-OM NAMHO GANESAYA NAMHA-

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BASIC CONCEPTS

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' (bagassee 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.

2. **Can improvement in quality of base bitumen by adding and mixing polymers and additives to it, amount to manufacture?**

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

Facts of the Case: Osnar Chemical Pvt. Ltd. (Osnar) was engaged in the supply of PMB (Polymer Modified Bitumen) and CRMB (Crumbled Rubber Modified Bitumen). It entered into a contract with M/s. Afcons Infrastructure Ltd. (Afcons) wherein it agreed to supply PMB to Afcons at their work site. Afcons was to supply raw materials [base bitumen and certain additives] to Osnar at the site.

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

Revenue contended that the aforesaid process carried out by the assessee (Osnar) at the work site amounted to manufacture of PMB in terms of section 2(f) of the Central Excise Act, 1944 for the following reasons:

(i) The end products [PMB and CRMB] were different from bitumen.

(ii) Bitumen and polymer were classifiable under tariff entries different from the finished products-PMB and CRMB.

(iii) One of the essential conditions for the purpose of levy of excise duty i.e. the test of marketability was satisfied because PMB and CRMB were commercially known in the market for being bought and sold.

However, the assessee contended that adding and mixing polymers and additives to base bitumen only improved its quality and could not be termed as manufacture.

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

Observations of the Court: The Supreme Court observed that:

(i) "Manufacture" could be said to have taken place only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use. It is a well settled principle that mere improvement in quality did not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it could no longer be regarded as the original commodity but was instead recognized as a new and distinct article that manufacture could be said to have taken place.

The process of mixing polymers and additives with bitumen merely resulted in the improvement of quality of bitumen. However, bitumen remained bitumen. There was no change in the characteristics or identity of bitumen and only its grade or quality was improved. The said process did not result in transformation of bitumen into a new product having a different identity, characteristic and use. The end use also remained the same, namely mixing of aggregates for constructing the roads.

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

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

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

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

Facts of the case: The assessee was the manufacturer of the white cement. He repaired his worn out machineries/parts of the cement manufacturing plant at its workshop. This repairing process generated M.S. Scrap and Iron Scrap which were mentioned in Chapter Heading 72.04 of the Central Excise Tariff. The assessee cleared it without paying any excise duty. The Department issued a show cause notice demanding duty on the said metal scrap and waste contending that the process of generation of scrap and waste amounted to manufacture in terms of section 2(f) of the Central Excise Act, 1944.

Observations of the Court: The Apex Court observed that for imposition of excise duty under section 3 of the Central Excise Act, two conditions-goods being excisable goods under section 2(d) and goods being manufactured in the terms of section 2(f) of the Act, need to be satisfied conjunctively.

The metal scrap and waste were excisable goods under section 2(d) of the Act. Further, the 'manufacture' in terms of section 2(f), inter alia, includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient.

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

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

4. Are the physician samples excisable goods despite them being statutorily prohibited from being sold?

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

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

Observations of the Court: Supreme Court observed that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Sale is not a necessary condition for charging duty as excise duty is payable in case of free supply also. Since physician samples were capable of being sold in open market, the same were marketable and thus, liable to excise duty.

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

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

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

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

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

Facts of the case: The appellant assembled a machinery in the nature of testing equipments to test their final products. Balance sheet of the appellant stated that addition to plant and machinery included testing equipments. The said position was further corroborated by the Director's report wherein it was mentioned that during the year, the company developed a large number of testing equipments on its own.

Revenue sought to levy excise duty on the said testing equipment on the ground that process of assembling testing equipments undertaken by the assessee amounted to manufacture. However, the assessee contended that said process could not be said to be a manufacturing process because:

(i) items were assembled in the factory for purely research and development purposes, and after such research and development, same were dismantled,

(ii) testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange, and

(iii) testing equipments were not taken out from the factory premises of the appellant. Observations of the Court: The Supreme Court observed that:-

(i) once the appellant had themselves made admission regarding the development of testing equipments in their own Balance Sheet, which was further substantiated in the Director's report, it could not make contrary submissions later on.

(ii) assessee's stand that testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange, confirmed that such equipments were saleable and marketable.

Decision : In the light of the aforesaid observations, the Apex Court held that duty was payable on such testing equipments used for testing the final product

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

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

Facts of the case: In the instant case, the product had a shelf-life of 2 to 3 days. The appellant contended that since the product did not have shelf-life, it did not satisfy the test of marketability. Thus, excise duty cannot be levied on the same.

Decision: The Supreme Court ruled that short shelf-life could not be equated with no shelf-life and would not *ipso facto* mean that it could not be marketed. A shelf-life of 2 to 3 days was sufficiently long enough for a product to be commercially marketable.

Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it was shown that the product had absolutely no shelf-life or the shelf-life of the product was such that it was not capable of being brought or sold during that shelf-life

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

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

Facts of the case: The assessee was engaged in the manufacture of asphalt batch mix and drum mix/ hot mix plant at sites and undertook contracts for supplying, erection, commissioning of such plant and after sale services relating thereto.

The Revenue contended that setting up of such plant by using duty paid parts and components amounts to manufacture of excisable goods as the assembled plant, in the given case, was not an immovable property.

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

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

8. **Does the process of preparation of tarpaulin made-ups after cutting and stitching the tarpaulin fabric and fixing eye-lets in it, amount to manufacture?**

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

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

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

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

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

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

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

Decision: The High Court pronounced that cutting and embossing did not transform aluminium foil into distinct and identifiable commodity. It did not change the nature and substance of foil. The said process did not render any marketable value to the foil, but only made it usable for packing. Cut to shape/embossed aluminium foils used for packing cigarettes could not be considered as distinct marketable commodity and hence, it was not liable to excise duty.

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

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

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

Decision: The High Court observed that none of the activity that the assessee undertook involved any process on the compact discs that were imported. It held that the Tribunal rightly concluded that **the activities carried out by the respondent did not amount to manufacture since the compact disc had been complete and finished when imported by the assessee.** Thus, the question of law was answered in favour of assessee in favour of assessee and against Revenue.

CLASSIFICATION OF EXCISABLE GOODS

1. **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.

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

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

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

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

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

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

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

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

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

	6807.10	*Goods, in which more than 25% by weight of red mud, press mud or blast furnace slag or one or more of these materials have been used.*	*8%*

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

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

Facts of the Case: The assessee manufactured Povidone Iodine Cleansing Solution USP and Wokadine Surgical Scrub. These products were antiseptic and used by the surgeons for cleaning or de-germing their hands and scrubbing the surface of the skin of the patient before operation.

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

Observations of the Court: The Supreme Court observed that the factors to be considered for the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the use to which the product is put to.

In the instant case, it is not in dispute that the product is used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient. Therefore, the product is basically and primarily used for prophylactic purposes i.e., to prevent the infection or diseases, even though the same contains very less quantity of the prophylactic ingredient.

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

**Note: Chapter Note 2(i) of Chapter 30 of the Central Excise Tariff Act defines 'medicament' as follows:*

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

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

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

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

Heading NO	*Sub-HeadingNo*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
30.03		*Medicaments (including veterinary medicaments)*	
	3003.10	*Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic.*	*15%*
	3003.20	*Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems. Medicaments, including those in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems.*	*8%*
34.02		*Organic surface active agents (other than soap): surface-active preparations, washing preparations (including auxiliary washing preparations and cleaning preparation, whether or not containing soap).*	
	3402.90	*Other*	*18%*

4. Can the 'soft serve' served at McDonalds India be classified as "ice cream" for the purpose of levying excise duty?

CCEx. v. Connaught Plaza Restaurant (Pvt) Ltd. 2012 (286) E.L.T. 321 (S.C.)

Facts of the case: McDonalds India [M/s Connaught Plaza Restaurant (Pvt) Ltd.] manufactured and served 'soft serves' dispensed through vending machines at its restaurants. The Department raised a demand for the excise duty on the fast-food restaurant chain. It contended that 'soft serve' was classifiable under Heading 21.05, Sub-Heading 2105.00-"ice cream and other edible ice, whether or not containing cocoa" and thus, would attract excise duty @ 16% plus an additional duty (applicable at the relevant time). However, McDonalds India opposed the classification sought by the Department and claimed that the 'soft serve' was classifiable under Heading 04.04 as "other dairy produce" chargeable to nil rate of duty. Hence, it was not required to pay any duty.

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

On the other hand, the assessee contended that 'soft serve' must be classified under Heading 04.04 as "other dairy produce; edible products of animal origin, not elsewhere specified or included" and not under Heading 21.05.

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

Observations of the Court: The Apex Court considered the various submissions of the assessee as under:-

(i) The assessee quoted that as per the definition of "ice cream" under the Prevention of Food Adulteration Act, 1955 (PFA), the milk fat content of "ice-cream" shall not be less than 10%. Hence, if the 'soft serve', containing 5% milk fat content is marketed as "ice-cream", it would make the assessee liable to prosecution under the PFA.

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

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

SC rejected this averment on the ground that the manner, in which a product might be marketed by a manufacturer, did not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters was the way in which the consumer perceived the product notwithstanding marketing strategies. An average reasonable person who walked into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', could not be expected to be aware of intricate details such as the percentage of milk fat content, milk non-solid fats, stabilisers, emulsifiers or the manufacturing process, much less its technical distinction from "ice-cream".

(iii) The assessee pleaded that in the matters pertaining to classification of a commodity, technical and scientific meaning of the product was to prevail over the commercial parlance meaning.

The Apex Court observed that none of the terms in Heading 04.04, Heading 21.05 and Heading 2108.91 had been defined and no technical or scientific meanings had been given in the chapter notes. Further, 'soft serve' was also not defined in any of the said chapters. Supreme Court, after considering various judgments, concluded that in the absence of a statutory definition or technical description, interpretation ought to be in accordance with common parlance principle and not according to scientific and technical meanings.

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

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

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

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

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

Heading NO	*Sub-HeadingNo*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
21.05	*2105.00*	*Ice-cream and other edible ice, whether or not containing cocoa*	*16%*
21.08		*Edible preparations, not elsewhere specified or included*	

	2108.91	*-Not bearing a brand name*	*Nil*

"Chapter 4 Dairy Produce, etc.

Heading NO	*Sub-HeadingNo*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
04.04		*Other dairy produce; Edible products of animal origin, not elsewhere specified or included* *- Ghee :*	
	0404.11	*--Put up in unit containers and bearing a brand name*	*Nil*
	0404.19	*--Other*	*Nil*
	0404.90	*--Other*	*Nil*

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

VALUATION OF EXCISABLE GOODS

1. 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.***

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

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

Facts of the case: The petitioners were the manufacturers of cars. They used to enter into an agreement with the dealers wherein they notified the maximum amount for which their car could be sold by the said dealer. The dealer paid to the petitioners a particular price quoted by them. According to the petitioners, this price was the assessable value and excise duty was paid on it. The amount charged by the dealer to his customer minus the amount charged by the petitioners to such dealer was the dealer's margin.

Further, on account of the dealership agreement, the dealer was required to carry out Pre Delivery Inspection (PDI) before the car was actually delivered to the customer. After the car was delivered to the customer, the dealer was required to conduct specified number of free services of the said car as set out in the Owner's Manual [hereinafter referred to as "said services"]. A customer could get the benefit of terms of warranty from petitioners only when it got the car duly inspected as per the PDI requirements and also availed the said services.

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

However, the petitioners contended that *Circular No. 643/34/2002 -CX, dated 1-7-2002 and Circular No. 681/72/2002-CX, dated 12-12-2002* (to the extent it affirms the aforesaid circular) were contrary to the provisions of section 4(1)(a) and section 4(3)(d) of the Central Excise Act, 1944.

The petitioner contended that they were required to pay excise duty on the amount charged by them to the dealer while selling the car to the dealer. The expenses to conduct PDI and said services would not be included in the assessable value as they did not reimburse these expenses to the dealer.

Observations of the Court: The High Court, after considering the rival submissions observed as follows:-

1. The High Court accepted the contention of the petitioners that it did not charge the dealer for the expenses incurred by the dealer towards PDI and said services. It further stated that when a car was sold by the petitioner to dealer, price was the sole consideration and the petitioners and dealer were not related to each other. Hence, since the requirements of section 4(1)(a) were being complied with, the assessable value would be the transaction value [determined as per section 4(3)(d)]. Accordingly, the expenses incurred for PDI and said services should not be included in the transaction value of the car.
2. The High Court rejected the Revenue's claim that the expenses incurred for PDI and after sales services must be included in the transaction value for the reason that the warranty given by the petitioners was linked with such expenses. The Court observed that it only implied that petitioner would undertake the responsibility to provide the benefit of warranty to customer only when the customer had availed PDI and after sales services. However, it had no bearing on assessable value.
3. The High Court opined that in Clause 7 of Circular dated 1st July, 2002, reference to rule 6 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000 was not correct. Valuation rules, in the first place, would not apply in the instant case as this transaction did not fall within the ambit of section 4(1)(b) because the transaction of sale of a car between the petitioners and the dealer was governed by the provisions of section 4(1)(a).
4. The Court noted that the said circular wrongly held that the expenses incurred by dealer towards PDI and said services were on behalf of manufacturer. Thus, such expenses could not be said to form as one of the considerations for sale of goods.
   Expenses incurred towards PDI and said services could not be equated with advertisement and publicity charges. It was contrary to the provisions of section 4(1)(a) read with section 4(3)(d).

Decision: In the light of the above discussion, the High Court held that Clause No. 7 of Circular dated 1st July, 2002 and Circular dated 12th December, 2002 (where it affirms the earlier circular dated 1st July, 2002) were not in conformity with the provisions of section 4(1)(a) read with section 4(3)(d) of the Central Excise Act, 1944. Further, as per section 4(3)(d), the PDI and free after sales services charges could be included in the transaction value only when they were charged by the assessee to the buyer.

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

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

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

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

CENVAT CREDIT

1. 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 <u>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.</u>

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.

2. 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.

   <u>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.</u>

   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.

3. 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.

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

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

Facts of the Case: The assessee was engaged in manufacturing various types of packaging machines. The machines were 'made to order'. As per purchase order, machine was to be inspected at the assessee's premises in the presence of customer's engineer before despatch, using duty paid testing material. Only when the customer was satisfied, the machine was declared as manufactured and ready for clearance. Otherwise, it was re-adjusted and tuned to match the customer's requirement.

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

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

The Supreme Court was of the opinion that the process of testing the customized packing machines was inextricably connected with the manufacturing process, in as uch as, until this process was carried out in terms of the covenant in the purchase order, the manufacturing process was not complete; the machines were not fit for sale and hence, not marketable at the factory gate.

Decision: The Court was, therefore, of the opinion that the manufacturing process in the present case got completed on testing of the said machines. Hence, the testing material used for testing the packing machines were inputs used in relation to the manufacture of the final product and would be eligible for CENVAT credit.

5. Is assessee required to reverse the CENVAT credit availed on capital goods destroyed by fire when insurance company reimburses value of such capital goods inclusive of excise duty?

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

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

Observations of the Court: The High Court observed that the assessee had paid the premium and covered the risk of this capital goods and when the goods were destroyed in terms of the insurance policy, the insurance company had compensated the assessee. It was not a case of double benefit to assessee, as contended by the Department.

Decision: The High Court held that merely because the insurance company paid the assessee the value of goods including the excise duty paid, that would not render the availment of the CENVAT credit wrong or irregular. Excise Department cannot demand reversal of credit or payment of the said amount.

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

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

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

13(1) [now rule 15(1)] was imposable only on the person who had availed CENVAT credit [company in the given case], namely the manufacturer.

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

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

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

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

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

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

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

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

8. **Whether (i) technical testing and analysis services availed by the assessee for testing of clinical samples prior to commencement of commercial production and (ii) services of commission agent are eligible input services for claiming CENVAT?**

CCEx v. Cadila Healthcare Ltd. 2013 (30) S.T.R. 3 (Guj.)

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

Further, the assessee also availed CENVAT credit of service tax paid by it on commission paid to foreign agents for the sale of such medicaments. Credit was taken as per the inclusive part of the definition of input service, which included services in relation to sales promotion. However, the Department contended that there was a clear distinction between sales promotion and sale and a commission agent is directly concerned with sales rather than sales promotion. Therefore, service provided by commission agent would not fall within the purview of the main or inclusive part of the definition of input service.

Observations of the Court: The High Court observed that the activity of testing and analysis of the trial batches was in relation to the manufacture of final product as unless such trial batches were tested and approval from the regulatory authority was obtained, the final product could not be manufactured.

The High Court did not find any merits in the contention of the department that CENVAT credit was not admissible in respect of the technical testing and analysis services availed in respect of the product at trial production stage as the goods had not reached the commercial production stage. It was more so as the trail batches were removed on payment of excise duty and thus, CENVAT credit of service tax paid in respect of such services could not be denied.

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

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

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

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

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

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

In order to receive continuous and uninterrupted supply of electricity, the assessee installed DG sets/electricity generation plant to be used in the factory of the textile division and it used furnace oil as fuel in the generation of electricity. The assessee availed CENVAT credit on furnace oil, used as fuel for the generation of electricity, which was used for captive consumption in its own factory. When the assessee's other unit required electricity, the assessee supplied part of the electricity so generated to its other unit.

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

Observations of the Court: The High Court observed that though both the separately registered factories/divisions are situated within a common boundary wall, it could not be said that the other division is also within the factory of the assessee wherein the electricity is generated. The reason given by the High Court for such an observation was that the assessee itself had described the factory of its other division as a separate place of business by applying for separate central excise registration and had obtained such separate registration.

Decision: The High Court held that credit could be availed on eligible inputs utilized in the generation of electricity only to the extent the same were used to produce electricity within the factory registered for that purpose (textile division). However, credit on inputs utilized to produce electricity which was supplied to a factory registered as a different unit (plastic division) would not be allowed. The High Court rejected the contention of the assessee that separate registration of two units situated within a common boundary wall would not make them two different factories.

EXPORT PROCEDURES

1. **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 <u>procedure cannot be raised to the level of a mandatory requirement</u>. 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 <u>while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.</u>

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.*

2. 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:

(i) 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.

(ii) word “or” used in rule 18 should be read as “and” as there is a combined 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.

(iii) 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) The word “or” is interpreted as ‘and’ only when the literal interpretation of the word produces absurd results. However, in rule 18, if word “or” is taken to be disjunctive, no absurd result occurs, rather the intention manifested in rule 18 can be given full effect to, i.e. to give the benefit admissible on one of the item, either on finished goods or inputs used in the manufacture or processing of such goods.

(ii) Rule 19 provides benefit on the finished goods i.e. any excisable goods can be exported without payment of duty from the factory of producer. However, it does not provide for rebate of duty paid on the materials used in manufacture or processing of such goods. Thus, the intention of rule 19 is to provide benefit on finished goods and not on raw materials.

The procedures & stages in rules 18 and 19 are different. The word ‘or’ used in rule 18 cannot be interpreted as ‘and’ to provide benefit on both, with the aid of different provision of rule 19.

(iii) It is important to note that *Notification No. 19/2004-Central Excise (N.T.) dated 06.09.2004* provides rebate of the whole of the duty paid on all “excisable goods” while *Notification No. 21/2004-C.E. (N.T.) dated 06.09.2004* provides the rebate of whole of the duty paid on ‘materials’ *i.e.* inputs used in the manufacture or processing of export goods. Issuance of two difference notifications further makes it clear that both the benefits cannot be claimed simultaneously.

(iv) Since a combined Form ARE-2 can be used to claim both the benefits, i.e. the rebate on finished goods or on inputs used in manufacture of such goods, it cannot be inferred out that the rebate is available on both i.e., finished goods as well as on the inputs.

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

1. **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.

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

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

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

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

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

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

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

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

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

   Observations of the Court: The High Court observed that since the subsequent show cause notice only formed prima facie view in regard to allegations, it could not be said to be issued after pre-judging the question involved in the matter. The High Court opined that since it was not a case of show cause notice being issued without jurisdiction, adjudicating authority could not be restrained from proceeding further with the SCN.

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

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

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

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

   Tribunal affirmed that the penalty was leviable under section 11AC. However, it further noted that since the option to pay the reduced penalty under the proviso to erstwhile section 11AC [now section 11AC(1)(c)] had not been given in the adjudication order, the benefit of reduced penalty under section 11AC could not be denied to the assessee. Thus, it permitted the assessee to pay 25% penalty within 30 days from the date of communication of the order passed by the Tribunal.

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

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

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

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

Notes:

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

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

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

   (ii) the details of such transaction are available in the specified records.

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

2. *The Bombay High Court, while deciding the aforesaid case, departed from the view taken by the High Courts in the following cases in the said matter:-*

   - *Commissioner v. Bhagyoday Silk Industries 2010 (262) E.L.T. 248 (Guj.)*
   - *Commissioner v. J.R. Fabrics Pvt. Ltd. 2009 (238) E.L.T. 209 (P & H)*
   - *K.P. Pouches Pvt. Ltd. v. Union of India 2008 (228) E.L.T. 31 (Del.).*

3. *The Gujarat High Court has taken a view contrary to the abovementioned opinion of Bombay High Court in case of CCEx. v. Ratnamani Metals and Tubes Ltd. 2013 (296) ELT 327 (Guj.) wherein the High Court held that an option can also be granted to the assessee to deposit the entire dues along with interest and 25% penalty within a period of 30 days of communication of the order of Tribunal.*

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

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

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

   Commissioner (Adjudication) imposed a penalty under rule 25(1) of the Central Excise Rules, 2002 on the respondents. However, in an appeal filed by the respondents to CESTAT, CESTAT noted that penalty under rule 25(1) could be imposed only on four categories of persons:-

   (i) producer;

   (ii) manufacturer;

   (iii) registered person of a warehouse; or

   (iv) a registered dealer.

   The above four categories of persons are also mentioned at the end of rule 25(1) where the liability of penalty has been spelt out.

   Since, the respondents were neither producers nor manufacturers of the said zarda, neither were they the registered persons of a warehouse in which the said zarda had been stored nor were the registered dealers, penalty under rule 25(1) (higher of duty payable on excisable goods in respect of which contravention has been committed or ` 2,000), could not be imposed on the respondents.

   Decision: The Department aggrieved by the said order filed an appeal with High Court wherein it contended that clause (c) of rule 25(1) of the Central Excise Rules, 2002 would be applicable in the instant case. However, High Court concurred with the view of the Tribunal and concluded that rule 25(1)(c) would have no application in the present case because said clause would also apply only in respect of four categories of persons mentioned in rule 25(1) of said rules.

Note: Rule 25(1) of the Central Excise Rules 2002 reads as follows:

Subject to the provisions of section 11AC of the Central Excise Act, if any producer, manufacturer, registered person of a warehouse or a registered dealer-

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or two thousand rupees, whichever is greater.

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

Nanumal Glass Works v. CCEx. Kanpur, 2012 (284) E.L.T. 15 (All.)

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

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

Observations of the Court: The High Court noted that in terms of section 37C(a) of the Central Excise Act, 1944, containing the provisions relating to service of decisions, orders, summons etc., an order is deemed to be served on the person if it is tendered to the person for whom it is intended **or his authorized agent.** The High Court opined that the communication of the order to the authorised agent of a person, therefore, is sufficient communication. Thus, when the order was passed by the Tribunal on 22nd July, 2010 in presence of advocate of the assessee, the order would be deemed to be communicated to the authorized agent of the assessee (i.e. his advocate) on the same date and 30 days period would start from 22nd July, 2010.

Decision: The High Court held that when a decision is pronounced in the open court in the presence of the advocate of the assessee, who is the authorized agent of the assessee within the meaning of section 37C, the date of pronouncement of order would be deemed to be the date

REFUND

1. **Whether filing of refund claim under section 11B of Central Excise Act, 1944 is required in case of *suo motu* availment of CENVAT credit which was reversed earlier (i.e., the debit in the CENVAT Account is not made towards any duty payment)?**
ICMC Corporation Ltd. v CESTAT, CHENNAI 2014 (302) E.L.T. 45 (Mad.)

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.

2. **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 salutory doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been

collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

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

1. 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:-

2. 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

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

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

   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.

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

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

   Facts of the Case: The adjudicating authority, in the assessee's case, concluded that excise duty was payable on assessee's product. Aggrieved by the order, the assessee carried an appeal before the Commissioner (Appeals), who accepted the assessee's stand and held that excise duty was not payable on its product. Department did not appeal against it and the said order of the appellate authority attained finality.

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

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

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

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

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

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

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

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

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

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

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. **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.

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

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

Facts of the Case: The assessee (availing SSI exemption) was using brand name "ELEX" on the flat knitting machines manufactured by it. The said brand name belonged to a firm in which assessee was a partner.

Point of Dispute: The Department denied the benefit of the SSI exemption on the ground that assessee had manufactured and cleared the goods under other firm's brand name.

Decision: The Tribunal held that since the assessee was a partner in the firm of whose brand name it was using, he was the co-owner of such brand name. Hence, he could not be said to have used the brand name of another person, in the manufacture and clearance of goods in his individual capacity. Thus, assessee was eligible for benefit of SSI exemption in the given case.

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

Note: This case has been further affirmed by Supreme Court in case of CCEX v. Elex Knitting Machinery Co. 2012 (283) ELT A18 (SC).

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

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

Facts of the case: The respondent-assessee was using the brand name of "Dominant" while clearing the machines manufactured by it. One more manufacturing unit was also engaged in the manufacture and clearance of the same goods under the same brand name of "Dominant" in the same premises.

Further, both the firms had common partners and machines were cleared from both the units under common serial number having common accounts. Department clubbed the clearance of the goods from both the units for the purposes of SSI exemption on the ground that both the units belong to same persons and had common machinery, staff and office premises etc.

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

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

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

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

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

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

(i) Physical manifestation of the brand name on goods is not a compulsory requirement as such an interpretation would lead to absurd results in case of goods, which are incapable of physically bearing brand names viz., liquids, soft drinks, milk, dairy products, powders etc. Such goods would continue to be branded good, as long as its environment conveys so viz., packaging/wrapping, accessories, uniform of vendors, invoices, menu cards, hoardings and display boards of outlet, furniture/props used, the specific outlet itself in its entirety and other such factors, all of which together or individually or in parts, may convey that goods is a branded one.

(ii) The test of whether the goods is branded or unbranded, must not be the physical presence of the brand name on the good, but whether it is used in relation to such specified goods for the purpose of indicating a connection in the course of trade between such specified goods and some person using such name with or without any indication of the identity of the person. The Court opined that a brand/ trade name must not be reduced to a label or sticker that is affixed on a good.

(iii) Once it is established that a specified good is a branded good, whether it is sold without any trade name on it, or by another manufacturer, it does not cease to be a branded good of the first manufacturer. Therefore, soft drinks of a certain company

do not cease to be manufactured branded goods of that company simply because they are served in plain glasses, without any indication of the company, in a private restaurant.

Decision: The Supreme Court held that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods for the purpose of SSI exemption. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the good is sold. However, such factors would carry different hues in different scenarios. There can be no single formula to determine if a good is branded or not; such determination would vary from case to case.

NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

1. **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

1. (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.

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

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

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

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

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

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

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

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

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

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

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

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

Compiled By

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