper officer may direct;*
- (e) *the person-in-charge of the conveyance has satisfied the proper officer that no penalty is leviable on him under section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct;*
- (f) *in any case where any export goods have been loaded without payment of export duty or in contravention of any provision of this Act or any other law for the time being in force relating to export of goods,*
 - (i) *such goods have been unloaded, or*
 - (ii) *where the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that it is not practicable to unload such goods, the person-in-charge of the conveyance has given an undertaking, secured by such guarantee or deposit of such amount as the proper officer may direct, for bringing back the goods to India.*

37. Where goods have been ordered to be released provisionally under section 110A of the Customs Act, 1962, can release of goods be claimed under section 110(2) of the Customs Act, 1962?

Akanksha Syntex (P) Ltd. v Union of India 2014 (300) E.L.T. 49 (P & H)

Facts of the case: In the instant case, an order for provisional release of the seized goods had been made under section 110A of the Act pursuant to an application filed by the petitioner in this regard. However, the petitioner claimed unconditional release of its seized goods in terms of sections 110(2) and 124 of the Act as no show cause notice had been issued within the extended period of six months (initial period of six months was extended by another six months by the Commissioner of Customs in this case).

As per section 110(2) of the Customs Act, 1962 where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. However, the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.

Point of dispute: It was the contention of the Department that once an order for provisional release of goods has been made under section 110A of the Act, in view of judgment of the Bombay High Court in *Jayant Hansraj Shah v. Union of India and Others 2008 (229) E.L.T. 339 (Bom.)*, goods cannot be released under sections 110(2) and 124 of the Act. The only recourse available to the petitioner was either to comply with the order of provisional release and in case, the petitioner was unable to abide by the terms of the provisional release then in view of the judgment of the Bombay High Court in *Jayant Hansraj Shah's* case, the prayer for return of goods unconditionally could not be made.

Observations of the Court: The High Court observed that the object of enacting section 110(2) of the Act is that the Customs Officer may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under sub-section (1) thereof. Sub-section (2) of section 110 strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice within that period has been issued under section 124(a) for confiscation of the goods.

The High Court opined that a plain and combined reading of sections 110(2), 124 and 110A spells out that any order for provisional release shall not take away the right of the assessee under section 110(2) read with section 124 of the Act. Where no action is initiated by way of issuance of show cause notice under section 124(a) of the Act within six months or extended period stipulated under section 110(2) of the Act, the person from whose possession the goods were seized becomes entitled to their return.

The High Court did not accept the contrary interpretation of the Bombay High Court in *Jayant Hansraj Shah's* case. The High Court was of the view that the said interpretation was not borne out from the plain reading of the aforesaid provisions.

Decision: The remedy of provisional release is independent of remedy of claiming unconditional release in the absence of issuance of any valid show cause notice during the period of limitation or extended limitation prescribed under section 110(2) of the Customs Act, 1962.

Notes:

- (i) *Delhi High Court has also taken a similar view in the case of Jatin Ahuja vs Union of India 2013 (287) E.L.T. 3 (Del.) and held that any effort to say that provisional release of seized goods under section 110A would extinguish the operation of the consequence (of not issuing show cause notice, within the statutory period) spelt out in section 110(2) would be contrary to the plain meaning and intendment of the statute. This is because section 110A is an interim order enabling release of goods, (for instance, where they are fast moving, or perishable). The existence of such power does not in any way impede or limit the operation of the mandatory provision of section 110(2). There are no internal indications in section 110A that the amplitude of section 110(2) is curtailed. Thus, the effect of the statute, by virtue of section 110(2), is that on expiration of the total period of one year (in the absence of a show cause notice) the seizure ceases, and the goods which are the subject matter of seizure, are to be released unconditionally. There is nothing in section 110A to detract from this consequence.*
- (ii) *In Jayant Hansraj Shah's case the Bombay High Court took a contrary view and rejected the plea of the petitioner of unconditional release of the seized goods with the following observations :-*

"The procedure for confiscation of the goods can be resorted to if the goods are not provisionally released. If the owner in terms of section 110A applies for provisional release

and an order is passed it can be said that the goods continue to be under seizure as the order under section 110A is a quasi judicial order. Section 110(2) would not be operative. It is only in the case where no provisional order is passed for release of the seized goods and if no notice is issued under Section 124(a) for confiscation of the goods only then would section 110(2) apply and the respondent would be bound to release the goods.

Any other reading of the section would mean that a person whose goods are seized would seek a provisional release of the goods, get an order of provisional release, allow the authorities to proceed to believe on that basis that such person seeks to release the goods provisionally and on the expiry of the period of six months if notice is not issued under section 124(a) then contend that the terms for provisional release of the goods are no longer binding as the period of six months has expired and no notice has been served. The period of notice is only when the respondents seek to confiscate the goods. If there be a provisional release order it is not within the jurisdiction of the respondents to proceed to issue the notice under section 124. At the highest they can proceed under section 110(1A) by following the procedure set out therein. In our opinion, therefore, as procedure for confiscation could not have been initiated pursuant to the order of provisional release the contention urged by the petitioners that the goods should be released under section 124(2) has to be rejected."

- (iii) *Punjab and Haryana High Court also departed from Jayant Hansraj Shah case in the case of Rama Overseas v. Union of India 2013 (293) ELT 669 (P & H).*

Settlement Commission

38. Does Settlement Commission have jurisdiction over baggage cases?

CCus.v. Ashok Kumar Jain 2013 (292) ELT 32 (Del.)

Points of dispute: In this case the Department contended that the Settlement Commission lacks the jurisdiction to entertain the baggage cases.

Decision: The High Court opined that the provisions that conferred jurisdiction on the Settlement Commission (Section 127B) cannot be construed as narrowly as it sought to be urged by the Revenue. A plain reading of the provisions of sections 127A and 127B reveals that there is no bar/express or implied on the Settlement Commission - in respect of entertaining applications by the passengers which brought in goods through their baggage.

It further noted that section 127B enumerates the kinds of cases which could not be entertained by the Settlement Commission. Had the intention of the Parliament been to exclude adjudication by Customs Authorities in respect of baggage claim from the purview of the Commission's jurisdiction, such intention would have been more clearly manifested as it had been mentioned in provisos to section 127B(1).

39. Is judicial review of the order of the Settlement Commission by the High Court or Supreme Court under writ petition/special leave petition, permissible?

Saurashtra Cement Ltd. v. CCus. 2013 (292) E.L.T. 486 (Guj.)

While examining the scope of judicial review in relation to a decision of Settlement Commission, the High Court noted that although the decision of Settlement Commission is final, finality clause would not exclude the jurisdiction of the High Court under Article 226 of the Constitution (writ petition to a High Court) or that of the Supreme Court under Articles 32 or 136 of the Constitution (writ petition or special leave petition to Supreme Court). The Court would ordinarily interfere if the Settlement Commission has acted without jurisdiction vested in it or its decision is wholly arbitrary or perverse or mala fide or is against the principles of natural justice or when such decision is ultra vires the Act or the same is based on irrelevant considerations.

The Court, however, pronounced that the scope of court's inquiry against the decision of the Settlement Commission is very narrow, i.e. judicial review is concerned with the decision-making process and not with the decision of the Settlement Commission.

Note: Apart from the appellate remedies available under the customs law, the Constitution of India also provides remedies in the form of Special Leave Petitions (SLPs) and Writs. The Supreme Court of India is empowered under Article 136 of the Constitution of India to grant special leave to any of the parties to appeal, aggrieved by any order or judgment passed by any Court or Tribunal in India. The applications under Article 136 are termed as Special Leave Petitions (SLPs) as these can be admitted only with special leave (permission) of Supreme Court. The High Courts, within the territory of its jurisdiction, have powers, vide article 226 of Constitution, to issue orders or writs for enforcement of any fundamental right and for any other purpose. The Supreme Court, under Article 32 of the Constitution of India, is also empowered to issue writs for enforcement of fundamental rights.

Miscellaneous provisions

- 40. Whether any interest is payable on delayed refund of sale proceeds of auction of seized goods after adjustment of expenses and charges in terms of section 150 of the Customs Act, 1962?**

Vishnu M Harlalka v. Union of India 2013 (294) ELT 5 (Bom)

Facts of the case: In the instant case, the Settlement Commission ordered to release the seized goods of the assessee on payment of a specified amount of fine and penalty adjudicated by it. However, since the seized goods had already been auctioned by the Department, the Commission directed the Revenue to refund to the assessee, the amount remaining in balance after adjustment of expenses and charges as payable in terms of section 150 of the Customs Act, 1962 and further adjustment of fine and penalty as adjudicated by it. The refund was however, not granted despite several representations. The response to the RTI query showed that refund was sanctioned but it was not paid till filing of this writ petition.

During the pendency of this writ petition, the principal amount of the sale proceeds was paid to the assessee but the interest on the same was not paid. It was the contention of the Department that the amount paid to the assessee represented the balance of sale proceeds of the goods auctioned or disposed of after adjustments under section 150 of

the Act. Since the amount paid did not represent the amount of duty or interest, the provisions of sections 27 and 27A of the Customs Act relating to claim for refund of duty and interest on delayed refunds respectively would not be applicable.

Observations of the Court: The High Court observed that though no period was stipulated in the order of the Settlement Commission for the grant of refund, the entire exercise ought to have been carried out within a reasonable period of time. All statutory powers have to be exercised within a reasonable period even when no specific period is prescribed by the provision of law. The High Court noted that there was absolutely no reason or justification for the delay in payment of balance sale proceeds.

Decision: The High Court held that Department cannot plead that the Customs Act, 1962 provides for the payment of interest only in respect of refund of duty and interest and hence, the assessee would not be entitled to interest on the balance of the sale proceeds which were directed to be paid by the Settlement Commission. The High Court clarified that acceptance of such a submission would mean that despite an order of the competent authority directing the Department to grant a refund, the Department can wait for an inordinately long period to grant the refund. The High Court directed the Department to pay interest from the date of approval of proposal for sanctioning the refund.

Note: Section 27(1) inter alia provides that a person claiming refund of duty and interest, if any, paid or borne by him may make an application for such refund before the expiry of one year from the date of payment of such duty or interest. Section 27(2) inter alia requires an order to be passed on the receipt of such application, subject to the satisfaction of the Assistant/Deputy Commissioner of Customs, that the whole or part of the duty or interest paid by the applicant is refundable. Section 27A stipulates that if any duty ordered to be refunded under section 27(2) to an applicant is not refunded within three months from the receipt of the application under section 27(1), interest shall be paid at such rate not below 5% and not exceeding 30% p.a. as fixed by the Central Government. Currently, the notified rate of interest on delayed refunds is 6%.

Where any goods, not being confiscated goods, are sold under the provisions of the Act, the manner of application of sale proceeds thereof is provided under section 150(2). The proceeds have to be applied for the payment of (i) expenses of sale, (ii) freight and other charges to the carrier, (iii) duty, if any; (iv) charges to the person having custody of the goods; and (v) any amount due to the Central Government from the owner of the goods, under the provisions of the Act or under any law relating to customs. The balance is to be paid to the owner of the goods.

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