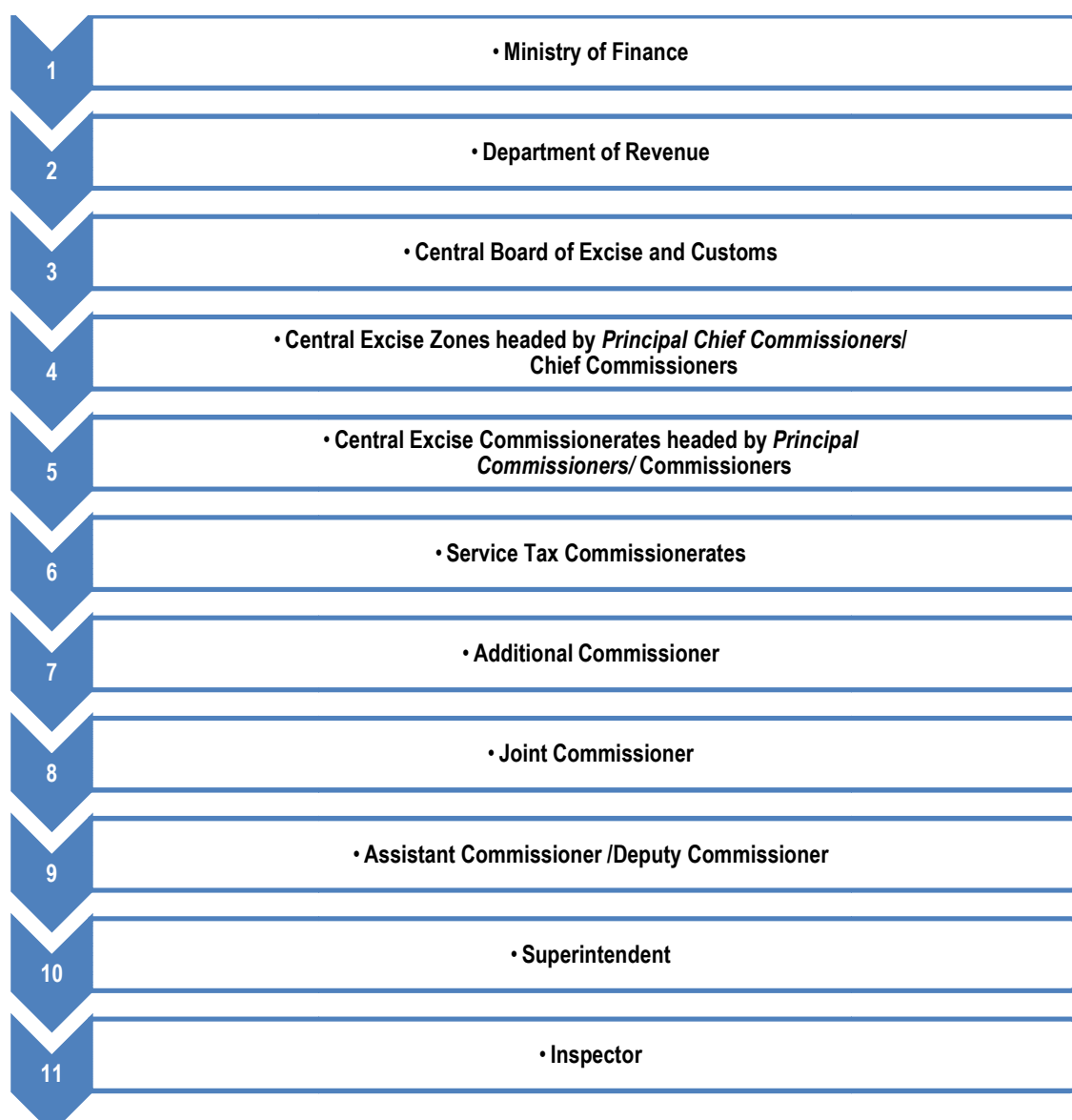


Chapter 1 - Basic Concepts

1.1 Introduction

Prior to 1944 there were 16 individual Acts which levied excise duty. Each such act dealt with one or same type of commodities. All these acts were consolidated and a consolidating Act was passed in 1944 called as Central Excises and Salt Act, 1944 which came into effect from 28th Feb 1944. In 1996 the Act was renamed as Central Excise Act, 1944. The Central Excise Act, 1944 (originally Central Excises and Salt Act, 1944) and Rules framed there under came into force on 28th February, 1944.

1.2 Administration of Central Excise tax law



1.3 Body of Central excise law

Central excise law covers the following:

- Central Excise Act, 1944;
- Central Excise Rules, 2002;
- CENVAT Credit Rules, 2004;
- Central Excise (Appeal) Rules, 2001;
- Central Excise (Advance Rulings) Rules, 2002;
- Central Excise (Settlement of Cases) Rules, 2007;
- Central Excise (Removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001;
- Central Excise valuation (Determination of price of Excisable Goods) Rules, 2000;
- Central Excise (Compounding of Offences) Rules, 2005;
- Central Excise (Determination of Retail Sale price of Excisable goods) Rules, 2008;
- Central Excise Tariff Act, 1985 CETA.

1.4 Important Definitions

Adjudicating Authority: It means any authority competent to pass any order or decision under this act, but does not include the Central Board of Excise or Customs constituted under Central Boards of Revenue Act, 1963. (Sec 2(a))

Broker or Commission agent: It means a person who in the ordinary course of business makes contracts for sale or purchase of excisable goods for others. (Sec 2(aaa))

Central Excise Officer: It means the Principal chief commissioner, Chief Commissioner, Principal commissioner, Commissioner, Joint Commissioner, Assistant Commissioner or Deputy Commissioner of Central Excise or any person (including an officer of the State Government) invested by the Central board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this act. (Sec 2(b))

Curing: It includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture. (Sec 2(c))

Excisable goods: It means goods specified in First Schedule and the Second Schedule to Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. (Sec 2(d))

Explanation to Sec 2(d): For the purpose of this clause goods includes 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.

Factory: It means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process. (Sec 2(e))

Fund: It means the Consumer Welfare Fund established under section 12C. (Sec 2(ee))

Manufacture: It includes any process:

- (i) Incidental or ancillary to the completion of a manufactured product; and
- (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the CETA, 1985 as amounting to manufacture; or
- (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer. (Sec 2(f))

Note: The word “**Manufacturer**” shall also be construed accordingly and shall also include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account. For example: A Contractor.

Prescribed: It means prescribed by rules made under this act. (Sec 2(g))

Sale and Purchase: With their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration. (Sec 2(h))

Wholesale dealer: It means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale. (Sec 2(K))

1.5 Various duties under Central excise act, 1944

Basic excise duty: It is levied u/s 3(1)(a) of the Central Excise Act and is levied at the rates specified in First Schedule to CETA (Central Excise Tariff Act, 1985).

Special excise duty: It is levied u/s 3(1)(b) of Central Excise Act on some commodities like Pan masala, Cars etc. These items are covered in Second Schedule to CETA. However, w.e.f 01.03.2006, all goods are exempted from special excise duty.

Additional excise duty: It is levied as surcharge on pan masala and on certain tobacco products except biris to finance the National Rural Health Mission. It is charged at the prescribed specific rates on cigarettes and at the rate of 10% on other products.

National Calamity Contingent Duty (NCCD): It is imposed vide sec 136 of finance act, 2001 on pan masala, chewing tobacco and cigarettes.

Duty on 100% EOU & FTZ: Generally, 100% Export Oriented Undertakings and units in Free Trade Zone export all their production. However, if they clear their final products in Domestic Tarriff Area (DTA) then excise duty has to be paid. The duty amount in this case is equal to the aggregate of customs duty that would have been payable on the like article as if it is been imported in India. Even though the rate of

customs duty is considered for payment of duty, actually the duty paid by them is central excise duty. The rate of customs duty is taken only as a measure.

Clean energy cess: It is levied @ Rs.200 per tonne w.e.f 01.07.2010.

1.6 Levy of excise duty by Constitution of India

1) Constitution of India gives authority to levy tax

Article 246 of Constitution of India gives the respective authority to Union and State governments for levying tax. Seventh schedule to the Constitution of India contains three lists setting out matters under which the state and Union have the authority to make laws.

List I [Union List]

This list enumerates the matters in respect of which the parliament has an exclusive rights to make laws.

List II [State List]

This list enumerates the matters in respect of which the legislature of any state has an exclusive rights to make laws.

List III [Concurrent List]

This enumerates the matters in respect of which both parliament and subject to list I legislature of any state, have powers to make laws.

2) Excise duty is levied under Entry 84 of Union List

Entry 84 of the union list of seventh schedule to the constitution of India empowers CG to levy excise duty on tobacco and other goods manufactured and produced in India except:

- i. Alcoholic liquors for human consumption
- ii. Opium, Indian hemp and other narcotic drugs and narcotics.

but including:

Medicinal and toilet preparations containing alcohol, or any substance stated before.

1.7 Charging section - [Sec 3(1)]

Charging section gives out event on occurrence of which excise duty can be levied. What is event on occurrence of which excise duty can be levied is understood from this section.

1) Duty to be levied at rates specified in first /second schedule to CETA, 1985

There shall be levied and collected in such manner as may be prescribed:

- a) A duty of excise on all excisable goods which are produced or manufactured in India as, and at the rates set forth in the First Schedule to Central Excise Tariff Act, 1985 (CETA, 1985);
- b) A special duty of excise on excisable goods specified in the Second Schedule to CETA, 1985 which are produced or manufactured in India as, and at the rates set forth in Second Schedule to Central Excise Tariff Act, 1985 (CETA, 1985).

2) Taxable event for levy of excise duty is manufacture or production

Excise duty is levied upon manufacture or production of goods in India. Therefore the taxable event for levy of excise duty is manufacture or production of goods.

Note:

1) No Excise duty shall be levied on excisable goods produced or manufactured in SEZ (Special Economic Zone).

1.8 Excisable goods produced or manufactured by a 100% EOU - [Proviso to Sec 3(1)]

100% EOU are the units located in India which manufacture or produce goods with an intention to wholly export it. However, at times they may also remove goods within India. This provision specifies the treatment in case such goods are cleared within India (i.e. Domestic Tariff Area).

1) Duty to be equivalent to the aggregate of customs duty

If a 100% EOU exports the excisable goods, then they are exempted from excise duty. However, if the excisable goods manufactured or produced by a 100% EOU are brought to any other place within India [i.e. Domestic Tariff Area (DTA)] then the duty in such a case shall be equal to the aggregate of customs duty that would have been payable on the like articles as if it were imported in India.

2) 50% of the Customs duty and 100% of Additional customs duty is exempted

However, 100% EOU has been granted an exemption from clearances in DTA (Domestic Tariff Area) from the following:

- (a) 50% of the Basic customs duty leviable thereon;
- (b) Additional duty of customs u/s 3(5) of the Customs Tariff Act, 1975. However, exemption from additional duty is available only if the goods so removed are not exempt from payment of sales tax/VAT in India.

[Notification No. 23/2003-C.E., dated 31/3/2013]

Conceptual Notes:

1) Even though the rate of customs duty is considered for payment of duty, actually the duty paid is central excise duty. The rate of customs duty is taken only as a measure.

2) In case there are different rates for the like goods then the higher of such rate should be considered for levying the duty.

1.9 Geographical coverage of act and applicability of act on Government

1) Act applies to whole of India including Jammu & Kashmir

The act applies to whole of "India". India includes territorial waters of India and continental shelf and exclusive zone of India. Originally act did not apply to the state of Jammu & Kashmir but now its application is also extended to the State of Jammu & Kashmir.

2) Law applies to government as it applies to others

Even if goods are produced or manufactured by Central government/State government, excise duty shall be levied.

1.10 Analysis of Charging section

If the analyse the section 3(1) of the act i.e. charging section then it can be safely construed that in order to levy excise duty following four conditions must be satisfied:

- (a) There must be a 'manufacture';
- (b) Manufacture must be in 'India';
- (c) Manufacture must result in 'Goods';
- (d) The resultant goods must be 'Excisable Goods'.

1.11 Meaning of the term 'Goods'

Excise duty is levied on excisable goods but before we understand the term 'Excisable goods', we must know what is 'Goods'.

1) To be called 'Goods' article must be capable of coming to market to be bought and sold

Central excise act has not defined the term 'Goods'. However, in the landmark judgment of **UOI v/s Delhi Cloth and General Mills (1977)**, The apex court held that in order to be called 'Goods' the article must be **capable of coming to the market to be bought and sold**. Therefore from the above decision two fundamental concepts i.e. to be called Excisable goods they must be:

- **Moveable;** and
- **Marketable.**

The term moveable and marketable both are not defined in Central excise act, 1944, Therefore the same has to be understood and interpreted based on various court judgments.

1.12 When can goods be called 'Moveable'

In order to levy excise duty, goods need to be moveable and marketable but when can goods be called moveable is not defined anywhere in this act. Therefore, term has got its meaning from various landmark judgments as provided below:

Article must be capable of coming to market to be bought and sold	Based on these two landmark judgments the following principal are drawn: To be called 'Goods' the article must be such that it is capable of being bought and sold in the market, they must be such that they can ordinarily come or can be brought to the market to be bought and sold. [UOI v/s Delhi Cloth Mills (DCM) (1977)] [South Bihar Sugar Mills v/s UOI (1978)]
What about Immovable goods?	No Excise duty can be levied on Immovable property.

1.13 When can goods be called 'Marketable'

In order to levy excise duty, goods need to be moveable and marketable but when can goods be called marketable is not defined anywhere in this act. Therefore, term has got its meaning from various landmark judgments as provided below:

	Article must be something which can ordinarily come to market to be bought or sold.
Actual sale is not necessary; Even transient items can be goods;	(a) To be marketable actual sale of goods is not necessary. (b) Usage in captive consumption is not determinative of whether the article is not capable of being sold in the market. (c) Even transient items can be goods provided they are capable of being marketed during the said short period of their life. [Union Carbide India Ltd (1986) v/s UOI] [C.C.EX v/s Ambalal Sarabhai Enterprises (1989)]
Mere mention in tariff is not enough	If goods are mentioned in tariff it means they are excisable goods but mere mention in tariff does not mean that they are also marketable. Marketability is an important condition for dutiability and the same has to be proved in each case based on the facts and circumstances. [Bhor Industries v/s C.C.EX (1989)]
Onus is on department	Onus is on the department to produce the evidence of marketability. [Cipla Ltd v/s UOI (1990)]

Number of purchasers is not the criteria	Marketability does not depend upon the number of purchasers; even one purchaser is sufficient to be called marketable nor is that the market must be confined to only territorial limits of India. [A.P. State Electricity Board v/s CCE (1994)]
Capable to be bought and sold for a consideration	Explanation to section 2(d) introduces the concept of deemed marketability by providing that "Goods includes 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." [Deemed Marketability – Explanation to Sec 2(d)]

1.14 Certain important concepts

We will now understand the meaning of the certain important terms and understand how they are different from each other in terms of chargeability and treatment. Terms such as Excisable goods, Non-excisable goods, Exempted goods, 'Nil' rated goods, Non-dutiable goods.

1) 'Excisable Goods' - Goods that are specified in First & Second schedule to CETA, 1985 and includes salt

'Excisable goods' means goods specified in First Schedule and the Second Schedule to Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

2) 'Non Excisable Goods' - Goods that are not listed in schedules to CETA or listed in schedules but with no rate of duty mentioned against them (not even 'Nil' rate)

Goods are considered to be 'Non-excisable goods' if:

- The goods in question are not listed in the Schedules to CETA; or
- The goods are listed in Schedules to CETA but no rate of duty is being mentioned against them i.e. not even 'Nil' rate is mentioned i.e. the rate column is 'BLANK'.

3) 'Nil Rated Goods' - They are also excisable goods

It was held by the apex court that 'Nil' rate of duty is also a rate of duty and goods with nil rate of duty cannot be treated as non-excisable goods. To be non-excisable the rate column in the tariff must be BLANK.

[C.C.EX v/s Vazir Sultan Tobacco Co. Ltd (1996)]

4) 'Non-dutiable Goods' - They are also excisable goods but are not liable to duty

'Non-dutiable goods' are though excisable goods but are not liable to duty on any of the following account:

- That the rate of duty is 'Nil' in the tariff schedule; or
- That exemption is granted by a notification on such goods; or
- On account of any other reason i.e. not manufactured, not moveable, not marketable etc.

5) 'Exempted Goods' - Goods that are excisable but not liable to duty due to exemption given

'Exempted goods' are the goods which are not liable to duty of excise as they are exempted through a general or specific notification issued in this regard.

6) 'Exempted goods' to be chargeable to duty, if excisable

It was held by the apex court that, Goods exempted at the time manufacture shall still be chargeable to duty if the following conditions satisfy:

- Goods were excisable at the time of manufacture; and
- Exemption was withdrawn prior to the date of removal. **[Wallace Flour Mills Co. Ltd]**

Conceptual Notes:

From the above it can be understood that mere exemption granted by a notification does not mean that the goods become non-excisable because exciseability depends on listing of goods in schedules to CETA and exemption depends on the notifications issued by the department. It is important to note that the excise law have different treatment for non-excisable goods and exempted goods and both cannot be read and understood in the same context as the treatment for non-excisable goods and exempted goods differ as illustrated in the table below:

At the time of manufacture, goods were	At the time of removal	Treatment
Excisable but Exempted by notification	Exemption was withdrawn	Chargeable to duty as they were excisable at the time of manufacture.
Excisable and not Exempted by notification	Goods were exempted by notification	Not chargeable to duty as they were exempted at the time of removal.
Excisable	Goods were not Excisable	Chargeable to duty as they were excisable at the time of manufacture.
Not Excisable	Goods were excisable	Not chargeable to duty as they were not excisable at the time of manufacture.
'Nil' rate of duty	Goods liable @ 10% rate of duty	They are listed with 'Nil' rate in CETA and are considered as excisable goods. It should be charged @ 10% as rate prevalent at the time of removal of goods must be taken into consideration.
Goods were not liable to 'special levy'	Goods were made liable to 'special levy' by way of finance act.	Special levy shall not be charged as it was not applicable at the time of manufacture.

Three Fundamental Principles arise as follows:

Taxability of Goods – At the time of manufacture/production of goods;

Collectability of Duty – At the time of removal of goods;

Rate of Duty – Rate prevalent at the time of removal of goods must be taken.

1.15 Concept of 'Manufacture'

As per charging section, Excise duty shall be levied when the goods are manufactured or produced. Therefore, it becomes important to understand when manufacture is said to have taken place. If there is no manufacture there cannot be a levy of excise duty. Although the term 'manufacture' is defined in the act, still a reference to court judgments is required in order to understand and interpret the same more clearly. 'Manufacture' is defined u/s Sec 2(f) of the act as follows:

'Manufacture' includes any process:

- i. Incidental or ancillary to the completion of a manufactured product; or
- ii. which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the CETA, 1985 as amounting to manufacture; or **(Deemed manufacture)**
- iii. which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer. **(Deemed manufacture)**

Note: Point (ii) & (iii) in the aforesaid definition means “**Deemed manufacture**”.

Relevant judgments:

A new and different article must emerge having a distinctive name and character or use	In a landmark judgment issued by apex court manufacture has been described as follows: “Manufacture implies a change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use.” [UOI v/s Delhi Cloth Mills Co. Ltd. (1977)]
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1.16 Concept of ‘Manufacturer’

The term “Manufacturer” shall be construed accordingly and shall also include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account. For example: a Contractor, a job worker can also be termed as manufacturer.

1.17 Special cases

As the term ‘Manufacture’ has got its true meaning from various court judgments. It has always been a matter of dispute as to certain activities whether they can be termed manufacture or not. Provided below are certain special cases in this regard.

1.17.1 Distinction between ‘Manufacturing’ & ‘Processing’

If the duty is to be levied on manufacture, then whether processing can also be termed as manufacture. We shall now understand what makes processing different from manufacture.

1) Manufacture involves ‘many’ processes, manufacture brings into existence a new and distinct commodity; Process may not bring into existence a new and distinct commodity

Manufacture involves series of processes but Process may not amount to manufacture i.e. if the identity of the commodity remains the same then it is termed as processed and not as manufactured. It is only when a process or series of processes has taken the input material into a new and distinct article commercially, than the manufacture of goods is said to have taken place.

At some point manufacturing and processing shall merge and that is called as the process which is incidental or ancillary to the completion of the manufactured product.

1.17.2 Whether ‘Assembly’ amounts to manufacture

1) ‘Assembly’ amounts to manufacture if commercially new commodity with different name and character or use emerges

Assembly is a process of putting together a number of items or parts of an item to make a product or item. Not all cases of assembly amounts to manufacture. After assembling of various parts if a new commercial commodity with different name, character and use emerges then the same amounts to manufacture.

1.17.3 Whether ‘Packing’ amounts to manufacture

1) ‘Packing’ amounts to manufacture as it is an activity incidental or ancillary to manufacture

As per sec 2(f)(i) “**Manufacture includes activities incidental or ancillary to the completion of the manufactured product.**” Therefore, packing comes under this ambit of the said definition and is considered as an activity incidental to the completion of the manufactured product. Normally, the fully manufactured goods cannot be sold without being packed hence the activity of packing amounts to manufacture.

2) ‘Repacking’ does not amount to manufacture

Repacking of already packed goods does not amount to manufacture.

3) ‘Packing’ or ‘repacking’ amounts to deemed manufacture in certain cases

As per sec 2(f)(ii) & 2(f)(iii) packing or repacking amounts to deemed manufacture in following cases:

- a) In relation to certain products as specified in the Section or Chapter Notes of the First Schedule to CETA, 1985; or
- b) Packing or repacking in a unit container, in relation to the goods specified in the Third Schedule.

1.17.4 Whether ‘Labeling’ and ‘Branding’ amounts to manufacture

1) ‘Labeling’ and ‘branding’ does not amount to manufacture as a new and distinct product does not emerge

‘Labeling’ and ‘branding’ of the products does not amount to manufacture as a new and distinct product does not emerge merely by labeling or branding and a fully manufactured product exists even before labeling and branding.

2) ‘labeling’ and ‘branding’ in relation to goods specified in third schedule to CETA amounts to Deemed manufacture

However as per section 2(f)(iii), where the process of labeling or re-labeling of containers is in relation to goods specified in Third Schedule to CETA then such process of labeling or re-labeling shall amount to deemed manufacture.

1.17.5 Relevance of change in tariff heading/sub-heading

The question here is that can a change in tariff heading itself be a parameter to determine whether a product is manufactured or not.

1) Change in tariff heading does not determine manufacturability

Merely because the output product and input product falls under the different tariff heading/sub-heading under the CETA, 1985 it cannot be assumed that the manufacture of the product has taken place. In other words, merely because the output product and input product falls under the same tariff heading/sub-heading under the CETA, 1985 it cannot be assumed that the manufacture of the product has not taken place.

1.17.6 Dutiability of intermediate products and captive consumption

1) Captive consumption means utilization of goods for further processing or self consumption

Captive consumption means utilization of intermediate goods produced or manufactured in the same factory for further processing. Generally, in large factories with several departments this is quite common that the output of one department becomes an input of another department to be self consumed in making of a final product.

2) Intermediate goods liable to duty, at each intermediate stage if qualify to be goods

Intermediate product for self consumption shall be liable to excise duty at each stage if they qualify to be 'Goods' (i.e. moveable & marketable) at each such intermediate stage and therefore at every stage of manufacture excise duty is leviable. However, CENVAT credit can be claimed

3) Intermediate product is exempted, if final product is dutiable

Currently, several exemption notifications are issued by the department whereby levy of duty at the intermediate stage is exempted provided the final product is chargeable to duty. However, if the final product is exempted or chargeable to 'Nil' rate of duty then intermediate product shall not be exempted and duty shall be levied at each intermediate stage.

1.17.7 Dutiability of Site related activities and immovable property

As it is learnt that excise duty cannot be levied on immovable property, therefore it is of paramount importance to understand when an immovable property is said to have arise.

1) No levy of duty if output is an immovable property

Generally, various parts, components are removed from the factory and are fabricated, erected etc at the project site. Therefore, if an immovable property comes into existence after such construction, erection, fabrication etc. then duty shall not be levied on such immovable structure. However, if the final product at the project site is an movable property then duty shall be chargeable.

2) How to identify that the goods are Immoveable property

Based on various courts judgments and departmental clarifications issued in this regard following broad principles can help in understanding and ascertain whether the property can be considered as immovable property:

a) Attached by foundation to earth and cannot be easily dismantled without substantial damage

Where various items that are assembled or erected at site are attached by foundation to earth in such a manner that the same cannot be again easily dismantled without substantial damage to its components and cannot be again reassembled then that item would be considered as Immoveable and will therefore not be excisable. The intention of the party is also a factor that must be taken into consideration to ascertain whether the embedment of machinery in the earth was to be temporary or permanent or was it done only with an intention to avoid duty.

b) Compulsorily dismantling is required to transfer and not just for convenience of transport

If any goods installed at the site is capable of being sold or shifted to other location in its as is condition and without dismantling the same then it cannot be termed as Immoveable property. In other words, if the goods installed at the site has to be dismantled in order to sell it or to transfer it to other location then it qualifies to be an immovable goods. However, If goods could be sold or shifted to other location in its as is condition without dismantling but the same is dismantled only for the transport convenience or ease of shifting then it cannot be argued that the goods are Immoveable property.

Note: Excise duty shall however be levied on all the individual components, parts, items that were removed from the factory and taken to site for manufacturing of an immovable property at the site.

Examples:

- a) **Turnkey projects** like steel plants, cement plants, power plants etc. involving supply of large number of components, machinery, equipments, pipes and tubes etc. for their

assembly/installation/erection/etc at site will not be considered as excisable goods for imposition of central excise duty.

- b) **Huge tanks made of metal for storage of petroleum products in oil refineries or installations** though not embedded in earth but are erected at site, stage by stage, and after completion they cannot be physically moved. On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are, therefore, not moveable and cannot be considered as excisable goods.
- c) **Refrigeration/Air conditioning plants** are basically systems comprising compressors, ducting, pipings, insulators, and sometimes cooling towers etc. They are in the nature of systems and not machines as the whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods.
- d) **Lifts & escalators** which are installed in buildings and permanently fitted into a civil structure cannot be considered to be excisable goods.

1.17.8 Dutiability of Waste & Scrap

1) Waste & Scrap are chargeable to duty if arising out of a manufacturing process and if they are moveable, marketable and excisable

Waste & Scrap are the byproducts or intermediate products that arose out of the final products in the manufacturing process. It shall be chargeable to duty if they are moveable, marketable and listed in tariff. Further as, excise duty is leviable on **manufacture** and therefore waste & scrap is chargeable to duty only if they arise out of the **manufacturing process**. In other words if waste & scrap is generated not due to manufacturing process then they shall not be chargeable to duty.

Chapter 2 - Classification

2.1 Introduction

The classification of goods consists of determining the headings or sub-headings of the Central Excise Tariff under which the said goods would be covered.

Need for classification:

- (i) The actual amount of excise duty payable on excisable goods is, inter alia, dependent upon the rate of duty. The rate of duty is determinable on the basis of classification of goods.
- (ii) The classification of goods is also required to be decided for the purposes of determining eligibility to exemptions, most of which are with reference to the Tariff headings or sub headings.

2.2 Harmonized System of Nomenclature (HSN)

1) It is an internationally accepted product coding system formulated under GATT

Central Excise Tariff Act, 1985 (CETA) is based on HSN. HSN is the internationally accepted product coding system formulated under the auspices of the General Agreement on Tariff & Trade (GATT). CETA, 1985 is modeled in accordance with international practices and therefore the classification of a product under this code would be same across the countries. It is done to facilitate common understanding of products across countries.

2.2.1 Explanatory notes to HSN

1) These are official notes to clarify scope & extent of each and every heading of HSN

Explanatory notes to HSN are the official notes issued by Customs Co-operation Council, Brussels. They explain and clarify the scope and extent of each and every heading of HSN.

2) It is only for persuasive use and not legally binding

They do not have the legal backing, these notes are only of persuasive value and can be used as an aid to classification when there is an ambiguity as to the scope of the entry.

3) It must be used only in case of ambiguity about the scope of entry

When there is no ambiguity about the scope of the entry, the classification has to be done as per the tariff entry itself and not as per these explanatory notes. In other words, Explanatory notes to HSN must be used only when there is any ambiguity about the scope of entry.

Examples:

Product: Hot air generators

First Heading: 7322

“Radiators for central heating, not electrically, heated, and parts thereof, of iron or steel; air heaters and hot air distributors which can also distribute fresh or conditioned air, not electrically heated, incorporating a motor-driven fan or blower, and parts thereof, of iron or steel.”

Second Heading: 8419

“Machinery, plant or laboratory equipment whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than

machinery or plant of a kind used for domestic purposes, instantaneous or storage water heaters, non-electric.”

Classification of hot air generators: Heading no. 7322 expressly covers air heaters. Since the said tariff entry is clear about the scope, the hot air generators are classifiable under the heading 7322 and there is no need to refer to Explanatory notes to HSN.

2.3 Schedules to CETA

There are three schedules to Central Excise Tariff act, 1985 i.e. First Schedule, Second Schedule and Third Schedule as specified below:

First Schedule: It specifies the various goods/items on which Basic excise duty is leviable.

Second Schedule: It specifies the various goods/items on which Special excise duty is leviable. However, w.e.f 01/03/2006, all goods are exempted from Special excise duty.

Third Schedule: It specifies certain goods listed by the department in relation to which packing, repacking, labeling, re-labeling, MRP declaration/alteration amounts to deemed manufacture u/s 2(f)(iii) and duty is calculated based on ‘Maximum Retail Price’.

Analysis

In reality such activity of packing, repacking, labeling etc may or may not amount necessarily amount to manufacture. However, authorities by inserting a deeming fiction in law assumes such activity to be deemed as manufacture and extends the levy of duty based on MRP valuation on such goods specified in third schedule to CETA.

Contents of First Schedule:

It consists of 98 Chapters & 20 Sections. This schedule provides the rate of Basic excise duty leviable on various products, it contains the following:

Sections: It has group of chapters representing the very broad classification of goods. Each section is divided into various chapters and sub-chapters. In total there are 20 sections in First schedule of CETA, 1985.

Chapters: Each chapter contains goods of a particular class. The chapters are arranged in such a manner that all goods of a similar kind beginning with the raw material and ending with the finished products come in a sequential order. It is also designed to group all goods relating to the same industry and all goods obtained from the same raw material under one chapter in progressive manner. (It is two digits number.). Currently, there are 98 chapters in First schedule of CETA, 1985.

Chapter Notes: These notes are mentioned at the beginning of each chapter and they have been given legal backing. Therefore, if there is any ambiguity in classifying the goods among various chapters, then chapter notes can be referred to get more clarity and appropriately classifying the goods under the correct chapter.

Headings: Each chapter and sub-chapter is further divided into various heading in such manner that different types of goods belonging to the same class of product are covered under one heading. (It is a four digits number wherein first two digits pertains to the chapter it is classified under).

Sub-Headings: Each heading is further classified into various sub-heading. (It has six digits number wherein first four digits pertains to the heading it is classified under).

Tariff items: It is the specific item under which the goods are classified. Therefore, excisable goods are classified and excise duty is levied by using eight digit classification system which is called as 'Tariff item'. Different rates of excise duty can be provided for different tariff item.

The 'Tariff item' under eight digit system would be interpreted as follows:

First two digits: refers to chapter number of the tariff

Next two digits: refers to heading of the goods in that chapter

Next two digits: refers to sub-heading of the goods in that chapter

Last two digits: refers to sub - sub - heading of the goods in that chapter.

For Example: Digital Cameras are classified under Tariff item 8525 80 10, the break up of the same is as illustrated below:

Chapter 85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
Heading 8525	Transmission apparatus for Radio Broadcasting or Television, whether or not incorporation reception apparatus or sound recording or reproducing apparatus; television camera, Digital camera and video camera recorders.
Sub-heading 8525 80	Television cameras, Digital cameras and video camera recorders
Tariff item 8525 80 20	Digital Camera

2.4 Rules of interpretation & General explanatory notes

In order to interpret the First Schedule to CETA, 1985, department has laid down the following:

- (a) Six Rules of interpretation; and
- (b) Two General explanatory notes.

2.4.1 General rule for classification - [Rule 1]

Rule 1 is the general rule and is laid down in order to provide ease of classification, Rule 1 is as under:

1) 'Titles' does not have legal force - to be used only for better interpretation

The Titles of sections, chapters and sub-chapters does not have any legal force and can only have persuasive use for better interpretation.

2) 'Headings' have legal force only when read with section & chapter notes

Terms of headings when read with relative section & chapter notes have a legal force and is relevant for the purpose of classification.

3) 'Rules' not to be used when classification is otherwise possible

One must not resort to rules of interpretation when classification is possible on the basis of description in heading, sub-heading, chapter notes and section notes.

4) Notes of one chapter or section cannot be used for other chapter or section

Notes of one chapter or section cannot be applied for interpreting the entries in other chapters or sections.

2.4.2 Classification of incomplete/unfinished articles - [Rule 2(a)]**1) Finished/complete article also include same article in unfinished/incomplete form**

If any particular heading refers to finished/complete article, then the unfinished/ incomplete form of that article must also be classified under the same heading provided the unfinished/incomplete goods has the essential character of the finished goods.

2) Finished/complete article also include same article in unassembled/dis-assembled form

If any particular heading refers to finished/complete article, then the unassembled/dis-assembled form of that article must also be classified under the same heading provided the unassembled/dis-assembled goods has the essential character of the finished goods.

Examples:

- (i) Railway coaches removed without seats would still be classified as railway coaches.
- (ii) A car without seats would still be classified as car.

3) Only minor adjustments pending, can be construed as having essential character

It was held that goods requiring only minor adjustments would be construed as having essential character. In other words, those requiring major processes like turning, grinding, broaching, cutting etc cannot be construed as minor adjustments thereby not having the essential character of the finished product.

2.4.3 Classification of mixtures/combinations of a material/substance with other material/substances - [Rule 2(b)]**1) Material/substance includes mixtures or combinations of that material/substance**

Any reference to a material or substance would also refer to a mixtures or combinations of that material or substance. In other words, classification under any material or substance also includes mixture or combination of that material or substance.

2) Partial content of some other material does not affect classification

Any reference to a goods of a given material or substance would also refer to any other goods consisting wholly or partly of such other material or substance. In other words, classification under material/substance also includes other goods consisting wholly or partly of such material/substance.

Examples:

- (i) The term coffee will also include coffee mixed with chicory.
- (ii) Natural rubber will also cover a mixture of a natural and a synthetic rubber.

2.4.4 Classification if goods are classifiable under two or more headings - [Rule 3]

If after applying rule 2(b), classification is possible under two or more headings then rule 3 must be applied in the following sequential order:

1) Specific heading prevails over general heading - Rule 3(a)

The heading that provides a more specific description should be preferred over the heading that provides a general description.

Relevant Judgment:

Electric shaving machine was classifiable under following two headings:-

Heading No. 8510: Shavers and hair clippers with self contained electric motors; and

Heading No. 8509: Electro-mechanical domestic appliances with self-contained electric motor.

It was held that the said product was classifiable under heading No. 8510 as heading No. 8510 is more specific as compared to heading No. 8509. **[Nagaraju Bros v. State of Andhra Pradesh 1994 (S.C.)]**

2) Essential character principle - Rule 3(b)

If sub-rule 3(a) cannot solve the ambiguity then sub-rule 3(b) shall be applied. This sub-rule provides that composite goods should be classified under that material or substance that gives it its essential character.

Example:

A pencil with an eraser at the back shall be classified as pencil, as the essential character in it is a pencil whereby the attachment of eraser is only for the convenience of the user.

3) Latter the better maxim - Rule 3(c)

If both sub-rule 3(a) & sub-rule 3(b) cannot solve the ambiguity then sub-rule 3(c) shall be applied. This sub-rule provides that composite goods shall be classified on the basis of the heading that occurs last in numerical order.

2.4.5 Akin Rule - [Rule 4]

1) Classification under goods most 'akin'

This rule provides that if goods cannot be classified according to the above principles then it shall be classified under the heading appropriate to the goods to which they are most akin.

Example:

Product: Plastic films used to filter or remove the glare of the sun light, pasted on car glass windows, window panes etc.

Classification: These goods do not find a specific entry in the tariff schedule. However, heading 3925 30 00 covers Builder's wares of plastic not elsewhere specified – shutters, blinds (including Venetian blinds). Even though the product in question is not a builder's ware, they are most akin to plastic blinds and hence it can be classified under 3925 30 00 heading.

2.4.6 Classification of cases/containers used for packing of goods - [Rule 5]

1) Cases/container to be classified as the article inside such cases/container

Cases/containers which are specially designed or fitted to contain a specific article in it for a long term and presented or given with such article then such cases shall be classified under the classification that is attracted to the article inside the case/container. However, this provision does not apply when such packing material or packing containers are clearly suitable for repetitive use.

Examples:

- (i) Camera case should be classified as camera.
- (ii) Musical instrument case should be classified as musical instrument.
- (iii) Gas cylinders are meant for repetitive use and therefore cannot be classifiable along with gas.

2.4.7 Only sub-headings at the same level are comparable - [Rule 6]

1) Two sub-headings of same heading only comparable

For legal purposes, the classification of the goods in the sub-heading shall not be determined based on the comparison of that sub-heading with another sub-heading of the different heading. In other words, for the purpose of classification comparison of a sub-heading with another sub-heading of two different heading shall not be done.

2.4.8 Relevance of one dash ["-"], two dash ["--"], and three dash ["---"] - [Explanatory note 1]

Where description of an article or group of articles is preceded by:-	The said article or group of articles shall be taken to be a sub-classification of:-
One dash ["-"]	The article or group of articles covered by the said heading.
Two dash ["- -"]	The article or group of articles which has one dash ["-"].
Three dash ["- - -"]	The article or group of articles which has one dash ["-"] or two dash ["- -"].

2.4.9 Meaning of abbreviation "%" in relation to rate of duty - [Explanatory note 2]

The abbreviation "%" in the column 4 of the first schedule indicates that the duty on the goods shall be charged on the value of the goods on the basis of the percentage specified.

2.5 Trade parlance test**1) Popular/commercial meaning must be used if product not defined in CETA**

According to trade parlance test, if a product is not defined in the schedules and section notes and chapter notes of the tariff, then, it should be classified according to its popular meaning or meaning attached to it by those dealing with it i.e. in its commercial sense. However, if the tariff headings itself uses highly scientific or technical terms then goods should be classified in scientific or technical sense.

Notes:

- 1) While interpretative rules and explanatory notes are mandatory, whereas trade parlance test is recommendatory.
- 2) Burden to prove classification is on department and once it is discharged the onus falls on assessee.

2.6 Power of Central Government to amend the first and second schedule to CETA, 1985 - [Sec 5 of CETA, 1985]**1) Amendments to CETA can be made based on public interest but rates cannot be changed**

Section 5 of CETA, 1985 empowers CG to amend the First schedule and Second schedule of the tariff entry based on the public interest by a notification in the official gazette. But, CG by taking the recourse of this section cannot alter or affect in any manner the rates specified in the first schedule and second schedule. To alter/affect rates specified in the schedule, CG has to take the recourse of section 3 of Central Excise Tariff Act, 1985.

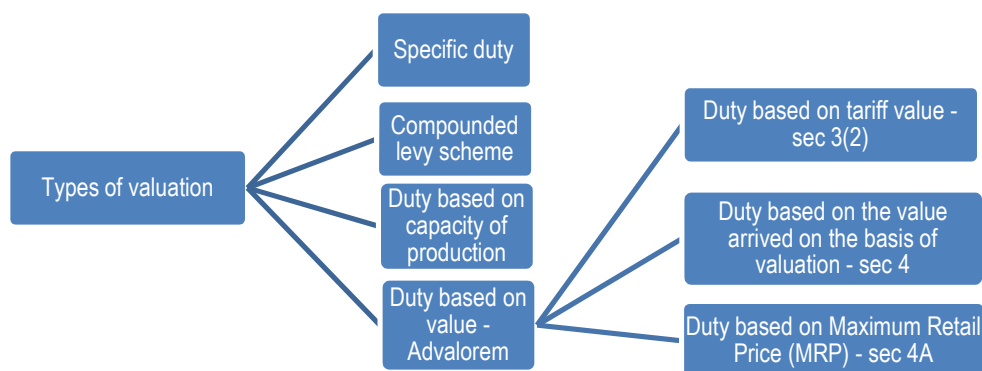
Chapter 3 - Valuation

3.1 Introduction

Valuation is important to understand as duty under central excise is payable based on different criterion. As a first step, an assessee has to establish whether the goods manufactured by him are excisable. After the excitability is decided, the goods have to be correctly classified. The next step is to value the goods so as to compute the duty payable on the excisable goods.

3.2 Basis of computing duty

Value can be ascertained and duty can be computed by any of the following ways of valuation:



3.3 Specific Duty

1) Duty payable on length, weight, volume etc.

In some case of goods, duty is payable on the basis of certain unit like length, weight, volume, etc. However, this type of duty needs frequent revision as the duty to be collected does not keep pace with increase in price of goods i.e. inflation. Therefore, more & more tariff entries are designed based on ad valorem duty structure.

Example:

Duty on cigarettes is payable on the basis of length of a cigarette.

3.4 Compounded levy scheme - [Rule 15 of Central Excise rules, 2002]

Generally, duty must be payable on the value at which manufactured goods are removed. However, in case of certain goods central government may require payment of duty on some other factor. For various reasons including safeguarding the interest of revenue or in public interest. This rule empowers Central Government to specify certain goods on which duty payable has to be computed in some other manner.

1) Duty payable on specified factor relevant to the production

Central government may by notification in an official gazette specify in case of some goods where assessee have the option to pay the duty of excise on the basis of specified factors relevant to the production at specified rates. The prescribed duty has to be paid by the manufacturer for the specified period.

Example:

Duty may be payable on size of equipment employed, number & types of machines used for manufacture etc.

2) CG to specify procedures in this regard

CG is empowered in this regard to specify the procedures for making an application, payment of duty, abatement etc.

3) Ease of formalities

It frees the manufacturer from day-to-day central excise formalities and maintenance of detailed accounts.

Example:

The Central Government has notified stainless steel pattas/patties and aluminium circles for the purpose of compounded levy scheme.

3.5 Duty based on capacity of production in respect of notified goods - [Sec 3A]

In respect of certain goods Central Government may require duty to be paid based on capacity of production. This section empowers Central Government to demand payment of duty on the basis of capacity of production in order to safeguard the interest of revenue.

1) Duty payable on the basis of 'Capacity of Production'

Central government may in order to safeguard the interest of revenue notify certain goods on which duty shall be payable on the basis of 'capacity of production'. Central Government passes such a notification due to following reasons:

- (a) Having regard to the nature of process of manufacture or production of certain excisable goods; or
- (b) Extent of evasion of duty; or
- (c) Such other factor as may be relevant.

Example:

Following mentioned goods manufactured with the aid of packing machine and packed in pouches have been notified for the purpose of section 3A:

- ✓ Pan masala containing tobacco commonly known as gutkha,
- ✓ Unmanufactured tobacco bearing a brand name,
- ✓ Chewing tobacco,
- ✓ Jarda scented tobacco.

2) CG to make rules for computing annual capacity & annual production

Where the goods are so notified, CG may, by rules:

- Provide the manner for determination of annual capacity of production of the factory and then such annual capacity shall be deemed to be the annual production of such goods by such factory; or
- Specify the factor on the basis of which the annual production shall be calculated;
- Aforesaid computations must be done by an officer not below the rank of Assistant Commissioner.

3) Proportionate calculation if factory operated only for part of the year

If the factory is in operation only during a part of the year, then annual production thereof shall be calculated proportionately for the part of the year it was in operation.

4) Duty to be exempted if goods not produced for any continuous period of 15 days or more

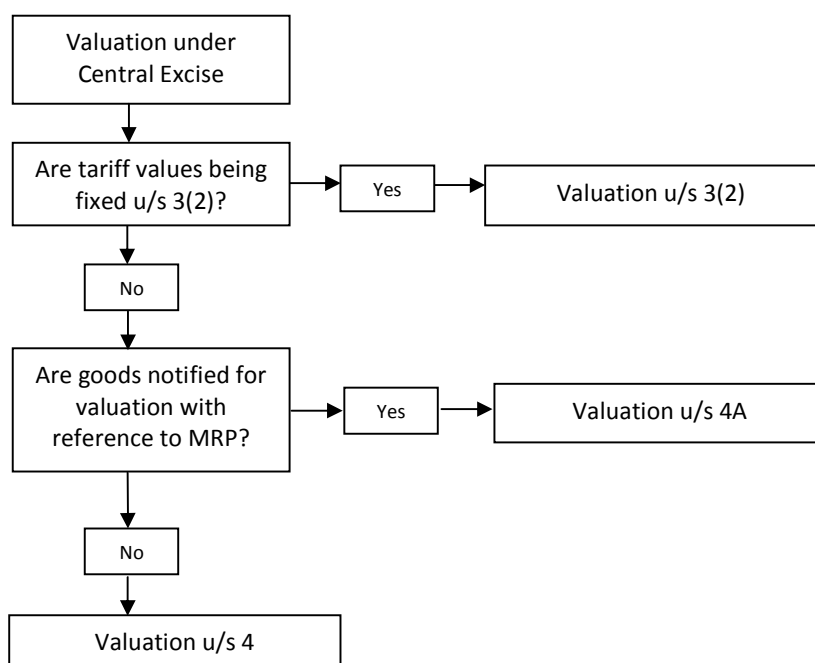
If the factory does not produce the notified goods during any continuous period of 15 days or more then duty calculated in respect of such period shall be abated/exempted, if the manufacturer fulfills such conditions as may be prescribed.

5) Annual production to be re-determined if the 'factor relevant to the production' is altered

If the factor relevant to the production is altered/modified at anytime during the year, then annual production thereof shall be re-determined having regard to such alteration/modification.

6) Non-applicability in case goods produced/manufactured by a 100% EOU and brought to any other place in India

The provisions of this section shall not apply in case of goods produced or manufactured, by a 100% EOU and brought to any other place in India.

3.6 Duty Payable Advalorem**Chart showing the scheme of Ad valorem valuation under Central Excise****3.6.1 Duty based on Tariff value - [Sec 3(2)]**

In respect of certain goods, Central government itself fixes the value of goods at which duty shall be paid. Such value is called as tariff value. Once the tariff value is fixed for certain goods by central government then manufacturer needs to pay duty at such value only. It need not pay duty on transaction value.

1) Tariff value to be fixed by CG

The CG in case of certain goods fix the value of goods on duty shall be charged. In such a case valuation becomes easy since the value is already fixed by the CG. CG also have the power to alter the values once fixed.

2) Different tariff values may be fixed for different class or description of same excisable goods or for different producers/manufacturers/buyers

CG may fix different tariff values for different classes or description of same excisable goods. It may also fix different tariff values for same class or description of the goods but produced or manufactured by different class of producers or manufacturers or sold to different classes of buyers.

Example:

Central Government has fixed tariff value for jewellery (other than silver jewellery) under heading 7113 and branded readymade garments under Chapter 61 and 62.

3.6.2 Duty on the basis of value arrived on valuation - [Sec 4]

Refer sec 4 in detail given below.

3.6.3 Duty on the basis of Maximum Retail Price (MRP) – [Sec 4A]

1) Goods specified in third schedule to CETA, to be valued at MRP

In case where the retail price and the wholesale price of goods are at wide variance and the government wants to raise revenues knowing that the manufacturer has shifted much of the overheads away from the manufacturing location. Then CG may notify certain goods in Third Schedule to CETA, 1985 on which duty shall be payable on the retail price of such goods i.e. MRP. [Details given in the later part of this chapter]

3.6.4 Valuation - [Sec 4]

With the intention of making the valuation mechanism simple, from 1st July 2000 valuation mechanism based on “normal price” was replaced by a user friendly and commercially acceptable new mechanism based on “transaction value”. Transaction value means the transaction at which goods are removed.

1) Value shall be the ‘Transaction value’

Price for the purpose of computation shall be the ‘Transaction value’ if the following conditions are satisfied:

- The excisable goods must be sold by the assessee;
- The excisable goods must be sold by the assessee for delivery at the **time and place of removal**;
- The assessee and the buyer of goods must **not be related**;
- Price must be the **sole consideration for sale**.

2) Value to be computed as per rules, if above conditions doesn’t satisfy

If any of the four conditions as laid down aforesaid is not satisfied then value shall be determined in accordance with the Central Excise (Determination of price of excisable goods) valuation rules, 2000.

3) Value = [(Actual Price) + (Money value of additional consideration) - (Taxes)] - [Explanation to Sec 4]

Value must be price actually paid to the assessee for the goods sold and money value of any additional consideration, flowing directly or indirectly to the assessee from the buyer but excluding sales tax and other taxes.

3.7 Important Definitions

Before we learn valuation rules, let us understand the meaning of certain important terms as arising out of section 4 pertaining to valuation.

“Assessee”	“Assessee” means the person who is liable to pay the duty of excise under this act and includes his agent. [Sec 4(3)(a)]
“Related Person”	The assessee and the buyer shall be deemed to be related if (i) They are inter-connected undertakings; or

	(ii) They are relatives as per sec 2 of Companies act, 1956; or (iii) Amongst them the buyer is a relative and a distributor of the assessee or a sub-distributor of such distributor; or (iv) They are so associated that they have interest, directly or indirectly, in the business of each other (<i>mutuality of business interest – Concept discussed below</i>). [Sec 4(3)(b)]
Distributor means distributor who is also a relative	The apex court held that the term 'relative and a distributor of an assessee' does not refer to any distributor but its limited only to a distributor who is also a relative of the assessee, within the meaning of the companies act, 1956. [UOI v/s Bombay Tyre International Ltd. (1983)]
	Price charged by the manufacturer to the distributor can be taken as 'transaction value' if the dealings between them are on principal-to-principal basis. [UOI v/s Mahindra & Mahindra Ltd. (1989)]
"Place of Removal"	"Place of Removal" means (i) A Factory or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; or (ii) A Warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed; or (iii) A Depot, premises of a consignment or any other place or premises from where the excisable goods are sold after their clearance from the factory. [Sec 4(3)(c)]
"Time of Removal"	"Time of Removal" means In respect of excisable goods removed from the place of removal referred to in sub-clause (iii) of Sec 4(3)(c) , then time of removal shall be deemed to be the time at which such goods are cleared from the factory. [Sec 4(3)(cc)]
"Transaction value"	"Transaction value" means 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 sale or any other time, including, any amount charged for, or to make provision for, advertising or publicity, marketing & 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. [Sec 4(3)(d)]

3.8 Concept of Mutuality of business interest

Both the parties must have interest in the business of	The apex court held that in order to attract the definition of sec 4(3)(b) , for levy of excise duty, the assessee and the person
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each other whether direct or indirect, the quality and degree of interest does not matter	alleged to be a related person must have interest, direct or indirect, in the business of each other. Each of them must have direct or indirect interest in the business of the other. The quality and degree of interest which each has in the business of the other may be different, the interest of the one in the business of the other may be direct, while the interest of the latter in the business of the former may be indirect but that does not matter so long each has got some interest, direct or indirect, in the business of each other. [UOI v/s Atic Industries Ltd. (1984)]
Entire sale to a single agent does not by itself prove mutuality of business interest	The apex court held that Sales of entire quantity of excisable products through a single agency, which also took advertising of such products would not, per se make the manufacturer and the agency as the related persons since the mutuality of business interest was not proved. [Pepsi foods (p) Ltd v/s CCE (1993)]
Common sharing of assets does not by itself prove mutuality of business interest	The mere fact of there being a common registered office and common usage of telephone and godown was not sufficient to prove the common ownership between two units so as to make them related persons. [Cheryl Laboratories v/s CCE (1994)]
Mere holding of shares does not prove mutuality of business interest	Mere holding of shares of the subsidiary company could not ipso facto mean that there was mutuality, unless reciprocity of interest was also involved i.e. subsidiary also having interest in the holding company. [Godrej Industries Ltd v/s CCE (2004)]

3.9 Inclusions & Exclusions from Transaction value

Mentioned below are certain inclusions and exclusions in the transaction value based on definition u/s 4(3)(d), various court judgment, departmental circulars and notifications.

Item or Cost	Whether includible
Advertising & Publicity charges	Yes , as per the definition of the Transaction value u/s 4(3)(d).
Warranty	Yes , as per the definition of the Transaction value u/s 4(3)(d). However, it should be included only if the same is paid by the buyer to the seller.
Marketing & Selling	Yes , as per the definition of the Transaction value u/s 4(3)(d).
Storage charges	Yes , as per the definition of the Transaction value u/s 4(3)(d).
Outward handling charges	Yes , as per the definition of the Transaction value u/s 4(3)(d). However, it is important to note that handling charges incurred only upto the 'place of removal' must be included (i.e. upto factory gate, depot, warehouse). Outward handling charges incurred after 'place of removal' must be excluded.
Servicing	Yes , as per the definition of the Transaction value u/s 4(3)(d).
Commission	Yes , as per the definition of the Transaction value u/s 4(3)(d).
Excise Duty	No , as per the definition of the Transaction value u/s 4(3)(d).
Sales Tax & Other Taxes	No , as per the definition of the Transaction value u/s 4(3)(d).
Trade Discount or Cash Discount	No , CBEC Circular No. 354/81/2000, dated 30-6-2000 clarifies that discount must be excluded i.e. it must be reduced from the price as the duty must be calculated on Net price after allowing discount.

Erection, Installation and Commissioning	No , The erection, installation and commissioning charges should not be included in the assessable value, if the final product is not moveable. In other words, it must be included only if the final product is moveable.
Primary & Secondary packing	Yes , As both primary & secondary packing are required by reason of or in connection with sale.
Durable or returnable packing	No , As they are returned back or reused and are amortized in the cost of the product.
Bought out items/Accessories	No , As bought out items/accessories cannot be considered as 'part' of the excisable goods. Further, it is a trading activity and not a manufacturing activity. However, if bought out items/accessories are such that excisable goods cannot function without the same then it shall be includable.
Dharmada Charges	Yes , Based on (CBEC Circular No. 736/79/2003, dated 21-11-2003)
Design, development & engineering charges	Yes , Since it is by reason of or in connection with sale.
Transit Insurance	No , As it is part of transportation cost, exclusion is possible only if it is shown separately in the invoice or atleast shown in the transportation cost separately in the invoice. In other words, if it is not shown separately in the invoice and added to the cost of the product then it is includible.
Delayed payment charges	No , As transaction value relates to the price paid or payable for the goods and delayed payment charge is nothing but the interest on the price of the goods. However, it must be separately shown in the invoice and should be charged over and above the sale price of the goods.
Interest on delayed payment of receivables	No , Interest is nothing but the finance charges and cannot be considered as payment by reason of or in connection with sale.
Interest on notional deposits/advances	No , It should ideally not be included. However, if it can be proved that there exists a nexus between the advance deposits and sale price then it must be excluded. In other words, it must be excluded if assessee charges lower prices from those who giving the advances/deposits and higher prices from those who are not giving the advances/deposits.
Value of trademark	Yes , It must be included only if the manufacturer himself is the owner of the brand name. However, it should be excluded if the goods are manufactured by someone else and then sold to a dealer who owns a brand name.
Outward freight/transportation cost	No . Cost after the 'place of removal' is excluded.
Pre-delivery inspection charges	Yes , Based on (CBEC Circular No. 936/26/2010, dated 27-10-2010)
After sale - service charges	Yes , Since it is by reason of or in connection with sale.
Consultancy charges	Yes , If it is in relation to pre-installation planning, layout design.
Testing charges	Yes , If recovered from the buyer in terms of the contract.
Inspection charges	Yes , Since it is by reason of or in connection with sale.

Royalty charges	Yes , Since it is by reason of or in connection with sale.
Preventive maintenance	No
Repairs & maintenance	No

3.10 Central Excise (Determination of price of excisable goods) valuation rules, 2000

As explained above if the valuation has to be done on the basis of transaction value under section 4 then the following four conditions has to be fulfilled.

- There should be sale of goods;
- The goods sold should be for delivery **at the time and place of removal**;
- The assessee and the buyer of the goods are not to be **related persons**;
- The price should be the **sole consideration for the sale**.

In those cases where any of the above said requirements are not fulfilled, then the assessable value shall be determined on the basis of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

3.10.1 Value when Price is not known at the time & place of removal - [Rule 4]

In certain cases price of goods may not be known at the time when goods are removed from a factory or warehouse or a depot. In such a case excise duty shall be paid at what value. This rule clarifies on how to arrive at the value in such a situation.

1) Value to be equal to price at which same class of goods are sold by same manufacturer at the nearest time

When the price of the goods is not known at the time & place of removal of the goods then value in such a case shall be the value of same class of goods sold by the same manufacturer for delivery at any other time nearest to the time of removal of the goods in question.

2) Value to be adjusted based on difference in the date of removal of goods

However, adjustment in value on account of difference in the date of removal of such goods and the excisable goods shall be done as found appropriate by the proper officer.

Example:

'Samples' distributed free or gifts given as a part of marketing strategy or free replacements under warranty are generally valued in accordance with rule – 4 i.e. value will be based on price of identical goods sold by the assessee near about the time of removal of such free samples or replacements as the price will be unknown at the time and place of removal of such goods.

3.10.2 Value when goods are removed from other than 'Place of removal' - [Rule 5]

As we know that the place of removal is nothing but a factory or a depot or a godown etc. This rule seeks to clarify whether transportation cost incurred from the 'place of removal' to the place where the goods are delivered to be included in the transaction value or not.

1) Cost of transportation incurred only upto 'place of removal' to be included in transaction value

When goods are sold for delivery from a place other than the 'Place of removal' then, The 'cost of transportation' incurred only upto the 'Place of removal' must be included in determining the 'transaction value'. i.e. The 'cost of transportation' incurred after the 'Place of removal' and upto the 'Place of delivery' shall be excluded from the 'transaction value'.

Definition:

“Place of Removal” means

- (i) **A Factory** or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; or
- (ii) **A Warehouse** or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed; or
- (iii) **A Depot, premises of a consignment** or any other place or premises from where the excisable goods are sold after their clearance from the factory.

2) ‘Cost of Transportation’ to be either actual cost (or) averaged freight computed as per principles of costing

‘Cost of transportation’ includes:

- (a) The actual cost of transportation; or
- (b) In case where freight is averaged, the cost of transportation calculated in accordance with the generally accepted principles of costing.

Note:

If the transportation vehicle is owned by the manufacturer then cost of transportation must be calculated as per option (b) above i.e. on the basis of averaged freight and assessee in such a case it is required to ascertain the total cost of transportation incurred based on principles of costing and average out the same for each removal. Assessee may be asked to furnish the certificate of the Cost Accountant in this regard.

3) ‘Cost of transportation’ from the factory gate to any other ‘Place of removal’ to be included in transaction value

If factory is the place of removal, then the transportation cost incurred upto the factory gate must be included in the transaction value. However, if the place of removal is other than the factory (i.e. a depot or a warehouse or premises of a consignment agent etc.) then the cost of transportation incurred from one place of removal to other place of removal (i.e. from factory gate to warehouse etc) must be included in the ‘transaction value’.

4) Cost of return fare not to be included in the transaction value

Cost of ‘return fare’ must not be included in the transaction value.

3.10.3 Value when Price is not the sole consideration for sale - [Rule 6]

In case where price paid is not the sole consideration for sale but the assessee gets something else whether in monetary or non-monetary form for sale of such goods either from the buyer of goods or from any other person. This rule clarifies on how to arrive at assessable value in such a case.

1) Transaction value to include money value of any additional consideration flowing directly or indirectly from the buyer to the seller

When the goods are sold, but price paid by the buyer is not the sole consideration, then the ‘transaction value’ in such a case shall be the aggregate of such price paid and the money value of any additional consideration flowing directly or indirectly from the buyer or any third party to the assessee in relation to sale of such goods.

2) Value to be transaction value where price is not the sole consideration and no additional consideration is flowing directly or indirectly from the buyer

Where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.

3) Value of raw material or other components supplied by the buyer free of cost to be included in transaction value

If buyer supplies certain raw material or other components free of cost to the seller in order to facilitate the manufacturing of the goods, then the cost of such material, components supplied by the buyer to the seller shall be treated as the money value of the additional consideration received from the buyer to the seller and the cost of such components etc, must be added in the cost of the goods sold while determining the transaction value of the excisable goods.

4) Notional interest on advance received must not be added to the cost of goods unless proved

Where an assessee receives any advance payment from the buyer against delivery of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods by way of charging a lesser price from or by offering a special discount to the buyer who has made the advance deposit.

Examples:

1) X, an assessee, sells his goods to Y against full advance payment at Rs.100/- per piece. However, X also sells such goods to Z without any advance payment at the same price of Rs.100/- per piece. No notional interest on the advance received by X is includible in the transaction value.

2) A, an assessee, manufactures and supplies certain goods as design and specification furnished by B at a price of Rs.10 lakhs. A takes 50% of the price as advance against these goods and there is no sale of such goods to any other buyer. There is no evidence available with the Central Excise Officer that the notional interest on the advance has resulted in lowering of the prices. Thus, no notional interest on the advance received shall be added to the transaction value.

3) A sells goods to B who supplies some raw materials free of cost to facilitate the manufacture process. The additional consideration represented as free raw materials has to be added in terms of Rule 6.

4) If X, a manufacturer, receives a subsidy from the buyer even if it is under the policy of Government it will be treated as additional consideration. However, if X himself manufactures patterns and clears them with castings and duty is discharged on transaction value rule 6 is not applicable.

5) X, a manufacturer, bills Rs.5 lakhs towards design charges and shows the same separately in the invoice along with the price of the material A. In the given case, the value of the design charges will be included in the assessable value of material A only if such design charges are related to the material A and not merely because it is shown in the invoice along with material A.

3.10.4 Value when excisable goods are sold from depot, premises of a consignment agent or from any other place - [Rule 7]

In cases where the goods are not sold at the factory gate or at the warehouse but they are transferred by the assessee to his depots or consignment agents or any other place for sale, then this rule clarifies on how to arrive at assessable value in such case.

1) Price charged to independent buyer at such other place on the date of removal from factory shall be the assessable value

When the excisable goods are not sold by the assessee at the time and place of removal but are instead transferred to a depot or premises of a consignment agent or to any other place (hereinafter referred to as 'such other place') from where they are to be sold, then the transaction value shall be the 'Normal transaction value' at which the goods are sold to independent buyers from 'such other place' at or about the same time when the goods are removed from the place of removal.

2) Normal transaction value of the nearest time must be considered, if no goods are sold at such other place at or about the same time of removal

If no goods are sold from 'such other place' at or about the same time of removal of goods from the factory, then the 'transaction value' in such a case shall be the 'Normal transaction value' of such goods sold to independent buyers at 'such other place' at or about the time nearest to the time of removal of goods under assessment.

Notes:

1) "Normal transaction value" means the transaction value of the goods sold in the 'greatest aggregate quantity'.

2) Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day'. In other words, Time period of a Whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.

Example:

Goods are transferred from Chennai factory to Bangalore branch on 17.3.2015. The normal transaction value at which goods are sold to independent buyer from Bangalore branch on 17.3.2015 shall be taken as transaction value. However, if there is no such sale made on 17.3.2015 at the Bangalore branch, then the transaction value at the nearest time, for instance, value at which goods are sold on 16.3.2015 at the Bangalore branch can be taken as transaction value.

3.10.5 Value when excisable goods are captively consumed - [Rule 8]

1) Value to be 110% of Cost of production or manufacture of goods

When the excisable goods are not sold by the assessee but are used for self-consumption by himself or on his behalf in the production or manufacture of other articles, then the transaction value in such a case shall be 110% of the cost of production or manufacture of such goods.

Note: Cost of production or manufacture be computed in accordance with the Cost Accounting Standard - 4 (CAS-4), issued by ICWAI. The various components of costs include Direct material cost, Direct labour cost, Direct expenses, Production overheads, Administration overheads, Research & development expenses, Selling cost, Distribution cost.

3.10.6 Value when excisable goods are sold to a related person - [Rule 9]

In case where goods are sold only through related persons (except interconnected undertakings) then this rule clarifies on how to arrive as assessable value in such a case.

1) Value to be the normal transaction value at which goods are sold by related buyer to an unrelated person

When the excisable goods are sold by an assessee to a buyer who is a related person as per sub-clause (ii), (iii) or (iv) of sec 4(3)(b) (except inter-connected undertaking), then the transaction value in such a case shall be the 'Normal transaction value' at which such goods are sold by such related buyer to an unrelated person.

2) Value to be the normal transaction value at which goods are sold by a related person to an unrelated person or a related retailer

If the related person also sells such goods to another related person then the transaction value shall be the 'Normal transaction value' at which such goods are sold by such second related buyer to an unrelated person. Like that the chain continues until the goods are sold to an unrelated person. However, if the goods are sold to a related person who is a retailer then such value itself can be taken as 'transaction value'.

3) Value to be computed as per rule 8, if related person captively consumes the goods

If the related person captively consumes the goods then value shall be determined in accordance with the Rule - 8 i.e. (110% of Cost).

Notes:

1) "Normal transaction value" means the transaction value of the goods sold in the 'greatest aggregate quantity'.

2) Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day', In other words, Time period of a whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.

Example:

X sells goods to its brother Y at Rs.1,000. Normal transaction value at which Y sells goods to unrelated buyer is Rs.1,200. Then by application of this rule value in hands of X, would be Rs.1,200. However, if Y also sells goods to a related person (say Z) then by application of this rule value in the hands of X shall be the price at which Z sells the goods to the unrelated person. The chain shall continue until the last stage where the goods are finally sold to a retailer. In such a case value at which such goods are sold to the retailer needs to be adopted even if the retailer is a related person.

3.10.7 Value when excisable goods are sold to an inter-connected undertaking - [Rule 10]

In case where goods are sold to interconnected undertaking then this rule clarifies on how to arrive as assessable value in such a case.

1) Value as per rule 9 to be adopted

If the excisable goods are sold by an assessee to an inter-connected undertaking and if such inter-connected undertaking is:

- Related as per sub clause (ii), (iii) or (iv) of sec 4(3)(b); or
- holding or subsidiary company of the assessee,

then value shall be determined as per Rule 9.

2) In any other case, Value shall be determined as if they are not related persons.

Meaning:

“Inter-connected undertakings” means two or more undertakings which are inter-connected with each other in any of the following manners, namely:-

- (A) if one owns or controls the other;
- (B) where the undertakings are owned by firms, if such firms have one or more common partners;
- (C) where the undertakings are owned by bodies corporate,-
 - (I) if one body corporate manages the other body corporate; or
 - (II) if one body corporate is a subsidiary of the other body corporate; or
 - (III) if the bodies corporate are under the same management; or
 - (IV) if one body corporate exercises control over the other body corporate in any other manner;
- (D) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, —
 - (I) hold, directly or indirectly, not less than fifty per cent. of the shares, whether preference or equity, of the body corporate; or
 - (II) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;
- (E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;
- (F) if the undertakings are owned or controlled by the same person or by the same group;
- (G) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses.

Explanation 1 — For the purposes of this clause, two bodies corporate shall be deemed to be under the same management, -

- (i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or
- (ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or
- (iii) if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of directors of the other; or
- (iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or employees of the first mentioned body corporate) one-fourth of the directors of the other; or
- (v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in the other; or
- (vi) if the same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares in one body corporate, also hold not less than one-fourth of the equity shares in the other; or
- (vii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries); or

(viii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or (ix) if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II - If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of, or controlled by, the group shall be deemed to be under the same management.

Explanation III - If two or more bodies corporate under the same management hold, in the aggregate, not less than one-fourth equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.

Explanation IV - In determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions in such bodies corporate shall not be taken into account.

Explanation V - For the purposes of this clause, "group" means a group of:

- (i) two or more individuals, associations of individuals, firms, trusts, trustees or bodies corporate (excluding financial institutions), or any combination thereof, which exercises, or is established to be in a position to exercise, control, directly or indirectly, over any body corporate, firm or trust; or
- (ii) associated persons.

Explanation VI - For the purposes of this clause:

- (I) a group of persons who are able, directly or indirectly, to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust, shall also be deemed to be in a position to exercise control over it;
- (II) "associated persons" —
 - (a) in relation to a director of a body corporate, means —
 - (i) a relative of such director, and includes a firm in which such director or his relative is a partner;
 - (ii) any trust of which any such director or his relative is a trustee;
 - (iii) any company of which such director, whether independently or together with his relatives, constitutes one-fourth of its Board of directors;
 - (iv) any other body corporate, at any general meeting of which not less than one-fourth of the total number of directors of such other body corporate are appointed or controlled by the director of the first mentioned body corporate or his relative, whether acting singly or jointly;
 - (b) in relation to the partner of a firm, means a relative of such partner and includes any other partner of such firm; and
 - (c) in relation to the trustee of a trust, means any other trustee of such trust;
- (III) where any person is an associated person in relation to another, the latter shall also be deemed to be an associated person in relation to the former.

3.10.8 Value when excisable goods manufactured on job-work basis - [Rule 10A]

This rule seeks to clarify on how to compute assessable value in case where excisable goods are produced or manufactured by a Job worker on behalf of the Principal manufacturer.

When does this rule apply?	When the excisable goods are produced or manufactured by a job-worker, on behalf of a principal manufacturer	
What should be 'value' in such a case?	In case where the goods are sold by the principal manufacturer from the factory of a job-worker?	Value shall be the ' Transaction value ' at which the goods are sold.
	In a case where, goods are sold by the principal manufacturer from the place other than factory of a job-worker?	Value shall be the ' Normal transaction value ' at which similar goods are sold from such other place at or about the same time. If no such goods are sold at or about the same time then, value of goods sold at the time nearest to the time of removal of goods.
Meaning of the term Normal transaction value?	Normal transaction value means the transaction value of the goods sold in the 'greatest aggregate quantity'.	
What is the time period to be taken into account to compute the greatest aggregate quantity?	Time period to be taken into account to compute the greatest aggregate quantity is 'Whole day', In other words, Time period of a Whole day must be taken into account while determining the Price at which the largest quantity of identical goods are sold.	

3.10.9 Residuary rule - [Rule 11]

This rule applies if value could not be determined under any of the above rules.

When does this rule apply?	When the value of excisable goods cannot be determined under any of the aforesaid rules.
What should be 'value' in such a case?	Value in such case shall be determined using reasonable means consistent with the principles of these rules u/s 4(1).

Example:

Where the assessee does not sell the inputs/capital goods to any independent buyer and the only removal of such input/capital goods, outside the factory, is in the nature of transfer to a sister unit, recourse will have to be taken to the residuary rule 11 of the valuation rules and the value determined using reasonable means consistent with the principles and general provisions of the valuation rules and sub-section (1) of sec.4 of the Act. In that case it would be reasonable to adopt the value shown in the invoice on the basis of which CENVAT credit was taken by the assessee in the first place.

Summary of all the above rules:

Rule 4	Value of goods sold nearest to the time of removal must be considered.
Rule 5	Freight cost to be deducted in case goods are removed from a place other than the place of removal.
Rule 6	If price is not the sole consideration then cost of any consideration additionally flowing must be added.

Rule 7	Value to be the value at which greatest aggregate quantity sold at that depot at the time of removal from the factory must be considered.
Rule 8	Value shall be 110% of the Cost of Production, in case of Captive consumption.
Rule 9	In case of sales to or through a related persons value shall be the price at which related person sells to unrelated buyers or the value sold to related persons who in turn sells in retail.
Rule 10	Sale to interconnected undertakings (one of the related persons) only those related in Section 4(3) (ii), (iii) or (iv) or holding/subsidiary companies would follow valuation under Rule 9.
Rule 10A	If goods are manufactured on job work basis, adopt the value at which the principal manufacturer sells the goods.
Rule 11	When the value of any excisable goods cannot be determined under any of the aforesaid rules, adopt best.

3.11 MRP based valuation - [Section 4A]

The provision relating to duty based on MRP is dealt in section 4A. Section 4A was introduced with effect from 14.5.97 and today covers more than 83 Tariff headings. The Government thought it fit to introduce the said section to fight the evil of manufacturers transferring cost to trading companies and reducing the excise duty payable by them because of which it was decided to tax on the basis of Maximum Retail Price of the product.

3.11.1 Valuation based on retail sale price - [Section 4A]

This section seeks to provide details about which goods shall be valued as per MRP provisions and whether any abatement is available. It also provides clarification on how valuation shall be done if more than one MRP is available on the package of the goods or if MRP written is altered after removal of goods etc.

1) Applicable to goods on which retail sale price is required to be declared as per legal metrology act, 2009

If the statutory requirement under the provisions of legal metrology act, 2009 or under any other law for the time being in force requires that the retail sale price to be declared on the goods, then provisions of section 4A applies to such category of goods. In other words, provisions of section 4A does not apply to those category of goods for which declaration of retail sale price is not required as per legal metrology act, 2009 or under any other law for the time being in force.

2) CG to specify goods on which MRP is to be declared under Legal metrology act, 2009

The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Legal Metrology Act, 2009 or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods.

3) Value u/s 4A to be deemed as MRP less abatement, if any

Where the goods specified under sub-section (1) above are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette.

4) Abatement to be granted having regard to quantum of excise duty and other taxes payable

The Central Government may, for the purpose of allowing any abatement under sub-section (2), take into account the amount of duty of excise, sales tax and other taxes, if any, payable on such goods.

5) Goods removed without declaring MRP or by declaring incorrect MRP or after removal if MRP is tampered, obliterated or altered then such goods are liable for confiscation

Where any goods specified under sub-section (1) are excisable goods and the manufacturer -

- Removes such goods from the place of manufacture, without declaring the retail sale price of such goods on the packages or declares a retail sale price which is not the retail sale price as required to be declared under the provisions of the Act, rules or other law as referred to in sub-section (1); or
- **Tampers** with, **obliterates** or **alters** the retail sale price declared on the package of such goods after their removal from the place of manufacture,

then, such goods shall be liable to confiscation and the retail sale price of such goods shall be ascertained in the prescribed manner which shall be deemed to be the retail sale price for the purposes of this section.

6) Highest retail sale price must be taken if more than one retail sale price declared - [Explanation 2(a)]

Where on the package of any excisable goods more than one retail sale price is declared, the maximum of such retail sale prices shall be deemed to be the retail sale price.

7) Altered retail price to be taken, if retail sale price increased after removal - [Explanation 2(b)]

Where the retail sale price, declared on the package of any excisable goods at the time of its clearance from the place of manufacture, is altered to increase the retail sale price, such altered retail sale price shall be deemed to be the retail sale price.

8) Different areas can have different retail price - [Explanation 2(c)]

Where different retail sale prices are declared on different packages for the sale in different areas, then each such retail sale price declared for each area shall be the retail sale price for the purposes of valuation of the excisable goods.

9) Retail sale price to be the maximum price received and includes all taxes and other costs - [Explanation 1]

For the purposes of this section, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale.

Provided that in case the provisions of the Act, rules or other law as referred to in sub-section (1) require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

Note:

For the purposes of this *explanation*, the expression 'ultimate consumer' shall not include industrial or institutional consumers.

Example:

As retail sale price also includes marketing costs, transportation costs and also profit element, it is obvious on behalf of government to give some abatement so that excise duty is not paid on exorbitant prices. For instance following are the rates of abatement given on various retail products:

- ✓ Biscuits - 30%
- ✓ Toothpaste - 30%
- ✓ Photographic cameras - 30%
- ✓ Pressure cooker - 25%

3.11.2 Central Excise (Determination of retail sale price of excisable goods) Rules, 2008

These rules are introduced to determine the retail sale price of any excisable goods under sub-section (4) of section 4A of the Act in certain specific circumstances.

3.11.2.1 Value of goods in certain cases - [Rule 4 & Rule 5]

When does this rule apply? a) Goods are removed without declaring MRP; b) By declaring MRP not as per SWM act, 1976; c) Obliterates MRP after removal	Where a manufacturer removes any excisable goods specified under sub-section (1) of section 4A of the Act, - (a) Without declaring the retail sale price on the packages of such goods; or (b) By declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Legal Metrology Act, 2009 or rules made thereunder or any other law for the time being in force; or (c) By declaring the retail sale price but obliterates the same after their removal from the place of manufacture. [RULE 4]	
What shall be the 'value' in such a case? [RULE 4] (i) Value shall be the declared value if identical goods are removed one month before or after such removal (ii) If not, then value shall be ascertained by conducting the enquiries in the retail market; (iii) If more than 1 MRP is ascertained by (i) or (ii) above, then higher of such value shall be retail	(i) If the manufacturer has manufactured and removed identical goods, within a period of 1 month, before or after removal of such goods, by declaring the retail sale price,	Then the said declared retail sale price shall be taken as the retail sale price of such goods.
	(ii) If the retail sale price cannot be ascertained in terms of clause (i) above,	Then the retail sale price of such goods shall be ascertained by conducting enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture.
	(iii) Provided that if more than one retail sale price is ascertained under clause (i) or	then the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all

sale price	clause (ii) above.	such goods.
When does this rule apply? [RULE 5] MRP being altered or tampered after removal of goods	Where a manufacturer alters or tampers the retail sale price declared on the package of goods after their removal from the place of manufacture, resulting into increase in the retail sale price.	
What shall be the 'value' in such a case? [Rule 5] Altered & increased MRP should be taken as MRP for all the removals during one month before and after such removal	(i) If retail sale price declared on the package of goods after their removal from the place of manufacture is altered or tampered, resulting into increase in the retail sale price.	then such increased retail sale price shall be taken as the retail sale price of all goods removed during a period of 1 month before and after the date of removal of such goods.
[Rule 5] If more than 1 MRP is ascertained, then higher of such value shall be retail sale price	(ii) Provided that where the manufacturer alters or tampers the declared retail sale price resulting into more than 1 retail sale price available on such goods,	then the highest of such retail sale price shall be taken as the retail sale price of all such goods.

3.11.3 Clarifications issued by the department pertaining to valuation u/s 4A

1) Scored out MRP must be ignored

Once an MRP is scored out, and another MRP printed on the package, it could not be said that the package has two MRPs printed on it, since the MRP scored out could not be considered as an MRP either by the seller or by the consumer. Hence the scored out MRP is to be ignored. The position remains same even if the scored out MRP is visible on the package.

Example:

Many times when a manufacturer wants to give a discount he also wants the customers to specifically know amount of discount that is being offered as a part of its marketing strategy. In such a case, original MRP (assume Rs. 100) will be scored and a new MRP (assume Rs. 85) shall be written with a brief write up (say Save Rs. 15). In such a case MRP of Rs. 85 shall be taken for the purpose of valuation u/s 4A.

2) Multipack MRP to be taken, if MRP on individual packs scored out

If the individual items have MRP's printed on them but are scored out, then the MRP printed on the multi-pack will be taken for purposes of valuation under section 4A.

Example:

If Toothpaste is packed in a multi pack along with tooth brush and the MRP's printed on individual items are scored out (i.e. Rs. 125) then the price given on multipack must be taken as MRP for the purpose of valuation.

3) MRP of a multipack to be taken, if clearly marked that individual item cannot be sold separately

If individual items are sold as multi-pack having more than one product and have clear markings that they are not to be sold separately or are packed in such a way that they cannot be sold separately, then the MRP indicated on the multi-pack should be considered for payment of duty u/s. 4A.

4) MRP of an aggregate of individual packs to be taken, if the above clear marking not available

If the individual items do not contain any such inscription (that they are not be sold separately) and are capable of being sold separately at the MRP printed on the individual pieces, then the aggregate of the MRP's of the pieces comprising in the multi-pack would be considered for payment of duty on the multi-pack under section 4A.

5) MRP mentioned on the multipack to be taken, if no MRP printed on individual pack of goods supplied free of cost

If an individual item is supplied free of cost in the multi-pack and has no MRP printed on it, then the MRP printed on the multi-pack will be taken for the purpose of valuation u/s 4A.

Chapter 16 - Point of Taxation

16.1 Background & Introduction

Since introduction, service tax was liable to be discharged on receipt basis that is to say one shall be liable to pay service tax only when consideration towards the value of services provided is received by service provider. Until 2011 the point of liability for payment of service tax was on receipt basis. However, in the quest of collecting the taxes at an earliest point and not wait upto the time of receipt of consideration, In 2011 Point of Taxation Rules were introduced for the first time. These are the set of rules that determine the point at which service becomes liable for payment of service tax in case of various situations. Therefore, with effect from 2011, point at which service becomes liable for payment of service tax needs to be envisaged based on these rules and not on receipt basis. To summarize, Point of taxation means the point in time when a service shall be deemed to have been provided or the point at which liability to pay service tax arises. Various rules framed in this regard are as explained below:

16.2 Determination of point of taxation - General rule - [Rule 3]

1) POT shall be earlier of receipt of money or issue of invoice or completion of service

For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be:

- a) The time when the invoice for the service provided/ agreed to be provided is issued. However, in case the invoice is not issued within 30 days of the completion of the provision of the service, the point of taxation shall be date of such completion.
- b) In a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.

Note: 30 days shall be substituted with 45 days in case of in case of banking and other financial institutions including NBFCs.

2) POT to be date of receipt of money if turnover less than 50 lakhs in previous year

As per rule 6(1) of service tax rules, 1994, In case of individuals and partnership firms, if aggregate value of taxable services provided from one or more premises is fifty lakh rupees or less in the previous financial year, then the service provider shall have the option to pay tax up to a total of rupees fifty lakhs in the current financial year, on receipt of money basis.

3) Date of completion of event specified in the contract shall be the date of completion of service - In case of continuous supply of service

In case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

4) Relaxation given if excess receipts for continuous supply of service is only upto Rs. 1,000/-

Wherever the provider of taxable service receives a payment up to Rs.1,000/- in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a) [Proviso to rule 3].

Analysis

As per rule 3 of the said rules, point of taxation would be determined as follows:-

S No.	Particulars	Point of taxation
1.	If invoice is issued within the 30 days* from the date of completion of service	Point of taxation would be: (a) Date of invoice; or (b) Date of receipt of consideration (whichever is earlier)
2.	If invoice is not issued within 30 days* from the date of completion of service	Point of taxation would be: (a) Date of completion of service; or (b) Date of receipt of consideration (whichever is earlier)

Examples:

Case	In case where	Point of Taxation	
I	Invoice is issued within 30 days* from the completion of service and payment is received after issue of invoice	Date of invoice	
II	Invoice is issued within 30 days* from the completion of service, but payment is received before issue of invoice	Date on which payment is received	
III	Invoice is not issued within 30 days* from the completion of service and payment is received after completion of service	Date of completion of service	
IV	Invoice is not issued within 30 days* from the completion of service. However, part payment is received before the completion of service and remaining payment is received after the completion of service.	For the payment received	Point of taxation is
		Before the date of completion of service	The date on which payment is received.
		After the date of Completion of service	The date of completion of service.

Note: *45 days applies in case of in case of banking and other financial institutions including NBFCs.

In case of provision of the taxable services other than banking and other financial institution including NBFCs, point of taxation would be determined as under:-

Case	Date of completion of service	Date of invoice	Date on which payment received	Point of Taxation
I	September 5, 2013	September 28, 2013	October 10, 2013	September 28, 2013
II	September 5, 2013	October 03, 2013	September 20, 2013	September 20, 2013
III	September 5, 2013	October 8, 2013	September 25, 2013	September 5, 2013
IV	September 5, 2013	October 8, 2013	Amount received partly on September 3, 2013 and remaining on September 20, 2013	September 3, 2013 and September 5, 2013 for respective Amounts

Concept of 'Continuous supply of Service'

Continuous supply of service means once after entering into a contract, the service provider continuously or repeatedly provides the service to the service receiver for the period agreed or until the completion of the contract or termination of the contract. Various services that fall under the ambit of continuous supply of service includes the follows:

- Construction Contracts;
- Telecommunication services;
- Credit Card Services etc.

Example:

In case of construction contracts it takes for an average 3 to 5 years for completion of construction of a residential flats and department does not want to wait upto the completion of the contract to collect the service tax therefore it is envisaged that date of completion of each events that requires receiver to make payment to the provider shall be deemed to be the date of completion. In case of construction industry, as an illustration various events that requires service receiver to make payment to service provider can be as follows:

- 20% payment at the event of Flat Booking;
- 10% payment on laying of the foundation;
- 20% payment on completion of third floor works;
- 20% payment on completion of all the floors;
- 10% payment on completion of painting and other finishing works;
- Balance 20% on handing over of possession.

From the above illustration, each event requiring payment from service receiver shall be termed as a separate date of completion for determining the point of taxation.

Reason for relaxation of upto Rs.1,000/-: Wherever the provider of taxable service in case of a continuous supply of service receives a payment up to Rs.1,000/- in excess of the amount indicated in the invoice, then the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined on the basis of invoice or completion of service, as per the option of the provider of service.

This provision is designed to give relief to the sectors like telecommunications or Credit Card services etc. where at times customer ends up paying higher amount than billed in order to round up the payments. Such additional payment will be set-off by customer from the subsequent bill. In such cases it becomes difficult for the service provider to compute service tax liability as ideally the service tax shall also be liable to be paid even on such additional amount which is received before the completion of service. Therefore, the relaxation is given stating that if such additional amounts which are received before the completion of service is less than Rs.1,000/- then in such cases service tax can be discharged on invoice value and the value of receipt of money can be ignored.

As a measure of added facilitation, an option has been provided to determine the point of taxation in respect of small advances up to Rs.1000/-, in excess of the amount indicated in the invoice, on the basis of invoice or completion of service rather than payment. Such provision is expected to address the accounting problems faced by service providers in telecommunications, credit card businesses who regularly receive minor excess payments from their customers.

16.2 Determination of point of taxation in case of change in effective rate of tax - [Rule 4]

Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a change in effective rate of tax in respect of a service, shall be determined in the manner laid down in the following table namely:-

In case a taxable service has been provided	Invoice has been issued	Payment received for the invoice	Point of taxation shall be
(i) Before the change in effective rate of tax.	After the change in effective rate of tax	After the change in effective rate of tax	(a) date of issuance of Invoice; or (b) date of receipt of payment (whichever is earlier)
	Prior to the change in effective rate of tax	After the change in effective rate of tax	date of issuance of invoice
	After the change in effective rate of tax	Prior to the change in effective rate of tax	date of receipt of payment
(ii) After the change in effective rate of tax.	prior to the change in effective rate of tax	After the change in effective rate of tax	date of receipt of payment
	Prior to the change in effective rate of tax	Prior to the change in effective rate of tax	(a) date of issuance of Invoice; or (b) date of receipt of payment whichever is

			earlier
	After the change in effective rate of tax	Prior to the change in effective rate of tax	date of issuance of invoice

Analysis

From the above we can understand that there are 3 events as under:

- Date of provision of service;
- Date of issue of invoice; and
- Date of payment.

From the above table it can be made out that if any 2 out of these 3 events take place before the date of rate change then the old rate or previous rate applies. Similarly, if any 2 out of these 3 events take place after the date of rate change then the new rate or rate in force after the change applies.

Definition of Date of Payment:**1) 'Date of payment' to be earlier of entry in books of accounts or credit in bank account**

Date of payment shall be earlier of the following:

- Date on which the payment is entered in the books of accounts; or
- Date on which payment is credited to the bank account of the person liable to pay tax.

2) 'Date of payment' to be the date of credit in the bank account in case of change in effective rate of tax or a new levy

Date of payment shall be the date of credit in the bank account in case of the following if the below conditions satisfy:

- There is a change in effective rate of tax or the service is being taxed for the first time during the period between such entry in books of accounts and its credit in the bank account; and
- the bank account is credited after four working days from the date of change of tax rate or introduction of new service; and
- the payment is made by way of an instrument which is credited to a bank account.

Further if any rule requires determination of the time or date of payment received the expression "date of payment" shall be construed to mean such date on which the payment is received.

16.3 Payment of tax in cases of new services - [Rule 5]

In case a service is introduced for the first time and then the tax treatment towards the same is explained in this rule.

(a) No tax payable if payment received and invoice issued before the introduction of new service

Where a service is taxed for the first time, then in case the invoice has been issued and also payment has been received against such invoice before such service became taxable then no tax shall be payable even if the service is actually provided after the same has become taxable;

(b) No tax payable if payment received before introduction of new service and invoice issued within 14 days of introduction of new service

In case the payment has been received before the service becomes taxable and invoice has been issued within 14 days of the date when the service is taxed for the first time even in such a situation no tax shall be payable.

Analysis

This question arises as to if a new service is introduced for the first time then how to give the treatment in case invoice is already issued or payment is received towards such service before the introduction of the such service. This rule explains the same by way of this rule. In order to ensure that the service does not become taxable the crux is that

- Payment must have mandatorily been received before the introduction of the service; and
- Invoice must have been issued before the introduction of the service or within 14 days of the introduction of the service.

The same is tabulated below for ease of understanding assuming a new service is introduced w.e.f 1st April 2015:

Invoice issued	Payment received	Service Provided	Taxability
March 29, 2015	March 25, 2015	April 5, 2015	Not Taxable, As invoice is issued and payment is received before the date of introduction of service.
April 5, 2015	March 25, 2015	April 5, 2015	Not Taxable, As payment is received before the date of introduction of service and even though invoice is issued after the introduction of service the same is issued within 14 days of introduction of service.
April 15, 2015	March 25, 2015	April 5, 2015	Taxable, As even though payment is received before the introduction of service but the invoice is issued after 14 days of the introduction of the service.
March 25, 2015	April 2, 2015	March 25, 2015	Taxable, As even though service is provided and invoice is also issued before introduction of the service still it is taxable as payment is received after the introduction of new service.
April 2, 2015	April 2, 2015	March 25, 2015	Taxable, As even though service is provided before the introduction of new service but the invoice is issued and also payment is received only after the introduction of service.

16.4 Determination of point of taxation in case of person liable to pay service tax under reverse charge or in case of associated enterprises - [Rule 7]

This rule determines the point of taxation in case of persons liable to pay service tax under reverse charge and in case of transactions with associated enterprise.

1) POT under reverse charge to be the 'date of payment to the vendor'

The point of taxation in case where recipient of service is required to pay service tax under reverse charge shall be the date on which payment is made to the vendor for the services provided.

2) POT to be the date immediately following 3 months, if payment not made to vendor within 3 months

In case where the aforesaid payment to the vendor is not made within a period of three months of the date of invoice, then the point of taxation shall be the date immediately following the said period of three months.

3) POT for associated enterprises to be earlier of 'date of debit in books' or 'date of payment'

In case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

Analysis

In respect of the persons liable to pay service tax under reverse charge mechanism, the point of taxation shall be the date on which payment is made subject to the condition that the payment is made within a period of three months of the date of invoice. However, if the payment is not made within a period of three months of the date of invoice, then point of taxation will be the first day that occurs immediately after the expiry of said three months. In other words, point of taxation in respect of services taxed under reverse charge will be the payment date or the first day that occurs immediately after a period of three months from the date of invoice, whichever is earlier.

Thus, point of taxation in the following cases of payment of service tax under reverse charge, will be as under:

S No	Date of invoice	Date of payment	Point of taxation
(i)	15.10.2014	10.01.2015	10.01.2015
(ii)	20.10.2014	15.02.2015	20.01.2015

In case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be:-

- the date of debit in the books of account of the person receiving the service; or
- date of making the payment whichever is earlier.

16.5 Determination of point of taxation in case of copyrights, etc - [Rule 8]**1) POT to be earlier of date of receipt of consideration or date of issue of invoice**

This rule applies in case of royalties and payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time of performance of service, and also in cases where subsequent use or benefit of these services by a person other than the provider gives rise to any payment of consideration.

Therefore, in such a case, the service shall be treated as having been provided each time when:-

- a payment in respect of such use/benefit is received by the provider in respect thereof; or
- an invoice is issued by the provider

(whichever is earlier).

16.6 Determination of point of taxation in other cases - [Rule 8A]

Rule 8A is the residual rule to determine the point of taxation by way of best judgment to handle situations where the tax-payer is unable to furnish one or more of the details needed i.e. date of payment or date of invoice or both to determine the point of taxation.

1) POT to be determined by Central Excise Officer to the best of his judgement

Where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available, the Central Excise Officer, may, require the concerned person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account such material and the effective rate of tax prevalent at different points of time, shall, by an order in writing, after giving an opportunity of being heard, determine the point of taxation to the best of his judgment.

Practical Questions & Answers**Question 1**

Determine the point of taxation and due date of e-payment of service tax in each of following independent cases:

Date of completion of service	Date of invoice	Date on which payment is received
10.04.2015	05.05.2015	20.05.2015
10.04.2015	05.05.2015	25.04.2015
10.04.2015	05.05.2015	25.04.2015 (Part) and 20.05.2015 (remaining)
10.04.2015	05.05.2015	06.04.2015 (Part) and 09.04.2015 (remaining)
10.04.2015	05.05.2015	06.04.2015 (Part) and 01.05.2015 (remaining)
10.04.2015	16.05.2015	20.05.2015
10.04.2015	16.05.2015	05.04.2015 (Part) and 14.05.2015 (remaining)

Assume that the service is provided by a company in all the above cases.

Answer:

As per rule 3 of the POTR, in case the invoice is issued within the prescribed period of 30 days from the date of completion of provision of service, point of taxation is:-

- (i) date of invoice; or
- (ii) date of payment (whichever is earlier).

However, in case the invoice is not issued within 30 days of the completion of the provision of the service, point of taxation is:-

- (i) date of completion of service; or
- (ii) date of payment (whichever is earlier).

Accordingly, the point of taxation in each of the given cases is as follows:

Date of completion of service	Date of invoice	Date on which payment is received	Point of taxation	Due date of e-payment of service tax
10.04.2015	5.05.2015	20.05.2015	05.05.2015	06.06.2015
10.04.2015	05.05.2015	25.04.2015	25.04.2015	06.05.2015
10.04.2015	05.05.2015	Part payment on 25.04.2015 remaining on 20.05.2015	25.04.2015 for the part payment and 05.05.2015 for the remaining amount	06.05.2015 for the part payment and 06.06.2015

10.04.2015	05.05.2015	Part payment on 06.04.2015 and Remaining on 09.04.2015	06.04.2015 for the part payment and 09.04.2015 for the remaining amount	06.05.2015 for the part Payment and 06.05.2015 for the remaining amount
10.04.2015	05.05.2015	Part payment on 06.04.2015 and Remaining on 01.05.2015	06.04.2015 for the part payment and 01.05.2015 for the remaining amount	06.05.2015 for the part Payment and 06.06.2015 for the remaining amount
10.04.2015	16.05.2015	20.05.2015	10.04.2015	06.05.2015
10.04.2015	16.05.2015	Part payment on 05.04.2015 and Remaining on 14.05.2015	05.04.2015 for the part payment and 10.04.2015 for the remaining amount	06.05.2015 for the part Payment and 06.05.2015 for the remaining amount

Question 2

Renu Ltd. enters into a contract with XYZ Ltd. for construction of a new building to be used primarily for commercial purposes for a total consideration of Rs.150 lakh on 02.07.2014. As per the terms of contract, Renu Ltd. is required to make payment at different stages of completion of the building namely, 50%, 75% and 100%. Determine the point of taxation using relevant details given as under:

Stage	Date	Date of issuance of invoice	Date of payment	Amount paid (in Rs.)
Initial booking	02.07.2014	02.07.2014	02.07.2014	15 lakh
50% completion of building	15.03.2015	22.03.2015	29.03.2015	60 lakh
75% completion of building	20.06.2015	24.07.2015	25.07.2015	35 lakh
100% completion of building	30.09.2015	21.10.2015	20.10.2015	40 lakh

Note: A certificate from a Chartered Engineer registered with the Institution of Engineers (India) has been obtained with respect to each stage (viz., 50%, 75% and 100%) of completion of building.

Answer:

Since in the present case, the construction services are provided by Renu Ltd. to XYZ Ltd. under a contract for a period exceeding 3 months with the obligation for payment periodically, such services would fall within the ambit of term "continuous supply of service" as per rule 2(c) of the POTR. The point of taxation in case of continuous supply of services is determined in accordance with provisions of rule 3 of POTR.

Further, it is important to note that in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires service receiver to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

Accordingly, the point of taxation with respect to each of the stages of completion is as follows:

Stage of Completion	Point of taxation
Initial booking	02.07.2014 as the date of completion of service, date of issuance

	of invoice and date of payment are the same.
50%	Since invoice has been issued within 30 days of completion of service, point of taxation is date of invoice (22.03.2015) or date of payment (29.03.2015) whichever is earlier, i.e. 22.03.2015
75%	Since invoice has not been issued within 30 days of completion of service, point of taxation is date of completion of service (20.06.2015) or date of payment (25.07.2015) whichever is earlier, i.e. 20.06.2015
100%	Since invoice has been issued within 30 days of completion of service, point of taxation is date of invoice (21.10.2015) or date of payment (20.10.2015) whichever is earlier, i.e. 20.10.2015

Question 3

Manoj Ltd. Imports business support services from Green Ltd. of USA on 13.10.2015. The relevant invoice for \$1,20,000 is raised by Green Ltd. on 18.10.2015. Manoj Ltd. makes the payment against the said invoice as follows:

Case I	22.11.2015
Case II	27.02.2016

Determine point of taxation in each of the aforesaid cases.

Answer:

In case of taxable services provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory, person liable to pay service tax is the recipient of such service [Notification No. 30/2012 ST dated 20.06.2012]. Hence, in the given case, since the business support service has been provided by Green Ltd. (located in non-taxable territory) and has been received by Manoj Ltd. (located in the taxable territory), Manoj Ltd. is liable to pay service tax (i.e. under reverse charge mechanism).

The point of taxation in respect of persons required to pay tax under the reverse charge mechanism, is the date on which payment is made. However, where the payment is not made within a period of 3 months of the date of invoice, the point of taxation will be the date immediately following the said period of three months. [Rule 7 of the POTR]. In view of the aforesaid provisions, the point of taxation in each of the given cases will be as under:

CASE	Point of taxation
CASE I	Since the importing company i.e. Manoj Ltd makes the payment within the three months from the date of invoice, the point of taxation will be date of payment i.e. 22.11.2015.
CASE II	As Manoj Ltd. makes the payment after three months from the date of invoice, point of taxation will be the date immediately following the said period of three months. Thus, point of taxation is 18.01.2016.

Question 4

Apte & Apte Ltd. is located in India and holding 51% of shares of Wilson Ltd, a USA based company. Wilson Ltd. provides business auxiliary services to Apte & Apte Ltd. From the following details, determine the point of taxation for Apte & Apte Ltd:

Agreed consideration	US \$1,00,000
Date on which services are provided by Wilson Ltd.	16-9-2015

Date on which invoice is issued by Wilson Ltd.	19-9-2015
Date of debit in the books of account of Apte & Apte Ltd.	30-9-2015
Date on which payment is made by Apte & Apte Ltd.	23-12-2015

Answer:

Since, Apte & Apte Ltd. holds 51% shares of Wilson Ltd., Apte & Apte Ltd. and Wilson Ltd. will be 'associated enterprises' as per section 92A of the Income-tax Act, 1961. As per rule 7 of the POTR, in case of associated enterprises, where the person providing the service is located outside India, the point of taxation is the earlier of the following two dates:

Date of debit in the books of account of person receiving the service [which is Apte & Apte Ltd. in the present case] 30.09.2015

Or

Date of making the payment [by Apte & Apte Ltd. in the present case] 23.12.2015.

Thus, point of taxation will be 30.09.2015.

Question 5

Prabhu Ltd. has obtained a patent for a process to extract coal from mines in February, 2012. Prabhu Ltd. entered into an agreement with Arti Ltd. in April, 2012 to allow Arti Ltd. to use its patented process to extract coals from mines for next three years. The consideration payable by Arti Ltd. for using the patented process has been fixed @ Rs.1000 per tonne of coal extracted. The quantum of coal extracted by Arti Ltd. and other relevant details are given in the following table:

Financial Year	Output [in tonnes]	Date of issuance of invoice	Date of receipt of Payment
2012-13	2,000	05.07.2013	26.08.2013
2013-14	3,000	13.04.2014	03.04.2014
2014-15	4,000	11.04.2015	20.05.2015

You are required to determine the point of taxation in the above case.

Answer:

Rule 8 of the POTR, inter alia, applies in respect of payments pertaining to patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration. The service shall be treated as provided each time when a payment in respect of such use or the benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier.

Since in the given case, whole amount of the consideration for the provision of patent is not ascertainable at the time when service was performed and subsequently the use of these services by Arti Ltd. gives right to any payment of consideration, both the conditions specified in rule 8 get satisfied. Therefore, the point of taxation of Prabhu Ltd. for various financial years, determined as per rule 8, is as under:

Financial Year	Point of Taxation	Reason
2012-13	05.07.2013	Date of issuance of invoice [05.07.2013] falls before date of payment [26.08.2013]
2013-14	03.04.2014	Date of payment [03.04.2014] precedes date of issuance of invoice [13.04.2014]
2014-15	11.04.2015	Date of issuance of invoice [11.04.2015] falls before date of payment [20.05.2015]

Question 6

HMV Ltd. obtains the copyright of classic songs of a famous singer recorded in a Compact Disk [CD]. It temporarily transferred the copyright to Babar Cassettes Industries Ltd. [hereinafter abbreviated as "BCI Ltd."] on 20.04.2013 at a consideration fixed @ Rs.10/- per CD sold by BCI Ltd. The no. of CDs sold by BCI Ltd. during different financial years as well as other relevant details is given in the following table:

Relevant Year	No. of CDs Sold	Date of issuance of invoice by HMV Ltd.	Date of receipt of payment from BCI Ltd.
2012-13	4,00,000	29.07.2013	16.08.2013
2013-14	6,00,000	03.06.2014	23.05.2014
2014-15	7,00,000	16.05.2015	16.05.2015

You are required to determine the point of taxation in the above case. Ignore exemption, if any, available on the said service.

Answer:

Since in the given case, whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use of these services by a person other than the provider gives right to payment of consideration, the service shall be treated as having been provided each time when a payment in respect of such use or the benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier [Rule 8 of the POTR]. The point of taxation for HMV Ltd. for various financial years, determined as per rule 8, is as under:

Financial Year	Point of Taxation	Reason
2012-13	29.07.2013	Date of issuance of invoice [29.07.2013] falls before date of payment [16.08.2013]
2013-14	23.05.2014	Date of payment [23.05.2014] precedes date of issuance of invoice [03.06.2014]
2014-15	16.05.2015	Date of issuance of invoice [16.05.2015] as well as date of receipt of payment [16.05.2015] is same.

Question 7

Mr. A is the author and copyright-owner of a book. He enters into an agreement with ABC Publishers on 15.07.2015. As per the terms of agreement, Mr. A transfers the copyright to said publishers for a lump sum consideration of Rs.10,00,000/-. The other relevant details are as under:

Date	Particulars
15.07.2015	Issue of invoice by Mr. A
27.11.2015	Receipt of lump sum consideration of Rs.10,00,000/-

Determine point of taxation in the above case. Ignore exemption, if any, available on the said service.

Answer:

Since in the present case the whole amount of consideration i.e., Rs.10,00,000/- is ascertained at the time of entering into agreement itself, one of the essential requirements of rule 8 does not get satisfied. Resultantly, rule 8 becomes inapplicable in the present case. Thus, point of taxation will be determined in accordance with rule 3 of the POTR in the following manner:

Since invoice has been issued within 30 days from the date of completion of provision of service [which in the present case is the date of entering into agreement], earlier of the following dates will be the Point of Taxation:

Date of invoice 15.07.2015

Date of payment 27.11.2015

Thus, point of taxation is 15.07.2015.

Question 8

On the basis of following information, determine the 'Point of Taxation' as per rule 3 of Point of Taxation Rules, 2011:-

Event	Date
Commencement of providing of service	05-06-2015
Completion of service	10-10-2015
Invoice issued	20-10-2015
Payment received by cheque and entered in the books	15-10-2015
Amount credited in Bank A/c	25-10-2015
Service became taxable for the first time	01-07-2015

Answer:

In the given case, since the invoice is issued within the prescribed period of 30 days from the date of completion of provision of service, the point of taxation, as per rule 3 of the Point of Taxation Rules, 2011, shall be:

(a) Date of invoice (i.e. 20.10.2015)

or

(b) Date of receipt of payment (i.e. 15.10.2015) [Refer note below] whichever is earlier, i.e. 15.10.2015

Note: As per rule 2A of the Point of Taxation Rules, 2011, date of payment is:-

(a) dates on which the payment is entered in the books of account (i.e. 15.10.2015)

or

(b) dates on which the payment is credited to the bank account of the person liable to pay tax (i.e. 25.10.2015)

whichever is earlier, i.e. 15.10.2015.

Chapter 19 - Service Tax Procedures

19.1 Introduction

We have already understood the concept of service, negative list of services, declared services, principles of interpretation of specified description of services or bundled services, point of taxation, place of provision of service, valuation, exemptions and abatement in respect of various taxable services. In this chapter, discussion is focused on procedures to be followed for complying with the provisions of the law.

19.2 Registration - [Section 69 & rule 4 of the Service Tax Rules, 1994]

A. Who should Register

1) Every person liable to pay must register

Every person liable to pay service tax is required to register himself by making an application to the Superintendent of Central Excise [Section 69(1)].

2) Other persons notified to register

Further, Central Government may also notify such other person or class of persons who will be required to obtain registration [Section 69(2)]. The following persons/class of persons have been notified under section 69(2):-

- i. an input service distributor; and
- ii. any provider of taxable service whose aggregate value of taxable service in a financial year exceeds Rs.9,00,000/-.

B. Application for registration

The procedure for registration has been laid down under rule 4 of the Service Tax Rules, 1994. It prescribes the time, manner and form for registration.

1) Application in form ST-1 to be submitted within 30 days of levy or commencement of business

Application for registration is to be made by every person liable for paying the service tax in Form ST-1:

- i. within 30 days from the date on which service tax is levied; or
- ii. within 30 days from the date of commencement of business whichever is later, to the concerned Superintendent of Central Excise having jurisdiction.

2) Application by input service distributor within 30 days of commencement of business

The input service distributor shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of the commencement of business.

3) Application within 30 days from value exceeding Rs.9,00,000/-

The provider of taxable service whose aggregate value of taxable service in a financial year exceeds Rs.9,00,000/- shall make an application to the jurisdictional Superintendent of Central Excise in the prescribed form for registration within a period of 30 days of exceeding the aggregate value of taxable service of Rs.9,00,000/-.

4) Aggregate value means sum total of first consecutive payments

"Aggregate value of taxable service" means the sum total of first consecutive payments received during a financial year towards the gross amount, as prescribed under section 67, charged by the service provider

towards taxable services but does not include payments received towards such gross amount which are exempt from the whole of service tax under any notification other than *Notification No. 6/2005-ST dated 01.03.2005***.

5) All services and all premises to be considered for computing 'aggregate value'

Where a provider of taxable service provides one or more taxable services from one or more premises, the aggregate value of all such taxable services and from all such premises and not separately for each services or each premises shall be taken into account for computation of aggregate value of taxable service.

C. Documents to be submitted for registration

1) PAN, Address proof etc. to be submitted within 15 days of application

The following documents have been prescribed by the CBEC to be submitted along with the application for registration under service tax:

- a) Copy of Permanent Account Number (PAN);
- b) Proof of Residence;
- c) Constitution of the Applicant;
- d) Power of Attorney in respect of authorized person(s).

The above documents must be submitted within a period of 15 days from the date of filing of the application, otherwise the application may be rejected.

D. Grant of registration certificate

1) Registration certificate to be granted with 7 days in form ST-2

The Superintendent of Central Excise shall after due verification of the application form (Form ST-1), or an intimation of change in any information or details under sub-rule (5A), as the case may be, grant a certificate of registration in Form ST-2 within 7 days from the date of receipt of the application or intimation.

Note: The time limit of seven days within which the registration is to be granted by the Superintendent of Central Excise/Service Tax would be reckoned from the date the application for registration is complete in all respects.

2) Deemed registration after 7 days

If the registration certificate is not granted within the said period, the registration applied for shall be deemed to have been granted.

Note: This may not be a solution for non-granting of the certificate since the registration number is required for payment of service tax, filing of returns, etc. [Sub-rule (5)].

E. Centralised registration - when to apply?

1) Centralised registration to be obtained if service provided/received from more than one premises

Where a person, liable for paying service tax on a taxable service:

- i. provides such service from more than one premises or offices; or
- ii. receives such service in more than one premises or offices; or
- iii. is having more than one premises or offices, which are engaged in relation to such service in any other manner, making such person liable for paying service tax.

2) Centralised billing or centralised accounting mandatory

Where an assessee providing taxable service from more than one premises or offices, who does not have any centralized billing systems or centralized accounting systems, as the case may be, shall make separate applications for registration in respect of each of such premises or offices to the jurisdictional Superintendent of Central Excise [Sub-rule (3A)].

In other words, application for centralised registration can be obtained only if the assessee has centralised billing system or centralised accounting system in respect of such service, and such centralised billing or centralised accounting systems are located in one or more premises.

3) Centralised registration is optional

Centralised registration is optional and the assessee can also apply for single registration for all the premises.

Note: It is always beneficial to go for centralised registration as it reduces the compliance of applying for multiple registrations, filing multiple returns etc.

4) Jurisdictional Principal commissioner or commissioner to grant the registration certificate

Registration shall be granted by the Principal commissioner or Commissioner of Central Excise having jurisdiction over the premises/offices for which centralized registration is sought (i.e., the premises from where centralized billing/accounting is done) [Sub rule (3)].

F. Other points

1) Change in details to be intimated within 30 days

Change in any information or details furnished by an assessee at the time of obtaining registration or any additional information or detail intended to be furnished should be intimated in Form ST-1 in writing by the assessee to the jurisdictional Assistant/Deputy Commissioner of Central Excise. Such intimation should be made within a period of 30 days of such change [Sub-rule (5A)].

2) Fresh registration certificate to be obtained in case of transfer of business

When a registered assessee transfers his business to another person, the transferee shall obtain a fresh certificate of registration [Sub-rule (6)].

3) Registration certificate to be surrendered if services not provided

Every registered assessee who ceases to provide taxable service shall surrender his registration certificate immediately to the Superintendent of Central Excise [Sub-rule (7)].

4) Compliance to be ensured after registration

On receipt of the certificate under sub-rule (7), the Superintendent of Central Excise shall ensure that the assessee has paid all monies due to the Central Government under the provisions of the Act/Rules/Notifications and thereupon cancel the registration certificate [Sub-rule (8)].

19.3 Issue of invoice, bill or challan or consignment note - [Rule 4A, 4B & 4C of the Service Tax Rules, 1994]

Rule 4A merits importance as the credit on invoices which are not in accordance with rule 4A can be denied.

1) Invoice/Bill/challan to be issued by service provider and input service distributor

As per rule 4A, every person providing taxable service shall issue an invoice or a bill, or a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided. The invoice, bill or challan shall be serially numbered.

Further, every input service distributor who distributes the credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorised by him, for each of the recipient of the credit distributed.

2) Contents of Invoice/Bill/Challan

a) For taxable service provided

The invoice, bill or challan shall be serially numbered and shall contain the following details, namely:

- i. Name, address and the registration number of such person;
- ii. Name and address of the person receiving taxable service;
- iii. Description of service provided or agreed to be provided;
- iv. Value of the taxable service provided or agreed to be provided; and
- v. Service tax payable thereon.

b) For distribution of input service

Invoice issued by the input service distributor shall be serially numbered and shall contain the following details, namely:

- i. Name, address and registration number of the person providing input services and the serial number and date of invoice, bill, or as the case may be, challan;
- ii. Name and address of the said input services distributor;
- iii. Name and address of the recipient of the credit distributed;
- iv. Amount of the credit distributed.

3) Address, serial number not required in case of Banking company, NBFC etc.

A banking company or a financial institution including non-banking financial company providing services to any person enjoys the relaxation that invoice may not be serially numbered and may not contain the address of the service receiver.

4) Invoice of Goods Transport agency shall contain consignment number, weight etc.

In case the service provider is a goods transport agency, an invoice, a bill or, a challan shall include any document, by whatever name called, which shall contain the details of the consignment note number and date, gross weight of the consignment and other required information.

5) Ticket issued to be a valid invoice in case of passenger transport service

In case of transport of passengers [by any mode of transport], the ticket (in any form, including electronic form, whatever may be the name) would be deemed to be the invoice/bill/challan for the purposes of the rule. The ticket would be a valid invoice/bill/challan even if it does not contain registration number of the service provider or address of the service receiver.

For instance, in case of air-travel, the airlines or the agent may not issue a separate invoice to the passenger but may issue the ticket showing the price of such ticket as well. In such a case, the ticket issued by the airlines would be a valid invoice.

6) Invoice not required where payment upto Rs.1,000/- received in excess of the invoiced amount

Wherever the provider of taxable service receives an amount Rs.1,000/- in excess of the amount indicated in the invoice and the provider of taxable service has opted to determine the point of taxation based on the

option as given in the Point of Taxation Rules, 2011 (i.e. in case of a 'continuous supply of services'), no invoice is required to be issued to such extent.

7) Reminder letters to pay renewal premium is not an invoice

Life insurance companies issue reminder notices/letters to the policy holders to pay renewal premiums. Such reminder notices only solicit furtherance of service which if accepted by policy holder by payment of premium results in a service. No tax point arises on account of such reminders. Thus, reminder letters/notices for insurance policies not being invoices would not invite levy of service tax [Circular No. 166/1/2013 ST dated 01.01.2013].

8) Invoice to be issued within 30 days of completion of service or receipt of money

Invoice has to be issued within 30 days from the date of:-

- i. completion of taxable service; or
- ii. receipt of any payment towards the value of such taxable service whichever is earlier.

9) Invoice to be issued within 30 days of 'completion of event' or receipt of money in case of 'continuous supply of services'

In case of continuous supply of service, every person providing such taxable service shall issue an invoice, bill or challan, as the case may be, within 30 days of the each event specified in the contract, which requires the service receiver to make any payment to service provider, is completed.

10) Time-limit of 45 days applies instead of 30 days for Banking company or NBFC etc.

The time-limit for issuance of invoice, bill or challan, as the case may be, shall be 45 days in case where the service provider is:

- i. A banking company;
- ii. A financial institution including a non-banking financial company; providing service to any person.

11) Invoice/bill/challan/consignment note can be authenticated by digital signature

Any invoice, bill or challan issued under rule 4A or consignment note issued under rule 4B may be authenticated by means of a digital signature. The Board may, by notification, specify the conditions, safeguards and procedure to be followed by any person issuing digitally signed invoices.

19.4 Issue of Consignment Note

1) Goods transport agency shall issue a consignment note

As per rule 4B any goods transport agency, which provides service in relation to transport of goods by road in a goods carriage, shall issue a consignment note to the recipient of service.

2) Consignment note must be serially numbered and contain details of consignment

"Consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered. and shall contain the following:

- i. Name of the consignor and consignee,
- ii. Registration number of the goods carriage in which the goods are transported,
- iii. Details of the goods transported,
- iv. Details of the place of origin and destination,

- v. Person liable for paying service tax whether consignor, consignee or the goods transport agency.

3) Consignment note not required if transport of goods is wholly exempted

Where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.

19.5 Service Tax under Reverse charge - [Section 68 & Rule 2(1)(d) of the Service Tax Rules]

Section 68 of the Finance Act, 1994 is the principal section which fixes responsibility to pay service tax. The powers to decide time and manner of payment of service tax have been granted to the Central Government vide rule 6 of the Service Tax Rules, 1994. Generally, it is the *service provider* rendering taxable services who is liable to pay service tax to the Central Government at regular intervals of time (normal charge). However, in certain cases, Government finds it convenient to collect service tax from the *service receiver* (reverse charge).

NORMAL CHARGE - Service provider to pay service tax: Every person providing taxable service to any person shall pay service tax at the rate specified in section 66B (12.36%) in the prescribed manner and within the prescribed period [Section 68(1)].

REVERSE CHARGE - Prescribed persons to pay service tax: When service tax is paid by service receiver, it is known as reverse charge. Payment of service tax under reverse charge is effected in two ways - one where entire service tax is payable by the service receiver and the other where only a part of service tax is payable by the service receiver and the remaining part is payable by the service provider. The first one is referred to as full reverse charge and the latter as partial reverse charge.

Section 68(2) empowers Central Government to notify taxable services in respect of which, service tax shall be paid by prescribed persons in the prescribed manner. Further, the extent of service tax which shall be payable by such person may also be notified and the provisions of service tax law shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider. For ease of reference a summarised table has been provided below detailing nature of services liable under reverse charge, percentage of tax payable and conditions therewith.

19.5.1 Services liable under Full reverse charge

In following cases as tabulated below, entire service tax is payable by the service receiver i.e. 100% liability towards service tax shall be discharged by the service receiver:

Nature of Service	Applicable when	Who is liable to pay
Insurance agent services	Services provided by insurance agent to the insurance company.	Insurance company
Mutual fund agent or distributor	Service provided by a mutual fund agent or distributor to a mutual fund or asset management company.	Mutual fund or asset management company
Agent of lottery tickets	Service provided by a selling or marketing agent of lottery tickets to a lottery distributor or selling agent.	lottery distributor or selling agent

Goods Transport Agency Services	Services provided by a goods transport agency in respect of transportation of goods by road to: a) factory governed by factories act, 1948; b) society registered under societies registration act. c) co-operative society established under any law; d) any dealer, registered under the Central Excise Act; e) any Body corporate established, by or under any law; f) any partnership firm and association of persons.	Person liable to pay freight
Services provided by 'aggregator'	Service provided or agreed to be provided by a person involving an aggregator in any manner.	The 'aggregator' of the service. Provided if the aggregator does not have a physical presence in the taxable territory, then any person representing the aggregator for any purpose in the taxable territory shall be liable for paying service tax; Provided further that if the aggregator does not have a physical presence or does not have a representative for any purpose in the taxable territory, then the aggregator shall appoint a person in the taxable territory for the purpose of paying service tax and such person shall be liable for paying service tax.'
Sponsorship services	Services provided by way of sponsorship to ✓ anybody corporate; or ✓ partnership firm located in the taxable territory.	Receiver of service i.e. the body corporate or the partnership firm.
Legal Services	Legal services provided by advocates or firm of advocates or arbitral tribunal to any business entity located in the taxable territory. Note: Services provided to a business entity by an arbitral tribunal or by an individual advocate or a firm of advocates by way of legal services are exempt from service tax if the turnover of such business entity	Business entity Note: if service is provided to other than business entity then such advocates etc. shall be liable to pay service tax.

	in the preceding financial year is less than Rs.10 lakh/- .	
Services by Government	Any services provided by Government or local authority to a business entity located in the taxable territory excluding,- (i) service of renting of immovable property, and (ii) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994. Note: Service specified in section 66D(i), (ii) & (iii) are as under: i. services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government; ii. services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; iii. transport of goods or passengers.	Business Entity Note: In case of service of renting of immovable property and in case of services specified in section 66D(i), (ii) & (iii), government or local authority shall be liable to pay service tax and not the business entity.
Import of services	Services provided by a person located in a non-taxable territory to person located in the taxable territory.	Recipient of service
Directors Services	Services provided by a director of a company or a body corporate to the said company or the body corporate.	Company or the body corporate
Recovery agents services	The taxable services provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company.	Banking company or Financial institution of NBFC
Manpower supply services	Applicable when: Service provider: Individual/HUF/AOP/Partnership firm (whether registered or not) Service Receiver: Body corporate “Services of supply of manpower provided by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in taxable territory to a business entity registered as body corporate, located in the taxable territory.”	Body corporate
Security services	Applicable when: Service provider: Individual/HUF/AOP/Partnership firm (whether registered or not) Service Receiver: Body corporate “Security services provided by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in	Body corporate

	taxable territory to a business entity registered as body corporate, located in the taxable territory.”	
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19.5.2 Services liable under partial reverse charge

In following cases as tabulated below, service tax is partially liable by the service provider and partially service receiver except in case of service of renting of motor vehicle where both option of full reverse charge and partial reverse charge is available and has been clubbed here for ease of reference:

Nature of service	Description	SP	SR
Renting of vehicle	Applicable when: Service provider: Individual/HUF/AOP/Partnership firm (whether registered or not) Service Receiver: Body corporate “services provided by way of renting of a motor vehicle designed to carry passengers <u>on abated value</u> to any person who is not engaged in the similar line of business by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory.”	Nil	100%
Renting of vehicle	Applicable when: Service provider: Individual/HUF/AOP/Partnership firm (whether registered or not) Service Receiver: Body corporate “services provided by way of renting of a motor vehicle designed to carry passengers <u>on non-abated value</u> to any person who is not engaged in the similar line of business by any individual/HUF/partnership firm (whether registered or not) including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory.”	50%	50%
Works contract service	Applicable when: Service provider: Individual/HUF/AOP/Partnership firm (whether registered or not) Service Receiver: Body corporate “provided or agreed to be provided in service portion in execution of works contract.” Note: In works contract services, where both service provider and service receiver are the persons liable to pay tax, service receiver has the option of choosing the valuation method as per choice, independent valuation method adopted by the service provider.	50%	50%

Definitions:

- 1) **'Partnership firm'** includes limited liability partnership [Rule 2(1)(cd)].
- 2) **'Body corporate'** includes a company incorporated outside India but does not include-
 - a) a corporation sole;
 - b) a co-operative society registered under any law relating to co-operative societies; and
 - c) any other body corporate (not being a company as defined in this Act) which the Central Government may, by notification in the Official Gazette, specify in this behalf [Rule 2(1)(bc)].
- 3) **'Goods carriage'** means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods [Rule 2(1)(c1a)].
- 4) **'Insurance agent'** means an insurance agent licensed under Section 42 of the Insurance Act, 1938 who receives agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance [Rule 2(1)(cba)].
- 5) **'Legal service'** means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority [Rule 2(1)(cca)].
- 6) **'Supply of manpower'** means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control [Rule 2(1)(g)].
- 7) **'Security services'** means services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity [Rule 2(1)(fa)].
- 8) **'aggregator'** means a person, who owns and manages a web based software application, and by means of the application and a communication device, enables a potential customer to connect with persons providing service of a particular kind under the brand name or trade name of the aggregator; [Rule 2(1)(aa)]
- 9) **'brand name or trade name'** means, a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as an invented word or writing, or a symbol, monogram, logo, label, signature, which is used for the purpose of indicating, or so as to indicate a connection, in the course of trade, between a service and some person using the name or mark with or without any indication of the identity of that person; [Rule 2(1)(bca)]

19.6 Records and access to registered premises [Rule 5 & Rule 5A]

1) Records maintained under various laws are acceptable

The records (including computerised data) as maintained by an assessee in accordance with various laws in force from time to time shall be acceptable. It implies that the nature of records to be maintained and the form in which the records are to be maintained are left at the judgment of the assessee [Sub-rule (1)].

2) List of records maintained to be furnished with first return

Every assessee shall furnish to the Superintendent of Central Excise, at the time of filing of return for the first time, a list in duplicate, of-

- (i) all the records prepared or maintained by the assessee for accounting of transactions in regard to-
 - a) providing of any service;
 - b) receipt or procurement of input services and payment for such input services;
 - c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;
 - d) other activities, such as manufacture and sale of goods, if any.
- (ii) all other financial records maintained by him in normal course of business. [Sub-rule (2)]

3) Records to be preserved for 5 years

All the records maintained by an assessee in this regard shall be preserved at least for a period of 5 years immediately after the financial year to which such records pertain [Sub-rule (3)].

4) Authorised officers shall have access to any registered premises

An officer authorised by the Principal commissioner or Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue [Sub-rule (1) of rule 5A].

5) Records, trial balance etc. to be made available on demand

Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Principal commissioner or Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be,-

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

6) Records can be preserved in electronic form and can be authenticated by digital signature

Records under this rule may be preserved in electronic form and every page of the record so preserved shall be authenticated by means of a digital signature. The Board may, by notification, specify the conditions, safeguards and procedure to be followed by an assessee preserving digitally signed records.

19.7 Payment of Service Tax - [Rule 6(1)]

1) Due date for payment of tax

Category of assessee	Month	Due date
Assessee other than individual or proprietary firm or partnership firm	a) All months except March	a) <u>E-payment</u> – 6th of the following month. b) <u>Other case</u> – 5th of the following month.
	b) For the month of March	By 31st March
Individual or proprietary firm or partnership firm	a) All Quarters except March	a) <u>E-payment</u> – 16th of the following quarter. b) <u>Other case</u> – 15th of the following quarter.
	b) For the Quarter ending March	By 31st March

Conceptual Notes:

- 1) Every assessee shall electronically pay the service tax payable by him, through internet banking Provided that the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction, may for reasons to be recorded in writing, allow the assessee to deposit the service tax by any mode other than internet banking.
- 2) Where the tax is paid by e-payment, then the same should be paid by 8 PM on the due date. If the same is paid later than 8 PM on the due date, then it shall be deemed to have been paid on the next date.
- 3) The duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.
- 4) If the assessee deposits the duty by cheque, the **date of presentation of the cheque** in the bank shall be deemed to be the date on which the duty has been paid subject to realization of that cheque.
- 5) Service tax is to be paid on the value of taxable services which is charged by an assessee. Any income tax deducted at source is included in the charged amount. Therefore, service tax is to be paid on the amount of income tax deducted at source also.

19.7.1 Payment of service tax in advance - [Rule 6(2)]

1) Option to pay service tax in advance

The assessee has been provided a facility to make advance payment of service tax on his own and adjust the amount so paid against the service tax which he is liable to pay for the subsequent period.

2) Details to be intimated to jurisdictional superintendent and in returns

Assessee needs to intimate:

- the details of the amount of service tax paid in advance, to the Jurisdictional Superintendent of Central Excise within a period of 15 days from the date of such payment.
- The details of the advance payment made, and its adjustment, if any in the subsequent return to be filed under section 70 [Sub-rule (1A) of rule 6].

19.7.2 Adjustment of tax paid in excess - [Rule 6(3)]

1) Excess service tax paid due to deficient provision of re-negotiation can be adjusted anytime

As per rule 6(3), where an assessee:

- Issues an invoice for service to be provided; or
- Receives any payment for service to be provided; or
- renegotiates the amount of invoice due to any terms contained in a contract

and later such service is not so provided by him either wholly or partially for any reason or such service is provided in deficient then the assessee may take the credit of such excess service tax paid by him.

2) Adjustment possible only if amount refunded or credit note issued

The said credit of the excess service tax paid can be taken only if the assessee:

- has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or
- has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.

3) Adjustment not possible if the same is due to clerical mistake

Rule 6(3) does not allow adjustment of excess payment of service tax per se, say due to clerical mistake etc. In such cases the assessee has to follow the procedure laid down in section 11B of Central Excise Act to claim the refund of excess tax paid.

19.7.3 Adjustment of excess service tax paid - [Rule 6(4A) & 6(4B)]

1) Excess tax paid can be adjusted in subsequent month or quarter

Where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be.

2) Adjustment not possible if payment made due to incorrect interpretation of law etc.

However, self-adjustment of excess credit shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification.

19.7.4 Adjustment of excess amount paid as service tax in case of renting of immovable property service - [Rule 6(4C)]

1) Property taxes paid can be claimed as deduction

In case of renting of immovable property service, a deduction of property taxes paid in respect of the immovable property is allowed from the gross amount charged for renting of the said immovable property.

2) Deduction can be availed upto one year, if not availed earlier

Where any amount towards service tax liability is paid in excess on account of non-availment of such deduction, then the same may be adjusted against the service tax liability within 1 year from the date of payment of such property tax.

3) Details to be intimated to jurisdictional superintendent within 15 days

The details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of 15 days from the date of such adjustment.

19.7.5 Provisional payment of service tax - [Rule 6(4), (5) & (6)]

1) Request for provisional assessment to be made if unable to estimate tax liability

In case the assessee is unable to correctly estimate, at the time of the deposit, the actual amount of service tax for any month or quarter, he may make a written request to Assistant/Deputy Commissioner of Central Excise for making payment of service tax on provisional basis.

2) AC/DC may allow payment of tax on provisional basis

The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, on receipt of such request, may allow payment of service tax on provisional basis on such value of taxable service as may be specified by him and the provisions of the Central Excise (No. 2) Rules, 2001, relating to provisional assessment except so far as they relate to execution of bond, shall, so far as may be, apply to such assessment.

3) Details of tax paid and payable to be submitted in form ST - 3A

Where an assessee under sub-rule (4) requests for a provisional assessment he shall file a statement giving details of the difference between the service tax deposited and the service tax liable to be paid for each month in a memorandum in Form ST-3A accompanying the quarterly or half - yearly return, as the case may be.

4) AC/DC to complete assessment after calling for documents/records

Where the assessee submits a memorandum in Form ST-3A under sub-rule (5), it shall be lawful for the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, to complete the assessment, wherever he deems it necessary, after calling such further documents or records as he may consider necessary and proper in the circumstances of the case.

19.8 Special provisions for payment of service tax

In case of certain business sectors, special rates are prescribed for payment of service tax i.e. in the case of air travel agent, life insurance business, purchase/sale of foreign currency, marketing/promotion of lottery etc. In all these instances the calculation of service tax liability can be calculated as per the normal rate or as per the special rate as per the option of the assessee.

19.8.1 Air Travel Agent - [Rule 6(7)]

Person liable for paying the service tax in relation to the services provided by an air travel agent, shall have the option to pay following amounts instead of paying service tax at the rate of 12%:

Domestic bookings of passage for travel by air	0.7% of the basic fare
International bookings of passage for travel by Air	1.4% of the basic fare

Points to be noted:**1) Option once exercised cannot be withdrawn during remaining financial year**

The option once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances.

2) Meaning of basic fare: For the purposes of this sub-rule, the expression "basic fare" means that part of the air fare on which commission is normally paid to the air travel agent by the airline.

19.8.2 Insurer Carrying on Life Insurance Business - [Rule 6(7A)]

An insurer carrying on life insurance business shall have the option to pay tax:

(i) On the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service;

(ii) Where amount of the gross premium allocated for investment or savings on behalf of policy holder is not intimated to the policy holder at the time of providing of service equivalent to:-

First year	3.5% of the gross amount of premium charged
Subsequent Year	1.75% of the gross amount of premium charged

towards the discharge of his service tax liability instead of paying service tax at the rate of 12%.

Note: Such option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance.

19.8.3 Sale/purchase of foreign currency including money changing - [Rule 6(7B)]

Person liable to pay service tax in relation to purchase or sale of foreign currency, including money changing, has an option to pay an amount at the following rates instead of paying service tax at the rate of 12%:-

Upto Rs.1,00,000	0.14% of the gross amount of currency exchanged; or Rs.35 whichever is higher
Exceeding Rs.1,00,000 and upto Rs.10,00,000	Rs.140 + 0.07% of the (gross amount of currency exchanged - Rs.1,00,000)
Exceeding Rs.10,00,000	Rs.770 + 0.014% of the (gross amount of currency exchanged - Rs.10,00,000); or Rs.7,000/- whichever is lower

Points to be noted:

1) Option once exercised cannot be withdrawn during remaining financial year

The person providing the service shall exercise such option for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

19.8.4 Services of promotion, marketing or organizing/assisting in organizing lottery - [Rule 6(7C)]

An optional mode of payment of service tax has been provided for the taxable service of promotion, marketing or organising/assisting in organising lottery in the following manner instead of paying service tax at the rate of 12%:-

Particulars	New Rate
Where the guaranteed lottery prize payout is > 80%	Rs.8,200/- on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.
Where the guaranteed lottery prize payout is < 80%	Rs.12,800/- on every Rs.10 Lakh (or part of Rs.10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw.

Points to be noted:

1) In case of online lottery, the aggregate face value of lottery tickets will be the aggregate value of tickets sold.

2) The distributor/selling agent will have to exercise such option within a period of one month of the beginning of each financial year. The new service provider can exercise such option within one month of providing the service.

3) The option once exercised cannot be withdrawn during the remaining part of the financial year.

19.9 Service Tax Returns – [Section 70, Rule 7, 7B & 7C]

Form of return	Return/revised return has to be furnished in Form ST-3	
Periodicity	Half-yearly (April to September) & (October to March)	
Due Date	April to September - to be filed by October 25 th October to March - to be filed by April 25 th	
Penalty for delay in filing	Period of Delay	Late fee
	First 15 days from due date	Rs.500/-
	More than 15 days but less than 30 days	Rs.1,000/-
	Beyond 30 days	Rs.1,000/- plus Rs.100/- for every day from the 31 st day till the date of furnishing the said return but upto a maximum of Rs.20,000/-
Revised return	To be submitted in Form ST-3 , to correct a mistake or omission, within a period of 90 days from the date of submission of the original return.	
Contents of Return	General details, like ✓ financial year, ✓ half year period (April-September or October-March), ✓ name of the assessee, ✓ registration number of the premises for which return is being filed, ✓ category of taxable services are required to be furnished. Apart from this, some significant month-wise details also need to be furnished. For instance: ✓ amount received towards taxable service(s) provided and amount received in advance towards taxable service(s) to be provided; ✓ Gross amount billed for exempted services and services exported without payment of tax; ✓ amount billed for services on which tax is to be paid; ✓ abatement claimed – value; ✓ notification number of abatement and exemption; ✓ service tax payable, education cess payable; ✓ GAR-7 challan date and number'; ✓ credit details for service tax provider/recipient.	
Return by input service distributor	Half yearly returns giving out the details of credit received and distributed in form ST - 3 by the following due date: April to September - to be filed by October 31st October to March - to be filed by April 30th	
Single return	For an assessee who provides more than one taxable service, only a single	

sufficient for multiple services provided	return will be sufficient. However, the details in each of the columns of the Form ST-3 have to be furnished separately for each of the taxable service rendered by him.
Nil return to be filed	Even if no service has been provided during a half year and no service tax is payable; the assessee has to file a Nil return within the prescribed time limit.
First Return	Every assessee shall furnish to the Superintendent of Central Excise, <u>at the time of filing of return for the first time</u> , a list in duplicate, of- - all the records prepared or maintained by the assessee for accounting of transactions in regard to,- - providing of any service, whether taxable or exempted; - receipt or procurement of input services and payment for such input services; - receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods; - other activities, such as manufacture and sale of goods, if any. - all other financial records maintained by him in the normal course of business.

Notes:**1) E-filing of returns is mandatory for the assesses**

With effect from 01.10.2011, every assessee will have to submit half-yearly service tax return electronically, irrespective of the amount of service tax paid by him in the preceding financial year.

2) Late fee may be reduced/waived if service tax payable is nil

Where the gross amount of service tax payable is nil, the Central Excise Officer may, on being satisfied that there is sufficient reason for not filling the return, reduce or waive the penalty (late fee) [Proviso to rule 7C].

3) Relevant date for recovery to be the date of filing of revised return

It has been clarified that where an assessee submits a revised return, the '**relevant date**' for the purpose of recovery of service tax, if any, under section 73 of the Act shall be the date of submission of such revised return.

Example:

BCC Ltd. is engaged in providing taxable services. For the half year ended on 30th September, it filed its return on:-

Case I: 9th November

Case II: 23rd November

Case III: 25th January

Determine the amount of late fee payable by BCC Ltd. in each of the independent cases.

Solution:

Case I - Return has been filed with a delay of 15 (i.e. 6+9) days from the date prescribed for submission of the return therefore penalty shall be Rs.500/-.

Case II - Return has been filed with a delay of 29 (i.e. 6+23) days from the date prescribed for submission of the return therefore penalty shall be Rs.1,000/-.

Case III - Return has been filed with a delay of 92 (i.e. 6+30+31+25) days from the date prescribed for submission of the return. Penalty shall be lower of the following two amounts:-

(i) Rs.1,000 + (Rs.100 × 62 days)

(ii) Rs.20,000/-

Late fees leviable is Rs.7,200/-

19.10 Audit of service tax assesses - [Sec 72A]

Section 72A provides for the special audit by the practicing Chartered Accountant/Cost Accountant.

1) Commissioner may order Special audit based on following circumstances

If the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax (herein referred to as "such person"),—

- i. has failed to declare or determine the value of a taxable service correctly; or
- ii. has availed and utilised credit of duty or tax paid—
 - a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or
 - b) by means of fraud, collusion, or any wilful misstatement or suppression of facts; or
- iii. has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner,

then he may direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

2) CA/CMA shall submit duly certified report to Commissioner within the specified period

The said Chartered Accountant or Cost Accountant shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.

3) Opportunity of being heard needs to be given

The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the special audit and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

4) Special audit applicable even if accounts are already audited under any other law

The provisions of subsection (1) shall apply even if the accounts of such person have been audited under any other law for the time being in force.

Note:

Director General of Audit, New Delhi has published Service Tax Audit Manual, 2010. As per the guidelines, frequency of audit the taxpayers would be as per following norms:-

Service tax payment (Cash + CENVAT)	To be audited
Above Rs.3 crores (Mandatory Units)	every year
Between Rs.1 crore and Rs.3 crores	once every two years
Between Rs.25 lakhs and Rs.1 crore	once every five years
Upto Rs.25 lakhs	2% of taxpayers to be audited every year

19.11 Large Tax Payer

LTU scheme is the beneficial scheme which would act as the single window facilitation centre for all large entities paying Central Excise Duty/Service Tax/Corporate tax. This was introduced as there was a need to monitor large tax paying entities in revenue interest [The concept of large tax payer has been discussed in detail in Chapter 5 of Module-1: Central Excise]. Rule 2(1)(cc) of the Service Tax Rules, 1994 defines “large tax payer” to have the meaning assigned to it in the Central Excise Rules, 2002. Procedures and facilities for large tax payer: Rule 10 has been inserted in the Service Tax Rules, 1994 which lays down the procedure and facilities for the large taxpayer. The provisions of this rule are discussed below:

Notwithstanding anything contained in these rules, the following shall apply to a large taxpayer:

1) Single or centralized return as the case may be needs to be filed

A large taxpayer shall submit the returns, as prescribed under these rules, for each of the registered premises. A large taxpayer who has obtained a centralized registration under rule 4(2) shall submit a consolidated return for all such premises.

2) Records to be made available in electronic form, if demanded

A large taxpayer, on demand, may be required to make available the financial, stores and CENVAT credit records in electronic media, such as, compact disc or tape for the purposes of carrying out any scrutiny and verification, as may be necessary.

3) Option to opt out with intimation of 30 days in advance

A large taxpayer may, with intimation of at least 30 days in advance, opt out to be a large taxpayer from the first day of the following financial year.

4) Notice deemed to have been issued by the Central excise officer until accepted by the Principal chief commissioner (LTU) or chief commissioner (LTU)

Any notice issued but not adjudged by any of the Central Excise Officer administering the Act or rules made thereunder immediately before the date of grant of acceptance by the Chief Commissioner of Central Excise, (Large Taxpayer Unit), shall be deemed to have been issued by Central Excise Officers of the said unit.

5) Service tax rules apply to LTU unless inconsistent

Provisions of these rules, in so far as they are consistent with the provisions of this rule shall mutatis mutandis apply in case of a LTU.

Chapter 21 - Appeals

Section Referencer

Particulars	Central Excise	Customs	Service Tax ##
Appeals to Commissioner (Appeals)	35	128	85
Procedure in Appeal	35A	128A	
Appeals Tribunal	-	129	
Appeals to the Appellate Tribunal	35B	129A	86
Orders of Appellate Tribunal	35C	129B	
Procedure of Appellate Tribunal	35D	129C	
Powers of Board or Commissioner to pass certain orders	35E	129D	84/86
Revision by Central Government	35EE	129DD	
Deposit, pending appeal, of duty demanded or penalty levied	35F	129E	83
Interest on delayed refund of amount deposited under the proviso to section 35F/129E	35FF	129EE	83
Appeal to High Court	35G	130	83
Powers of High Court or Supreme Court to require the statement to be amended	35I	130B	83
Case before High Court to be heard by not less than 2 judges	35J	130C	83
Decision of High Court or Supreme Court on the case stated	35K	130D	83
Appeal to supreme court on the case stated	35L	130E	83
Hearing before supreme court	35M	130F	83
Sums due to be paid notwithstanding reference etc.	35N	131	83
Exclusion of time taken for copy	35O	131A	83
Appearance by authorised representative	35Q	146A	83
Appeal not to be filed in certain cases	35R	131BA	83
Presumption as to documents in certain cases	36A	139	83
Service of decisions, summons, orders etc.	37C	153	83
Effect of amendments etc, of rules, notifications or orders	38A	159A	83

By virtue of section 83 of the finance act, 1994 (service tax law), certain provisions of the Central Excise Act, 1944 apply for the purpose of levy of service tax. The same is indicated by stating section 83 in the table.

21.1 Introduction

In taxation laws, litigation is inevitable as the taxpayer interprets the provisions to his benefits and the revenue interprets to its benefit. Appeal is a remedy available to the aggrieved by the decision or order passed by the authority, wherein the higher authority decides about the correctness of the said decision or order. It is important to understand that if appeal is not preferred, the order passed even if it were incorrect / questionable would become final. "The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi judicial adjudications. The right to

appeal is a statutory right and it can be circumscribed by the conditions in the grant.” **[Vijay Prakash D. Mehta v. Collector of Customs 1989 (39) E.L.T. 178 (S.C.)]**

21.2 Appellate stages

Order Passed by	Appellate authority
All officers upto & including Additional Commissioner	Appeal lies before Commissioner (Appeals)
Principal Commissioner/ Commissioner or Commissioner (Appeals)	Appeal lies before CESTAT, except in the following cases where the order relates to:– a) A case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; b) A rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; c) Goods exported outside India (except to Nepal or Bhutan) without payment of duty;
Commissioner (Appeals)	Revision application to Central Government (in matters relating to rebate of duty on exports, export without payment of duty, loss of goods in transit and processing loss). No further appeal.
CESTAT	Appeal lies before Supreme Court (matters relating to valuation and rate of duty)
CESTAT	Appeal lies before High Court (Other than matters relating to valuation and rate of duty)
High Court	Appeal lies before Supreme Court

21.3 Appeals to Commissioner (Appeals)

When to file an appeal?	If aggrieved by an order passed by all adjudicating officers upto & including Additional Commissioner
Time-limit for filing appeal?	Within 60 days from the date of the communication of decision/order. Extension: further 30 days by Commissioner (Appeals) on sufficient cause being shown. Note: 60 days and 30 days must be read as 2 months and 1 month in case of service tax.
Adjournment for hearing	Commissioner (Appeals) may grant adjournment maximum of 3 times to a party, if sufficient cause is shown, at any stage of proceeding.
Procedure in appeal?	1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard.

	2) At the hearing of an appeal, Commissioner (Appeals) may allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if he is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable.
Order by Commissioner (Appeals)	1) The Commissioner (Appeals) can pass such order, as he thinks fit, confirming, modifying or annulling the decision or order appealed against.
Principles of natural justice	Order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order. Further, where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit as specified to show cause against the proposed order.
Time-limit of passing order?	<u>Where it is possible to do so</u> , commissioner (Appeals) must hear and decide every appeal within a period of 6 months from the date on which it is filed.
Communication of the order?	Order passed shall be communicated to the appellant, the adjudicating authority, the Principal Chief Commissioner/ Chief Commissioner of Central Excise and the Principal Commissioner/ Commissioner of Central Excise.

21.4 Appeals to Appellate Tribunal

When to file an appeal?	1) Any assessee aggrieved by an order passed by Principal Commissioner/ Commissioner or Commissioner (Appeals); or 2) A Committee of Commissioners may, against an order passed by the Commissioner (Appeals) direct any Central Excise Officer authorized in this behalf to file an appeal to the Appellate Tribunal against such order.
Orders not appealable?	Order passed by Commissioner (Appeals) if such order relates to - <u>Excise:</u> - a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; - a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; - goods exported outside India (except to Nepal or Bhutan) without payment of duty;

	Customs: - any goods imported or exported as baggage; - any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or are short of the quantity required to be unloaded at that destination; - payment of drawback as provided in Chapter X, and the rules made thereunder.	
Rejection of appeal by CESTAT?	The Appellate Tribunal may, in its discretion, refuse to admit an appeal where in any disputed case, (other than a case relating to the determination of rate of duty or valuation of goods) the difference in duty involved or the duty involved or the fine or penalty does not exceed Rs.2,00,000/- .	
Time-limit for filing an appeal?	Every appeal under this section shall be filed within 3 months from the date on which the order sought to be appealed against is communicated to the Principal Commissioner/ Commissioner of Central Excise, or, as the case may be, the other party preferring the appeal.	
Who should file Memorandum of cross objection and time-limit?	On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may file a memorandum of cross-objections within 45 days of the receipt of the notice.	
Fee for filing an appeal?	Amount of duty, interest demanded and penalty levied	Fee for filing an appeal
	Less than or equal to Rs.5,00,000/-	Rs.1,000/-
	More than Rs.5,00,000/- but not exceeding Rs.50,00,000/-	Rs.5,000/-
	More than Rs.50,00,000/-	Rs.10,000/-
	Application made for rectification of mistake or for restoration of an appeal or an application	Rs.500/-
	Rectification application filed by or on behalf of CCEX	Nil
	Appeal filed by the department	Nil
	In the case of filing of a memorandum of cross-objections	Nil
Order by appellate Tribunal?	The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against. The Tribunal may even refer the case back to adjudicating authority for fresh adjudication.	
Adjournment for hearing	CESTAT may grant adjournment maximum of 3 times to a party, if sufficient cause is shown, at any stage of proceeding.	
Time-limit of passing order?	<u>Where it is possible to do so</u> , CESTAT must hear and decide every appeal within a period of 3 years from the date on which it is filed.	
Time-limit for Rectification of Mistake?	- The Appellate Tribunal may, at any time within 6 months from the date of the order may with a view to rectifying any mistake apparent from the record can amend any order passed by it. However, an amendment which has the effect of increasing the liability of the other party shall be made only after giving a notice and allowing a reasonable opportunity of being heard. - Such mistake must have been brought to its notice by Principal Commissioner/ Commissioner of Central Excise or the other party to the	

	Appeal.
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21.5 Pre-Deposit percentage of duty or penalty imposed before filing appeal

Erstwhile section 35F of Central Excise Act, 1944 mandated that an appeal could be filed before Commissioner (Appeals) and/or CESTAT only when the duty demanded or the penalty levied in the order being appealed against was deposited with the adjudicating authority. However, Commissioner (Appeals) and CESTAT were empowered to waive off such pre-deposit if the same caused undue hardship to the appellant. Due to this provision, the appellants invariably opted to file an application seeking two reliefs namely:

- Waiver of the condition of pre-deposit; and
- Staying the recovery proceedings till appeal is disposed of

To expedite the process of disposal of appeals and with a view to freeing appellate authorities from hearing stay applications and to take up regular appeals for final disposal, the said provisions have been substituted with effect from 06.08.2014. The new provision is tabulated below for ease of reference:

Stage of appeal	Appellate Authority	Quantum of pre-deposit
First Appeal	Commissioner (Appeals) or CESTAT	7.5% of the duty where only duty or both duty and penalty are in dispute (OR) 7.5% of the penalty where only penalty is in dispute
Second Appeal	CESTAT	10% of the duty where only duty or both duty and penalty are in dispute (OR) 10% of the penalty where only penalty is in dispute

Points to be noted:

- Quantum of pre-deposit shall in any case not exceed **Rs.10 Crore**.
- Pre-deposit shall be computed as a percentage of only duty demanded even in cases where dispute involves both duty demanded and penalty levied. Only when penalty alone is in dispute, would the pre-deposit be computed on the basis of penalty.
- New section 35F does not include interest payable within the ambit of duty demanded. Thus, pre deposit of 7.5%/10% would exclude interest, if any, payable on the duty demanded.

21.6 CBEC clarification on Pre-Deposit

CBECE has issued Circular No. 984/08/2014 CX dated 16.09.2014 which clarifies the following:

1) Quantum of pre-deposit:

a) 10% of duty demanded or penalty imposed must be paid before tribunal for order against Commissioner (Appeals)

Where an appeal is made against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This amount may or may not be same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

b) Pre-deposit percentage must be calculated on aggregate of all penalties, if penalty alone is in dispute

Where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, pre-deposit would be calculated based on the aggregate of all penalties imposed in the order sought to be appealed against.

2) Payments made during investigation:

c) Payments made during investigation can be off-set from pre-deposit requirement

Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10% (subject to a limit of Rs.10 crore), will be considered as payments towards pre-deposit for filing the appeals.

d) No Coercive action can be taken by department if proof of pre-deposit can be established

In respect of appeals filed on or after 06.08.2014, no coercive measures for the recovery of balance amounts of demands of tax and penalties can be taken if the party/assessee shows the proof of payment of pre-deposit (7.5% / 10%) and the copy of appeal memo.

e) Recovery of entire amount with interest can be made only on final disposal of the appeal, subject to stay by the higher authority

Recovery can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department unless order of Commissioner (Appeals) or CESTAT is stayed by authority/higher court. The amount to be recovered will include interest calculated from the date duty became payable till the date of payment.

3) Refund of Pre-Deposit:

f) Refund of amount pre-deposited can be filed in case of a favourable order

Refund of pre-deposit is not refund of duty and hence the same will not be governed by provisions of refund section 11B of Central Excise Act/section 27 of Customs Act, 1962. Therefore, once the appeal is decided in favour of the assessee, he can apply for refund of pre-deposit.

g) Refund must be granted within 15 days of receipt of letter seeking the same

Refund of pre-deposit along with interest will have to be made within 15 days of receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

h) Refund cannot be held on the grounds that department is seeking further appeal

Refund of pre-deposit should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the party.

i) Even in case of remand, pre-deposit needs to be refunded along with interest

In the event of a remand of order back to the lower authorities, refund of the pre-deposit shall be payable along with interest.

21.7 Interest on delayed refund of amount pre-deposited

1) Delayed in refund of pre-deposit shall be payable along with interest @ 6%

Where an amount deposited by the appellant under the aforesaid provisions is required to be refunded consequent upon the order of the appellate authority, then interest will have to be paid on the refund of such pre-deposit from the date of its payment to the date of refund. The rate of interest would be anywhere

between 5% to 36% and would be notified separately. Notification No.24/2014 CE (NT) dated 12.08.2014 has been issued to specify 6% as the rate of interest payable on delayed refund of pre-deposit.

21.8 Monetary limits for filing of appeals by the Department

1) Department shall file appeal only if the duty involved is above the threshold limit fixed

As per the National Litigation Policy, in Revenue matters, appeal shall not be filed if the amount involved is less than the monetary limit fixed by the Revenue authorities for the said purpose. CBEC has issued the instructions fixing the following monetary limits of duty as tabulated below, below which an appeal shall not be filed by the Department in CESTAT, High Court and Supreme Court:-

Appellate Forum	Monetary limit
CESTAT	5,00,000
High Court	10,00,000
Supreme Court	25,00,0000

Following clarifications have been given by the Board with regard to the monetary limits:

- (i) Monetary limit shall apply on the disputed duty and not on the total duty demanded in a case.
- (ii) Monetary limits being would apply to cases of refund as well.
- (iii) Monetary limits will not be applicable to application filed before the Joint Secretary (Revision Application).

21.9 Review by Committee of Chief Commissioners and Principal Commissioner/Commissioner

Which order can be reviewed?	1) Order passed by Principal Commissioners/ Commissioners of Central Excise can be reviewed by Committee of Chief Commissioners of Central Excise; 2) Orders passed by officers below the rank of Principal Commissioner/ Commissioner can be reviewed by Principal Commissioner/ Commissioner of Central Excise.
Procedure of Review by Committee of Chief Commissioners of Central Excise	Committee of Chief Commissioners of Central Excise may of its own motion, call for and examine the record of any proceeding in which a Principal Commissioner/ Commissioner of Central Excise has passed any order to satisfy itself upon the legality or propriety of the order. Thereafter, the Committee of Chief Commissioners may direct such Commissioner or any other Commissioner to file an appeal to the Appellate Tribunal and to determine such points as may be specified by it.
Difference in opinion in the Committee of Chief Commissioners of Central Excise	Where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board. If the Board, after considering the facts of the order, is of the opinion that the decision or order passed by the Principal Commissioner/ Commissioner of Central Excise is not legal or proper, it may direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order.
Procedure for Review	Similar powers of review as explained above are granted to the Principal

by Principal Commissioner/ Commissioner of Central Excise	Commissioner/ Commissioner of Central Excise in respect of orders passed taken by the adjudicating authority subordinate to him. The Principal Commissioner/ Commissioner may direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner (Appeals) to determine such points as may be specified by him.
Time limit for passing the order?	Every order as specified above shall be made within a period of 3 months from the date of communication of the decision or order of the adjudicating authority. However, the Board may on sufficient cause being shown extend the said period by another 30 days .
Time limit for making the application to CESTAT/Commissioner (Appeals)?	Principal Commissioner/ Commissioner or the adjudicating authority shall make an application to the Appellate Tribunal or the Commissioner (Appeals) within 1 month from the date of communication of the order of the Committee of the Chief Commissioner or Principal Commissioner/ Commissioner. Note: The time-limit of 1 month shall be replaced as 4 months in case of service tax where application is to appellate tribunal, it shall remain as 1 month in case an application is to commissioner (appeals).

21.10 Revision by the Central Government

Orders that can be revised?	Revision application can be filed with the Central Government against the orders passed by the Commissioner (Appeals), if such order relates to: (a) loss of goods in transit from factory to warehouse or from warehouse to warehouse; (b) rebate of duty of excise on goods exported; (c) goods exported outside India (except Nepal and Bhutan) without payment of duty; (d) processing loss; Note: In respect of the orders passed by the Commissioner (Appeals) in relation to any of the matters listed above, appeal will not lie to Appellate Tribunal, but a revision application will have to be filed with the Central Government.	
Minimum amount of duty/fine/penalty for filing a revision application?	The Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed Rs.5,000/- .	
Revision application by the Department?	The Principal Commissioner/ Commissioner of Central Excise may direct the proper officer to make an application to the Central Government for revision of the order passed by the Commissioner (Appeals) if he thinks that such order is not legal or proper.	
Time limit for filing the application?	The revision application by an assessee has to be made within 3 months from the date of the communication of the disputed order to the applicant. However, such period can be extended by a further period of 3 months by the Central Government, if it is satisfied by the sufficiency of the cause.	
Fee for filing the	Amount of duty, interest demanded and	Fee for filing an

application?	fine/penalty levied		appeal
	Less than or equal to Rs.1,00,000/-		Rs.200/-
	More than Rs.1,00,000/-		Rs.1,000
	However, no such fee shall be payable if the application is filed by the proper officer on behalf of the Principal Commissioner/ Commissioner of Central Excise.		
Revision Order?	The Central Government may, of its own motion, annul or modify any order.		
Principles of Natural justice	No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed unless the person affected by the proposed order has been given notice to show cause against it within 1 year from the date of the order sought to be annulled or modified. Further, in case of non/short levy of excise duty, no order levying or enhancing the duty shall be made unless the aggrieved person is given notice to show cause against it within the time-limit as specified in the act.		

21.11 Appeal to High Court

Who can file appeal?	Any person aggrieved by an order passed in appeal by the Appellate Tribunal (not being an order relating the rate of duty or value).
When appeal be accepted?	If the High Court is satisfied that the case involves a substantial question of law.
Time period	Any party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court within 180 days from the date on which the order appealed against is received.
Filing Fee?	Appeal needs to be accompanied by a fee of Rs.200/- . No filing fee in case appeal is filed by the department.
Condonation for delay in filing the appeal?	The High Court has power to condone the delay and admit an appeal after the expiry of the period of 180 days , if it is satisfied that there was sufficient cause for not filing the same within that period.
Hearing on Question of Law?	Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. However, the Court has the power to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.
Order of the High Court	The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit. The High Court may determine any issue which has not been determined by the Appellate Tribunal or has been wrongly determined by the Appellate Tribunal, by reason of a decision on a question of law.

	Decision by majority of the Judges: When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges. Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it
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21.12 Appeal to Supreme Court

When appeal can be filed?	1) Any person aggrieved by the judgment of the High Court can file an appeal to supreme court if the High Court certifies that the case is fit for appeal to the Supreme Court. The High Court can certify any case on its own motion or on an oral application made by or on behalf of the aggrieved party, immediately after passing of the judgment. 2) Any person aggrieved by an order of the Appellate Tribunal in relation to the determination of rate of duty or value.
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Chapter 22 - Advance Ruling & Settlement Commission

Section Referencer

Particulars	Central Excise	Customs	Service Tax ##
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Vacancies etc, not to invalidate proceedings	23B	28G	96B
Application for advance ruling	23C	28H	96C
Procedure on receipt of application	23D	28I	96D
Applicability of advance rulings	23E	28J	96E
Advance ruling to be void in certain circumstances	23F	28K	96F
Power of advance ruling authority	23G	28L	96G
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Settlement Commission – Definitions	31	127A	83
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Power of settlement commission to grant immunity from prosecution and penalty	32K	127H	83
Power of settlement commission to send a case back to the Central Excise Officer	32L	127I	83
Order of settlement to be conclusive	32M	127J	83
Recovery of sums due under order of settlement	32N	127K	83
Bar on subsequent application for settlement in certain cases	32O	127L	83
Proceedings before settlement commission to be judicial proceedings	32P	127M	83
Application of certain provisions of Central Excise Act	-	127N	-

22.1 Introduction

'Advance ruling' means the determination, by the Authority of a question of law or fact specified in the application regarding the liability to pay duty or tax in relation to a manufacture of goods, import/export of goods or towards provision of service by the applicant.

'Settlement Commission' is a mechanism for speedy settlement of cases involving high revenue stakes. This is similar to what is constituted under the Income Tax law. This is a beneficial piece of legislation to settle the case and pay the dues without going through adjudication stages having legal challenges, recoveries and harassments. It may also be referred as "out of court" settlement. The proceedings before the settlement commission shall be deemed to be judicial proceedings for the purpose of Indian Penal Code.

22.2 Advance Ruling

Who can file an application?	Applicant: means :- (i) (a) a non-resident setting up a joint venture in India in collaboration with a nonresident or a resident; or (b) a resident setting up a joint venture in India in collaboration with a nonresident; or (c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India; (ii) a joint venture in India; or (iii) a public sector company, resident public limited companies and resident private limited companies <i>and resident firm</i>. Notes: 1) "firm" shall have the meaning assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932) , and includes- (i) the limited liability partnership; or (ii) limited liability partnership which has no company as its partner; or (iii) the sole proprietorship; or (iv) One Person Company. 2) In case of customs, 'A resident who proposes to import goods claiming for assessment under heading 9801 of first schedule to customs tariff act, 1975 (i.e. project imports by resident) can also apply for advance ruling.
Does vacancy or defect in the constitution of Authority invalidate proceedings?	No proceeding before, or pronouncement of advance ruling by, the Authority under this Chapter shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.
Questions on which Advance ruling can be sought?	(a) classification of any goods or service; (b) the valuation of goods or services; (c) the principles to be adopted for the purposes of determination of value of the goods or services; (d) applicability of exemption notifications issued; (e) admissibility of credit of duty or tax/determination of the origin of goods; (f) determination of the liability to pay duty or tax.
Copies and fees for	The application shall be made in quadruplicate and be accompanied by a fee

application?	of Rs.2,500/-.
Time-limit for withdrawal of application?	An applicant may withdraw an application within 30 days from the date of the application.
Procedure receipt of application?	1) On receipt of an application, a copy thereof shall be forwarded to the CCE and, if necessary, call upon him to furnish the relevant records. 2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application. 3) Where an application is allowed, the Authority shall after examining such further material as may be placed before it by the applicant or obtained by the Authority pronounce its advance ruling on the question specified in the application. 4) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.
When can advance ruling authority reject the application?	The Authority shall not allow the application where the question raised in the application is: - already pending in the applicant's case before any Central Excise Officer or the Appellate Tribunal or any Court; or - the same as in a matter already decided by the Appellate Tribunal or any Court. Note: No application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard. Also, where the application is rejected, reasons for such rejection shall be given in the order.
Time-limit of passing order?	The Authority shall pronounce its advance ruling in writing within 90 days of the receipt of application.
Communication of the order?	A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the CCE, as soon as may be, after such pronouncement.
Applicability of advance ruling?	The advance ruling pronounced by the Authority shall be binding only: - on the applicant who had sought it in respect of any matter referred in the application; and - on the Principal commissioner/commissioner and the authorities subordinate to him, in respect of the applicant.
When can Advance ruling be void?	Where the Authority finds, on a representation made to it by the principal commissioner/commissioner or otherwise, that an advance ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts then the authority may, by order, declare such ruling to be void ab-initio and thereupon all the provisions of this Chapter shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

22.3 Settlement Commission

Who can make an application for settlement? Can it be withdrawn?	An assessee may make a case for settlement. An assessee is defined in as 'Any person who is liable to pay excise duty assessed and includes any manufacturer/producer or a registered person of a private warehouse in which excisable goods are stored'. It can also be an importer or exporter or any person. An application once made cannot be withdrawn.
What is it that can be settled?	A 'case' can be settled. The 'case' is defined as any pending proceedings under this act or any other act for the levy, assessment and collection of duty or taxes, before an adjudicating authority on the date on which an application is made. Notes: 1) When any proceeding is referred back by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause. Thus, Settlement Commission can only be approached when original adjudication is pending. 2) Since Commissioner (appeals) is not an 'adjudicating authority', therefore 'case' pending before it cannot be settled.
Can a completed proceeding be re-opened?	No, the Settlement Commission cannot reopen the proceedings that are already completed.
What categories of cases cannot be settled?	The following categories of cases can be settled: a) Assessee must have filed the application for settlement in respect of a case relating to him before the adjudication thereof; b) The applicant must have filed returns showing production, clearance and central excise duty paid. Note: If Settlement Commission is satisfied that circumstances exist for not filing the returns, it may allow the applicant to make an application for settlement after recording reasons for the same. Thus, Settlement Commission has the discretion to allow such applications after recording reasons therefor. c) Applicant must have received a show cause notice; d) Case must not be pending before the Appellate Tribunal or any Court; e) Dispute must not be related to interpretation of classification; f) The additional amount of duty accepted by the applicant in his application must exceed atleast Rs.3,00,000/-; g) Applicant, while filing the application, must have deposited the additional amount of excise duty accepted by him along with interest; h) Particulars of excisable goods in respect of which short levy on account of misclassification, undervaluation, inapplicability of exemption notification or CENVAT credit or otherwise. i) In Customs, the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or a declaration accompanying the goods imported/exported through post or courier, as the case may be and in relation to such documents, a show cause notice has

	been issued to him by the proper officer.
Can Settlement Commission grant immunity from prosecution and penalty/ interest/ fine?	The Commission can grant immunity from prosecution only for any offence under the Central Excise, Customs or service tax Act and either wholly or in part from the imposition of penalty and fine if it is satisfied that the applicant has made full and true disclosure and co-operated with the Commission. Note: It may be noted that if prosecution is launched before receipt of application, immunity against such prosecution cannot be granted.
Can such immunity be withdrawn?	Immunity can be withdrawn only if the person fails to pay the sums due within the time specified in the settlement order or where the applicant has concealed any material to the settlement or given false evidence relating to the settlement.
Can the case be sent back by the Settlement Commission to the Central Excise/Customs officer?	This can be done only where the Commission is satisfied that the person has not cooperated. The consequences of this are that it would be deemed that no application has been made before the Commission.
Can the Central Excise officer who received the case back use the materials produced before the Commission?	Yes. Central Excise/Customs officer can use the materials produced before the commission for further assessment proceedings.
Is the order of settlement final?	Except as provided in Chapter V, the order is final and conclusive and shall not be re-opened in any proceeding under this Act or under any other law. For example: If the order was obtained by fraud or misrepresentation, it would become void.
What is the time limit for payment of amounts ordered by Settlement Commission?	The duty, interest, fine and penalty payable in pursuance of the order shall be paid by the assessee within 30 days of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest due thereon.
Is the proceeding before the Settlement Commission a judicial proceeding?	The proceeding is a judicial proceeding within the meaning of Sec. 193 and 228 of the Indian Penal Code.
Where are the Benches of the Settlement Commission located?	The principal Bench is at New Delhi with other Benches at Chennai, Calcutta and Mumbai. The jurisdiction of the Bench is decided not by the place of business of the applicant but by the location of the headquarters of the Commissionerate passing the order.

Can the applicant take legal assistance?	Assistance of authorized representative can be taken.
Can the property of the applicant be attached?	Provisional attachment by Settlement Commission is possible. See procedure to be followed by Commission below for details.

22.4 Procedure to be followed by the Settlement Commission

1) Settlement commission shall either allow or reject the application at its discretion

The Settlement Commission shall issue a notice to the applicant within **7 days** from the date of receipt of the application, to explain in writing as to why the application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the applicant, the Settlement Commission shall, within a period of **14 days** from the date of the notice, pass an order either allowing the application to be proceeded with, or rejecting the same. The proceedings before the Settlement Commission shall abate on the date of rejection. However, where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

2) Report must be called for from the Principal Commissioner etc. and same must be furnished within 30 days

Where an application is allowed or deemed to have been allowed to be proceeded with, the Settlement Commission shall, within **7 days** from the date of order, call for a report along with the relevant records from the Principal Commissioner/ Commissioner having jurisdiction. The Principal Commissioner/ Commissioner shall furnish the report within a period of **30 days** from the date of the receipt of communication from the Settlement Commission. However, where the Principal Commissioner/ Commissioner does not furnish the report within the aforesaid period of **30 days**, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner/ Commissioner.

3) Report must be called for from the Commissioner (investigation) if needed, and same must be furnished within 90 days

After examination of the report of the Principal Commissioner/ Commissioner submitted within time, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct, for reasons to be recorded in writing, the Commissioner (Investigation) within **15 days** of the receipt of the report, to make such further enquiry or investigation on the matters covered by the application and any other matter relating to the case. The Commissioner (Investigation) should furnish the report of such enquiry within a period of **90 days** from the date of the receipt of the communication from the Settlement Commission. However, where the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order under subsection (5) without such report.

4) Order must be passed based on above reports and after giving an opportunity of being heard to both the parties

The Settlement Commission may pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Principal Commissioner/ Commissioner of Central Excise and Commissioner (Investigation) after examination of the records. An opportunity of being heard either in person or through a representative duly

authorised in this behalf shall be given to the applicant and to the Principal Commissioner/ Commissioner of Central Excise having jurisdiction before passing of such order. The Commission shall also examine any further evidence as may be placed before it or obtained by it before passing the order.

5) Order of settlement commission must be passed within 9 months or additional 3 months

The order under sub-section (5) shall be passed within **9 months** from the last day of the month in which the application was made. However, if the order is not passed within the stipulated time, the settlement proceedings shall abate and the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made. However, the aforesaid period may be extended, for reasons to be recorded in writing, by the Settlement Commission for a further period not exceeding 3 months.

8) Order must contain the terms of settlement, reasons for rejection etc.

The order passed under sub-section (5) shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make the settlement effective. However, in case of rejection the order shall contain the reasons therefor.

9) Order to be void if later found that settlement obtained by fraud or misrepresentation of facts

The order shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts. The amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant.

10) Central Excise officer shall complete the proceedings within 2 years if order of settlement commission becomes void

Where a settlement becomes void as mentioned above, the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The Central Excise Officer having jurisdiction may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of **2 years** from the date of the receipt of communication that the settlement became void.

11) Duty, interest, fine penalty as per order shall be paid within 30 days

The duty, interest, fine and penalty payable in pursuance of the order under sub-section (5) shall be paid by the assessee within **30 days** of receipt of a copy of the order by him. If the assessee fails to do so the amount which remains unpaid shall be recovered along with interest.

22.5 Bar on subsequent application for settlement in certain cases

A person shall not be entitled to apply for settlement in relation to any other matter in the following cases:-

1) When settlement commission imposes penalty on the grounds of concealment

Where an order of the Settlement has been passed which provides for the imposition of a penalty on the applicant for settlement, on the ground of concealment of particulars of his duty liability made from the Central Excise Officer; or

Note: In this clause, the concealment of particulars of duty liability relates to any such concealment made from the officer of customs."

2) Person is convicted of any offence in relation to the 'case'

Where after the passing of an order of settlement, in relation to a case, such person is convicted of any offence in relation to that case; or

3) Where 'Case' is sent back to the Central excise officers by the settlement commission

Where the case of such person is sent back to the Central Excise Officer by the Settlement Commission.

Chapter 25 - Important Case Laws

CENTRAL EXCISE

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.)

No, Though 'Bagasse' is a marketable product still excise duty cannot be imposed as it is not manufactured - High court quashes CBEC's Circular dated 28-10-2009

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 in as much 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. 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. Osner Chemical Pvt. Ltd. 2012 (276) E.L.T. 162 (S.C.)

No, Mere improvement in quality without emergence of new or distinct product does not amounts to manufacture

The Supreme Court observed that:

"Manufacture" could be said to have taken place only when there was transformation of raw materials into a new and different article having a different identity, characteristic and use. **It 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.

The Apex 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.

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.)

No, Generation of metal scrap or waste during the repairing process does not amounts to manufacture

The Apex Court observed that for imposition of excise duty under section 3 of the Central Excise Act, two conditions that the 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.

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. 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.)

Yes, Statutory prohibition of sale does not mean that product is not capable for sale

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 prohibition imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss.*** And could not be inferred that 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.

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

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

Yes, Assembling of the testing equipments for testing the final product in the factory amounts to manufacture

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

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.

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.)

Yes, Product with a short shelf life can also be considered marketable unless it is proved that there is absolutely no shelf life

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)

Yes, Machine not permanently attached to earth cannot be called immovable property and is liable for excise duty

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.)

No, Stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product and the same does not amounts to manufacture

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.)

No, Process of cutting and embossing aluminium foil did not transform aluminium foil into distinct and identifiable commodity and does not amounts to manufacture

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

No, Activity of packing of imported compact discs in a jewel box along with inlay card does not amounts to manufacture

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 a wholesale. 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 and against Revenue.

CLASSIFICATION OF EXCISABLE GOODS

11. 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)

Cream having pharmaceutical constituents and its use in curing certain skin diseases would be classifiable as a medicament

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.**

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.

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

CCE, Bhopal v. Minwool Rock Fibres Ltd. 2012 (278) E.L.T. 581 (S.C.)

Yes, Heading according to the composition of goods shall be preferred over specific heading

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

13. 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.)

Yes, antiseptic cleansing solution used for cleaning/degerming or scrubbing the skin of the patient before the operation can be classified as a 'medicament'

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. 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.**

14. 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.)**Yes, 'Soft serve' served at McDonalds shall be classified as 'Ice cream'**

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 nonsolid 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'.**

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".

VALUATION OF EXCISABLE GOODS

15. 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.)**Yes, Sales Tax/VAT shall be included in the assessable value if the same is not remitted to the sales tax department of the state government**

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.

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, and it is not excludible. As is seen from the facts, only 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. 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.***

16. 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.)

No, PDI and free after sales services charges can be included in the transaction value only when they are charged by the assessee to the buyer.

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 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).**

3. 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.**

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.

CENVAT CREDIT

17. 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.)

No, CENVAT credit of other duties/taxes cannot be utilized for payment 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). 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. The High Court held that **merely because CENVAT credit in respect of NCCD can be utilized only for payment of excise duty, it does not lead to the conclusion that credit of any other duty can be utilized for payment of NCCD.**

18. 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)

No, CENVAT credit cannot be availed on the machinery used in a foreign country and where no duty is paid on the final product

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

19. 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.)

Yes, wrongful availment of 100% CENVAT credit on capital goods in the year of purchase can be upheld if wrongly availed credit of 50% is not utilized

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.

20. 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.)

Yes, CENVAT credit can be availed on the testing material of machines as the machines are not marketable and manufacture is not complete until they are tested

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 much 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.** 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.**

21. 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.)

CENVAT credit cannot be denied on the grounds of repayment by insurance company for loss of goods along with excise duty

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. 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.

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

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

No, Penalty cannot be imposed on the directors for wrong availment of CENVAT credit by the company

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.** 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.

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

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

Yes, CENVAT credit can be taken on the basis of private challans if the same is not fake

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.** 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.**

24. 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.)

CENVAT credit can be availed for services received prior to the commencement of commercial production. Further Sales commission agent services are not eligible for CENVAT credit

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. **It was more so as the trial batches were removed on payment of excise duty and thus, CENVAT credit of service tax paid in respect of such services could not be denied.**

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

25. 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. CCE 2013 (287) ELT 261 (Guj.)

No, Two units of a manufacturer surrounded by a common boundary wall having separate registration shall be considered as separate factories for the purpose of availment of CENVAT credit

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. 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 make them a single factory.**

EXPORT PROCEDURES

26. 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.)

No, Non-production of ARE-1 forms ipso facto cannot invalidate rebate claim

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.** The High Court, therefore, held that the **procedure cannot be raised to the level of a mandatory requirement.** Rule 18 itself makes a distinction between conditions and limitations subject to which a rebate can be granted and the procedure governing the grant of a rebate. It was held by the High Court that **while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.** The High Court ruled that **non-production of ARE-1 forms ipso facto cannot invalidate rebate claim. In such a case, exporter can demonstrate by cogent evidence that goods were exported and duty paid and satisfy the requirements of rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE (NT).**

27. 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.)

No, Rebate claim under rule 18 can be made either on manufactured/finished goods or on raw material, but not on both

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.**

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.

DEMAND, ADJUDICATION AND OFFENCES

28. 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.)

No, Penalty can be imposed only if Mens rea (guilty mind) is proved

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.***

29. 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.)

No, Time-limit under section 11A of the Central Excise Act, 1944 cannot be applied to recovery of dues under compounded levy scheme

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***. 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.

30. 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.)

No, SCN for recovery of penalty & dues can be issued even if SCN for confiscation of goods pending adjudication

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. 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***.

31. 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.)

No, Appellate authorities or Courts cannot give option of reduced penalty to assessee beyond the time prescribed in the act

The High Court elucidated that when the 25% penalty under first and the second proviso to erstwhile section 11AC 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), ***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 made it clear that, it was only when the duty determined as payable under erstwhile section 11A(2) 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. ***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.***

32. 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.)

Penalty cannot be imposed on the 'firm' for clandestine removal of goods by the 'manufacturer'

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 Rs.2,000), could not be imposed on the respondents.** The Department aggrieved by the said order filed an appeal with High Court wherein it contended that 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.**

33. 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.)

Yes, Pronouncement of order in open court to authorized agent of assessee is deemed to be the 'service of notice'

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

REFUND

34. 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.)

No, Filing of refund claim not required for re-availing CENVAT credit

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.

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

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

No, Doctrine of unjust enrichment is not applicable to the state undertakings as 'state represents the people of the country' and no one speaks of people being unjustly enriched

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

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

36. 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.)

No, High court cannot be entertain writ petition if the order passed earlier is time barred

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:-

37. 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.)

Yes, Delay can be condoned if the length of delay is small and if the case is good on merits

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. 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.

38. Can delay in filing appeal to CESTAT for the reason that the authorized 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.)

Yes, Expiry of mother of authorized representative is a reasonable cause for condoning the delay

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.

39. 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. Tikitkar Industries, 2012 (277) E.L.T. 149 (S.C.)

No, Revenue cannot subsequently preclude from the judgment accepted by it earlier

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.***

40. 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.)

No, Re-appreciation of evidence and reconsideration of legal view cannot be considered for rectifying a mistake – Only mistake apparent from record must be taken up by CESTAT

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.*** 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.***

EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

41. 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.)

No, Penalty cannot be imposed upon dubious company if it did not undertake any transactions

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. 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.

42. 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.L.T. A48 (P & H)

No, Brand name of another firm cannot be considered as brand name belonging to the assessee even if the assessee is partner in that firm – SSI exemption eligible to assessee

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).

43. 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)

Yes, Clearances of two firms from same factory having common brand name, common management shall be clubbed for calculating SSI exemption

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.**

44. 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)

Yes, SSI exemption can be dis-entitled even if brand name is not physically bearing on the goods

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.

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

45. 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.)

No, Oppressive circular cannot be applied retrospectively – to be applied only prospectively

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. ***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.***

SETTLEMENT COMMISSION

46. (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.)

Yes, Settlement commission can dismiss application for non-compliance of pre-deposit of taxes and interest. Second application filed after depositing the additional excise duty and interest would be maintainable

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).

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.***

47. 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.)

No, Consolidated return filed for the entire period prior to registration cannot be treated as returns for approaching settlement commission

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).*** 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.

SERVICE TAX

BASIC CONCEPTS OF SERVICE TAX

48. Can service tax be levied on the services rendered in connection with a chit fund business?

Delhi Chit Fund Association v. UOI 2013 (30) S.T.R. 347 (Del.)

No, Services of a foreman of a chit business do not constitute a 'service' and hence not liable for service tax

In this case, the petitioner is an association of chit fund companies based in Delhi. As per the petitioner, services rendered in connection with chit fund business are not taxable. As per the definition of service under section 65B(44), transaction in money is not a service. The High Court observed that as per the opening words of the definition of 'service', an activity cannot be charged with service tax unless following four aspects or characteristics are present:-

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

A 'mere transaction in money' cannot be considered as 'service' as it lacks the above four constituent elements. The High Court elucidated that even though 'mere transaction in money' is not service in the first place, the intention of the legislature in excluding it from the definition might be that the legislature deemed it fit, *ex abundanti cautela*, to exclude it. A clue to proper interpretation of the exclusionary part of the definition is embedded in Explanation 2 which provides that except an activity for which a separate consideration is charged and which relates to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination, all other cases of transaction in money shall stand excluded from the charge of service tax, including the consideration charged for the services of a foreman in a chit business. The High Court inferred ***that since in a chit fund business, the subscription is tendered in any one forms of money as defined under section 65B(33), it would be a transaction in money and would fall in the exclusionary part of the definition. Otherwise also, in view of Explanation 2 read along with the exclusionary part, the services rendered by the foreman of the chit business for which a separate consideration is charged would be out of the clutches of the definition. Thus, either way, the services of a foreman of a chit business do not constitute a taxable service. Consequently, the High Court quashed Notification No. 26/2012-S.T. dated 20.06.2012 to the extent of the entry in Serial No. 8 thereof.***

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

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

Yes, Service tax liability created under law can be shifted by virtue of a clause in the contract entered into between the service provider and the service recipient

The Supreme Court observed that on reading the agreement between the parties, it could be inferred that service provider (contractor) had accepted the liability to pay service tax, since it arose out of discharge of its obligations under the contract. With regard to the submission of shifting of service tax liability, the Supreme Court held that service tax is an indirect tax which may be passed on. Thus, assessee can contract to shift its liability. The Finance Act, 1994 is relevant only between assessee and the tax authorities and is irrelevant in determining rights and liabilities between service provider and service recipient as agreed in a contract between them. There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under the contract between them.

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

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

No, Municipality can pass on the burden of service tax to the tenants(beneficiary)

The contention that there was no mention of the service tax liability in the contract, the Court held that ***this is a statutory right of the service provider/Municipality by virtue of the provisions under law to pass it on to the tenants. It is another matter that they may decide not to pass it on fully or partly.*** It is not

open to the petitioners to challenge the validity of the demand for service tax, in view of the fact that service tax is an indirect tax and the law provides that it can be passed on to the beneficiary. Hence, the service tax can be passed on by the service provider i.e., Municipality. **The word "State" in Article 289 does not embrace within its scope the Municipalities. Hence, when service tax is levied on the Municipality there is no violation of Article 289. Moreover, Municipality has also not raised the contention that there was a violation of Article 289. The High court held that Municipality can pass on the burden of service tax to the tenants.**

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

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

Yes, Running of guest houses by TTD even if as a shelter for pilgrims, would be liable for service tax

The High Court observed that as per erstwhile section 65(105)(zzzzw) of the Finance Act, 1994, service provided to any person by a hotel, inn, guest house, club or camp-site, by whatever name called, for providing of accommodation for a continuous period of less than three months is a taxable service. **Therefore, the High Court held that since the petitioner was running guest houses by whatever name called, whether it was a shelter for pilgrims or any other name, it was providing the taxable services and was thus liable to pay service tax.**

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

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

If only content of data stored in the software is sold and not the software, then it would amount to service and not sale

The High Court observed that the law as to whether the software is goods or not is no longer res integra as it has been settled by the Supreme Court ruling in TCS case [2004 (178) ELT 22 (SC)]. The High Court reiterated that **software is goods as per Article 366(12) of the Constitution**. A software, whether customized or non-customised, would become goods provided it has the attributes thereof having regard to (a) utility (b) capable of being bought and sold (c) capable of transmitted, transferred, delivered, stored and possessed. On the issue as to whether the transaction would amount to sale or service, the High Court was of the view that **it would depend upon the nature of individual transaction**. The High Court stated that **as a transaction could be exclusive sale or exclusive service or composite one i.e., where the element of sales and service both are involved; the nature of transaction becomes relevant for imposition of tax**. The High Court explained that **when a statute, particularly a taxing statute is considered with reference to the legislative competence, the nature of transaction and the dominant intention of such transaction would be relevant**. In the instant case, the terms of EULA indicated the dominant intention of parties whereby the developer retained the copyright of each software, be it canned, packaged or customised, and only the right to use with copyright protection was transferred to the subscribers or the members. **The High Court opined that in the transactions taking place between the members of ISODA (the petitioner) with its customers, the software is not sold as such, but only the contents of the data stored in the software are sold which would only amount to service and not sale. The High Court held that though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA.**

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

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

No, Service tax is not chargeable on the buffer subsidy received from Government for storage of free sale sugar by the assessee

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

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

Mayo College General Council v. CCEx. (Appeals) 2012 (28) STR 225 (Raj)**Yes, Allowing the use of a name, logo and motto amounts to providing of franchisee services**

The department contended that the petitioner was engaged in providing franchise service to schools that were running their institutes using its school name "Mayoor School". Therefore, a show cause notice proposing recovery of service tax along with interest and penalty was issued against them. The High Court held that **when the petitioner permitted other schools to use their name, logo as also motto, it clearly tantamounted to providing 'franchise service' to the said schools and if the petitioner realized the 'franchise' or 'collaboration fees' from the franchise schools, the petitioner was duty bound to pay service tax to the department.**

PLACE OF PROVISION OF SERVICE

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

Wipro Ltd. v. Union of India 2013 (29) S.T.R. 545 (Del.)**No, The rebate claim cannot be dis-entitled if non-filing of declaration is due to complex nature of assessee's business**

As per Notification No. 12/2005 ST dated 19.04.2005, rebate is granted of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India. Condition 3.1 of the Notification stipulated that the provider of taxable service to be exported has to file a declaration with the jurisdictional Assistant/Deputy Commissioner of Central Excise describing the taxable service intended to be exported with description, value and the amount of service tax/excise duty and cess payable on input services/inputs actually required to be used in providing taxable service to be exported, prior to date of export of such taxable service.

The High Court observed that nature of the services was such that they were rendered seamlessly, on continuous basis without any commencement or terminal points. Since the calls were received and attended to in the call centre on a continuous basis, it was impossible for the appellant to not only determine the date of export but also anticipate the call so that the declaration could be filed "prior" to the date of export. The High Court noted that the appellant was also required to describe, value and specify the amount of service tax payable on input services actually required to be used in providing taxable service to be exported. The High Court opined that **except the description of the input services, the appellant could not provide the value and amount of service tax payable as any estimation was ruled out by the use of the word "actually required" and the bill/invoice for the input services were received by the appellant only**

after the calls were attended to. Further, the High Court also observed that **one-to-one matching of input services with exported services was impossible since every phone call was export of taxable service but the invoices in respect of the input-services were received only at regular intervals, viz. monthly or fortnightly etc.** Thus, the High Court was of the view that in the very nature of things, and considering the peculiar features of the appellant's business, it was difficult to comply with the requirement "prior" to the date of the export. Furthermore, the High Court elaborated that **if particulars in declaration were furnished to service tax authorities within a reasonable time after export, along with necessary documentary evidence, and were found to be correct and authenticated, object/purpose of filing of declaration would be satisfied.** The High Court, therefore, allowed the rebate claims filed by the appellants and held that the condition of the notification must be capable of being complied with as if it could not be complied with, there would be no purpose behind it.

VALUATION OF TAXABLE SERVICE

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

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

No, Service tax is not liable to be paid on reimbursements - Rule 5(1) of the service tax rules is repugnant to sections 66 and 67 of the Act and is ultra vires the Finance Act, 1994

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

The High Court observed that since section 67(1) of Finance Act, 1994 is subject to provisions of Chapter V - which includes section 66 (now section 66B) – the value of taxable services has to be in consonance with section 66 which levies tax only on **taxable service**. Thus, there is an inbuilt mechanism to ensure that only taxable service are evaluated under section 67 which provides that value of taxable service is the gross amount charged by service provider 'for such service'. The High Court, therefore, opined that it is **only the consideration for the taxable service which is chargeable to tax under the relevant Sections. However, rule 5(1) goes far beyond the charging provisions as it includes the expenditure and costs - which are incurred by the service provider "in the course of providing taxable service" - in the value of the taxable service.** The High Court elaborated that **power to make rules could not exceed or go beyond the section which provides for charge or collection of service tax.** The High Court clarified that **even though section 94 prescribes to lay every rule framed by Central Government before each House of Parliament, which have power to modify them; the same cannot add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.** The High Court further observed that **rule 5(1) may also result in double taxation, if expenses like air travel tickets, had already been subjected to service tax.** The High Court was of the view that double taxation can be imposed only when it is clearly provided for and intended. It can never be enforced by implication. **The High Court, therefore, held that rule 5(1) of the Rules runs counter and is repugnant to sections 66 and 67 of the Act and to that extent it is ultra vires the Finance Act, 1994.**

Note: The Department has filed an appeal to Supreme Court against the aforesaid decision and it has been admitted in 2014 (35) STR J99 (SC).

SERVICE TAX PROCEDURES

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

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

No, TDS shall not be paid on Service tax component of the invoice

The High Court held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and is not included in the fees for professional services or technical services, ***the service tax component would not be subject to TDS under section 194J of the Income-tax Act, 1961.***

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

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

No, Every assessee shall make available to the authorized officer/audit party the records if any, for the scrutiny - Rule 5A(2) of service tax rules is not ultra vires the finance act, 1994

The High Court observed that in case of private assessee, the Commissioner will refer the matter to an officer or Chartered Accountant, to collect the material for the purpose of audit. Thus, the material can be collected either by the officer authorized by the Commissioner or by the auditor himself, but audit will be conducted by the audit party headed by the Chartered Accountant/Cost Accountant, as deputed by the Commissioner. The manner for conducting the audit is as per the accounting standards provided by the Institute of Chartered Accountant of India and the audit report will be made available to the assessee, as per law. ***So, it is pious duty of every assessee to make available, to the authorized officer/ audit party, the records, trial balance and income-tax audit report, if any, for the scrutiny of the officer or the audit party. In the light of the aforesaid discussion, the High Court held that section 5A(2) is not ultra vires. It is in consonance with section 72A of the Finance Act, 1994.***

DEMAND, ADJUDICATION AND OFFENCES

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

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

No, Recovering service tax during search without passing appropriate assessment order is not justifiable

The Court observed that ***it is a well settled position in law that no tax can be collected from the assessee, without an appropriate assessment order being passed by the authority concerned and without following the procedures established by law.*** However, in the present case, no such procedures had been followed. Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability, it had failed to show that the petitioner was actually liable to pay service tax. Thus, the High Court held that ***the amount collected by Department, from the petitioner, during the search conducted, could not be held to be valid in the eye of law, and directed the Department to return to the petitioner the sum of Rs.2 crores, collected from it, during the search conducted.***

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

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

No, Mere contravention of certain provisions does not enable the service tax authorities to invoke the extended period of limitation. There has to be a wil-ful intent to evade payment of tax

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

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

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

Yes, Entire amount of service tax outstanding should be taken into consideration while calculating the amount of Rs.50 lakh (minimum tax due to arrest a person)

The assessee was arrested on 22.01.2014 on the ground that he had collected service tax of Rs.2.59 crores during the period between financial years 2010-11 and 2013-14, but had deposited only Rs.15 lakh with the Government. The assessee did not dispute the liability to pay the service tax to the Government. However, he contended that only the amount collected between 10.05.2013 and 21.07.2013 (six months prior to his arrest) should be considered while calculating the amount of Rs.50 lakh (minimum default for arresting a person). He submitted that since penal provisions could not be made effective retrospectively, amended section 89(1) and newly introduced sections 90 and 91 of the Finance Act, 1994 (as introduced by the Finance Act, 2013) could not be made effective for a period prior to 10.05.2013 [i.e. the date on which Finance Act, 2013 came into effect]. The High Court held that ***since the said offence is a continuing offence, entire amount of service tax outstanding [which is required to be deposited with the Central Government] as on 10.05.2013, would be taken into consideration while calculating the amount of Rs.50 lakh as contemplated by section 89(1)(ii) of the Finance Act, 1994.***

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

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

No, Best judgment assessment under section 72 is not an ex-parte assessment procedure

The High Court held that section 72 could per se not be considered as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. ***Thus, said order is not akin to an ex parte order. Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.***

Note: Ex-parte order means proceedings by one party in the absence of or without the notice to, the other

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

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

No, Penalty u/s 76 is not payable if service tax and interest has been paid before issue of the show cause notice

The Karnataka High Court held that ***the authorities had no authority to initiate proceedings for recovery of penalty under section 76 when the tax payer paid service tax along with interest for delayed payments promptly. As per section 73(3), no notice shall be served against persons who***

had paid tax with interest; the authorities can initiate proceedings against defaulters who had not paid tax and not to harass persons who had paid tax with interest on their own. ***If the notices were issued contrary to this section, the person who had issued notice should be punishable and not the person to whom it was issued.***

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

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

No, Refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation

The High Court of Karnataka, distinguishing the landmark judgment by Supreme Court in the case of *Mafatlal Industries v. UOI* 1997 (89) E.L.T. 247 (S.C.) relating to refund of duty/tax, held that **service tax paid mistakenly under construction service although actually exempt, is payment made without authority of law.** Therefore, mere payment of amount would not make it 'service tax' payable by the assessee. The High Court opined that **once there was lack of authority to collect such service tax from the assessee, it would not give authority to the Department to retain such amount and validate it.** Further, provisions of section 11B of the Central Excise Act, 1944 apply to a claim of refund of excise duty/service tax only, and could not be extended to any other amounts collected without authority of law. In view of the above, the High Court held that **refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation under section 11B of the Central Excise Act, 1944.**

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

Ankleshwar Taluka ONGC Land Losers Travellers CoOP v CCE Surat-II 2013 29 STR 352 (Guj.)

Yes, Penalty cannot be imposed if there was confusion regarding tax liability and divergent views were taken by various courts and assessee acted bonafide

The High Court made the following three important observations:

- (i) **The levy was comparatively new and therefore, both unawareness and confusion were quite possible particularly considering the strata to which the members of the appellant society belonged to.** They were essentially agriculturists, who lost their lands when plant of ONGC was set up, and therefore, had created society and for many years they were providing rent-a-cab service to the ONGC.
- (ii) **There were divergent views of different benches of Tribunal, which may have added to such confusion.**
- (iii) **The fact that the appellant had persuaded their right of reimbursement of payment of service tax with the ONGC by way of conciliation and arbitration cannot deprive them of the defence of bona fide belief of applicability of service tax.**

The High Court opined that since the appellant was a society of persons, which was created in the interest of land losers - who had lost their lands with the ONGC setting up its plant in the area - and operating without any profit model, the submissions of the appellant ought to have been appreciated in light of overall circumstances. The High Court rejected the contention of the Revenue that there was no confusion and it was only on the ground of dispute with ONGC with regard to reimbursement of service tax that the said amount was not paid. The High Court held that **even if the appellants were aware of the levy of service tax and were not paying the amount on the ground of dispute with the ONGC, there could be no justification in levying the penalty in absence of any fraud, misrepresentation, collusion or wilful mis-statement or suppression. Moreover, when the entire issue for levying of the tax was debatable, that also would surely provide legitimate ground not to impose the penalty.**

OTHER PROVISIONS

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

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

No, Committee of Commissioners cannot again review its decision taken earlier

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

CUSTOMS**BASIC CONCEPTS**

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

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

No, Clearance of goods from DTA to SEZ is not chargeable to export duty under the SEZ Act, 2005 or under the Customs Act, 1962

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

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

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

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

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

No, Remission of duty is not permissible if the remission application is filed after the expiry of the warehousing period (including extended warehousing period)

The High Court, while interpreting section 23, stipulated that ***section 23 states that only when the imported goods have been lost or destroyed at any time before clearance for home consumption, the application for remission of duty can be considered.*** Further, even before an order for clearance of goods for home consumption is made, relinquishing of title to the goods can be made; in such event also, an

importer would not be liable to pay duty. Therefore, the expression **“at any time before clearance for home consumption”** would mean the time period as per the initial order during which the goods are warehoused or before the expiry of the extended date for clearance and not any period after the lapse of the aforesaid periods. The said expression cannot extend to a period after the lapse of the extended period merely because the licence holder has not cleared the goods within the stipulated time. Moreover, since in the given case, the goods continued to be in the warehouse, even after the expiry of the warehousing period, it would be a case of goods improperly removed from the warehouse as per section 72(1)(b) read with section 71. **The High Court, overruling the decision of the Tribunal, held that the circumstances made out under section 23 were not applicable to the present case since the destruction of the goods or loss of the goods had not occurred before the clearance for home consumption within the meaning of that section. When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not permit the remission of duty under section 23 of the Act.**

CLASSIFICATION OF GOODS

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

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

Yes, Classification recognized by the government in an exemption notification can be used to resolve the classification dispute

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

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

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

Yes, Description of the goods as per the documents submitted along with the Shipping Bill can be relevant criterion for the purpose of classification & No notice for payment of interest needs be issued separately as the payment of interest becomes automatic

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

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

IMPORTATION, EXPORTATION AND TRANSPORTATION OF GOODS

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

CCus v. Shreeji Overseas (India) Pvt. Ltd. 2013 (289) E.L.T. 401 (Guj.)

No, Time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be inferred as the time-limit for filing of bill of entry

The High Court noted that though section 46 does not provide for any time-limit for filing a bill of entry by an importer upon arrival of goods, section 48 permits the authorities to sell the goods after following the specified procedure, provided the same are not cleared for home consumption/warehoused/transhipped within 30 days of unloading the same at the customs station. **The High Court however held that the time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be read into section 46 and it cannot be inferred that section 46 prescribes any time-limit for filing of bill of entry.**

WAREHOUSING

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

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

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

- Whether the entire premises of 100% EOU should be treated as a warehouse?
- Whether the imported goods warehoused in the premises of 100% EOU are to be held to have been removed from the warehouse if the same is issued for manufacture/production/processing by the 100% EOU?
- Whether issue for use by 100% EOU would amount to clearance for home consumption?

No, Imported goods warehoused in the premises of a 100% EOU and used for the purpose of manufacturing cannot be treated to have been removed for home consumption

The EOUs are licensed to manufacture goods within the bonded premises for the purpose of export. Tribunal held that **neither the scheme of the Act nor the provisions contained in the Manual require filing of ex-bond bills of entry or payment of duty before taking the imported goods for manufacturing in bond nor there is any provision to treat such goods as deemed to have been removed for the purpose of the Customs Act, 1962.** The Tribunal answered the issues raised as follows:-

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

DEMAND & APPEALS

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

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

Yes, Adjudicating authority is required to supply to the assessee copies of documents on which it proposes to place reliance for the purpose of re-quantification of customs duty

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

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

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

Yes, Delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant can be condoned

In this case, CESTAT rejected the appellant's application for condonation of delay in filing the appeal before CESTAT on the ground that the reasons given for filing the appeal beyond stipulated time were not convincing. The Counsel of the appellant filed his personal affidavit stating that the appeal had been filed with a delay due to his mistake. ***The High Court held that the Tribunal ought to have taken a lenient view in this matter as the appellant was not going to gain anything by not filing the appeal and the reason for delay in filing appeal as given by the appellant was the mistake of its counsel who had also filed his personal affidavit.***

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

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

No, No writ petition shall be filed by the assessee if an alternate remedy by way of an appeal is available in accordance with law

The High Court observed that section 9A(8) of the Customs Tariff Act, 1975 specifically incorporates all the provisions of the Customs Act, 1962 relating to appeal as far as may be, in their application to the anti-dumping duty chargeable under section 9A. The order of the CESTAT passed in appeal would, therefore, clearly be subject to appeal, either to this Court under section 130 or to the Supreme Court under section 130E of the Customs Act, 1962 if the appeal relates to the rate of duty or to valuation of goods for the purposes of assessment. ***The High Court, therefore, held that it would not be appropriate for it to exercise the jurisdiction under Article 226 of the Constitution (i.e. filing writ petition), since an alternate remedy by way of an appeal was available in accordance with law. The High Court thus, dismissed the petition leaving it open to the assessee to take recourse to the appellate remedy.***

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

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

No, Duty is not leviable against the person who is neither the importer nor the owner of the goods and was also not in possession of such goods

The High Court observed as under:

(i) Section 28 applies to a case where the goods are imported by an importer and the duty is not paid in accordance with law, for which a notice of demand is issued on the person. In case of notice demanding duty under section 125(2), firstly the goods should have been confiscated and the duty demandable is in addition to the fine payable under section 125(1) in respect of confiscated goods. ***Thus, notices issued under sections 28 and 125(2) are not identical and fall into completely different areas.***

(ii) The material on record disclosed that the assessee did not import the goods. He was not the owner of the goods but only a dealer of the smuggled goods and therefore, there was no obligation cast on him under the Act to pay duty. Thus, ***the notice issued under section 28 of the Act to the assessee is unsustainable as he is not the person who is chargeable to duty under the Act.***

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

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

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

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

Yes, Tribunal can condone the delay in filing of an application consequent to review by the committee of chief commissioners if it was satisfied that there was sufficient cause was shown for not presenting it within prescribed period

The High Court observed that Parliament intended that entire section 129A, as far as applicable, should be supplemental to section 129D(4). For the sake of brevity, instead of repeating what had been provided in section 129A as regards the appeals to the Tribunal, it had been provided that the applications made by the Commissioner under section 129D(4) should be heard as if they were appeals made against the decision or order of the adjudicating authority and the provisions relating to the appeals to the Tribunal would apply in so far as they might be applicable. The expression, ***“including the provisions of section 129A(4)”*** was by way of clarification and had been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under section 129D(4) otherwise it could have been inferred that provisions relating to appeals to the Tribunal had been made applicable and not the cross objections. The use of expression ***“so far as may be”*** was to bring general provisions relating to the appeals to Tribunal into section 129D(4). Consequentially, section 129A(5) also stood incorporated in section 129D(4) by way of legal fiction and must be given effect to. In other words, if the Tribunal was satisfied that there was sufficient cause for not presenting the application under section 129D(4) within prescribed period, it might condone the delay in making such application and hear the same. In light of the above discussion, ***the High Court ruled that the Tribunal was competent to invoke section 129A(5) where an application under section 129D(4) had not been made within the prescribed time and condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.***

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

Uniworth Textiles Ltd. vs. CCEx. 2013 (288) ELT 161 (SC)

No, Extended period of limitation for demand of customs duty cannot be invoked merely because assessee has sought clarification about exemption from a wrong authority

The Apex Court observed that the primary issue under consideration in this case was the applicability of extended period of limitation for issuing a demand notice. The Apex Court noted that section 28 of the Customs Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of section 28 and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite. The Supreme Court observed that the assessee had shown *bona fide* conduct by seeking clarification from the Development Commissioner and in a sense had offered its activities to assessment. Only on receiving a satisfactory reply from the Development Commissioner did the assessee claim the exemption. The Apex Court elaborated that even if the Development Commissioner was not the most suitable repository of the answers sought by the assessee, it did not negate the bona fide conduct of the assessee. It still showed that assessee made efforts to adhere to the law rather than its breach. ***The Supreme Court reiterated that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. The Supreme***

Court held that mere non-payment of duties could not be equated with collusion or wilful misstatement or suppression of facts as then there would be no form of non-payment which would amount to ordinary default. The Apex Court opined that something more must be shown to construe the acts of the assessee as fit for the applicability of the proviso.

REFUND

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

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

Yes, Department is liable to pay interest for delaying the refund of special CVD

The High Court stated that a **conjoint reading of section 25(1) and section 27 of the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest.** The High Court, therefore, held that:

(i) It would be a misconception of the provisions of the Customs Act, 1962 to state that notification issued under section 25 of the Customs Act, 1962 does not have any specific provision for interest on delayed payment of refund.

(ii) When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.

(iii) Paragraph 4.3 of the Circular No. 6/2008 Cus. dated 28.04.2008 being contrary to the statute has to be struck down as bad.

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

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

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

Yes, In case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him

The High Court noted that section 116 of the Act imposes a penalty on the **person-in-charge** of the conveyance *inter alia* for short-landing of the goods at the place of destination and if the deficiency is not accounted for to the satisfaction of the Customs Authorities. Section 2(31) defines “person-in-charge” to *inter alia* mean in relation to a vessel, the master of the vessel. **Section 148 provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment in respect of the matter in question of all obligations imposed on such person-in-charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.** The High Court observed that if assessee affixed seal on containers after stuffing and took their charge, he stepped into shoes of/acted on behalf of master of vessel, the person-in-charge. The High Court held that **conjoint reading of sections 2(31), 116 and 148 of Customs Act, 1962 makes it clear that in case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him. Hence, duly appointed steamer agent of a vessel, would be liable to penalty. However, steamer agent, if innocent, could work out his remedy against the shipper for**

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

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

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

No, Seized goods needs to be un-conditionally released if SCN is not issued within the prescribed time-limit

The High Court observed that the object of enacting section 110(2) of the Act is that the Customs Officer may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under subsection (1) thereof. Sub-section (2) of section 110 strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice within that period has been issued under section 124(a) for confiscation of the goods. Where no action is initiated by way of issuance of show cause notice under section 124(a) of the Act within six months or extended period stipulated under section 110(2) of the Act, the person from whose possession the goods were seized becomes entitled to their return. ***The High Court did not accept the contrary interpretation of the Bombay High Court in Jayant Hansraj Shah's case. The High Court was of the view that the said interpretation was not borne out from the plain reading of the aforesaid provisions. The remedy of provisional release is independent of remedy of claiming unconditional release in the absence of issuance of any valid show cause notice during the period of limitation or extended limitation prescribed under section 110(2) of the Customs Act, 1962.***

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

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

No, Benefit of exemption meant for imported goods shall not be given to the smuggled goods The question which arose before the Apex Court for consideration was whether goods that were smuggled into the country could be considered as 'imported goods' for the purpose of granting the benefit of the exemption notification. The Apex Court held that ***the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962. The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling in the economy.***

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

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

Yes, Copies of documents seized during the course of seizure action needs to made available by the revenue officers to the assessee when asked for

The High Court held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document or seeking extract, and not the officer. If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. ***The denial by the Revenue to make***

the documents available was clearly an act without jurisdiction. The High Court directed the Revenue to make available the copies of the documents asked for by the assessee which were seized during the course of the seizure action.

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

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

No, Re-export of smuggled goods is possible only if true declaration or request for detention has been made on arrival at airport

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

SETTLEMENT COMMISSION

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

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

Yes, judicial review of the "decision-making process" and not the "decision" of the Settlement Commission is permissible

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

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

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

No, The assessee cannot accept settlement commissions order only to the extent what is favourable to them and reject the unfavourable portion

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

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

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

Yes, Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue

The High Court noted that the Settlement Commission while considering the aforesaid question of its jurisdiction for taking up the cases relating to drawback had considered the definition of “drawback” as defined in rules relating to drawback as also the definition of the word “case” as defined in section 127A(b) and after referring to the various judgments of the Tribunal came to the conclusion that the **Commission had jurisdiction to deal with the application for settlement**. The High Court stated that the reasons given by the Settlement Commission in support of its order are in consonance with the law laid down by the Supreme Court in the case of Liberty India v. Commissioner of Income Tax (2009) 317 ITR 218 (SC) wherein the Supreme Court has observed that **drawback is nothing but remission of duty on account of statutory provisions in the Act and Scheme framed by the Government of India**. The High Court, thus, concluded that **the duty drawback or claim for duty drawback is nothing but a claim for refund of duty as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act**. Thus, the High Court held that the Settlement Commission has jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue.

MISCELLANEOUS PROVISIONS

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

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

Yes, Interest is payable on delayed refund of sale proceeds by department on auction of seized goods

The High Court observed that though no period was stipulated in the order of the Settlement Commission for the grant of refund, the entire exercise ought to have been carried out within a reasonable period of time. The High Court noted that there was absolutely no reason or justification provided by the department for the delay in payment of balance sale proceeds. The High Court held that **Department cannot plead that the Customs Act, 1962 provides for the payment of interest only in respect of refund of duty and interest**. The High Court clarified that **acceptance of such a submission would mean that despite an order of the competent authority directing the Department to grant a refund, the Department can wait for an inordinately long period to grant the refund**. The High Court directed the Department to pay interest from the date of approval of proposal for sanctioning the refund.

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

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

No, Director cannot be held liable for the recovery of the customs dues of the company Considering the provisions of section 142 of the Customs Act, 1962 and the relevant rules*, the High Court elucidated that **it was only the defaulter against whom steps might be taken for the recovery of the dues**. In the present case, it was the company who was the defaulter. **The Court held that since the company was not being wound up, the juristic personality the company and its former director would certainly be separate and the dues recoverable from the former could not, in the absence of a statutory provision, be recovered from the latter. There was no provision in the Customs Act, 1962 corresponding to section 179 of the Income-tax Act, 1961 or section 18 of the Central Sales Tax,**

1956 (refer note below) which might enable the Revenue authorities to proceed against directors of companies who were not the defaulters.