

The suggested answers for Indirect Taxes (Paper 8) are based on the provisions as amended by the Finance (No.2) Act, 2004 and Notifications/Circulars issued up to 30.04.2005 which are relevant for November 2005 examinations.

PAPER – 8 : INDIRECT TAXES

*Question Nos. 1, 6 and 9 are compulsory. In addition thereto, answer any **two** questions from Part “A” and **one** question from Part “B”.*

PART – A

Question 1

- (a) (i) *Discuss in brief the concept of ‘Deemed Manufacture’.* (4 Marks)
- (ii) *TCL purchases duty paid metal rods and draws them into wire of a thinner gauge. Both the items fall under different tariff headings. The assessee claims that the process undertaken by it does not amount to manufacture. You are required to advise with reference to the present position of law in this regard.* (4 Marks)
- (b) *With reference to CENVAT Credit Rules, 2004, discuss giving reason whether the following statements are **true or false**:*
- (i) *Credit of duties of excise on inputs can be availed irrespective of whether payment is made or not against the invoice, whereas credit of service tax on input services can be availed only after making payment of the invoice.*
- (ii) *An input service distributor is comparable to a dealer under the CENVAT scheme of inputs and capital goods.*
- (iii) *The manufacturer shall not be allowed to transfer unutilized input credit in case of transfer of ownership of the factory by way of sale along with the inputs and capital goods.*
- (iv) *A manufacturer availing CENVAT credit on inputs without ensuring that excise duty indicated in the invoice has been paid on such inputs is liable to a penalty.* (2 x 4 = 8 Marks)
- (c) *ABC, an assessee availing the SSI exemption scheme, paid central excise duty of Rs.10,000 for the goods cleared in the month of March, 2005 on April 15, 2005. Discuss whether any interest will be charged from ABC for late payment of duty. If yes, what will be the interest liability?* (4 Marks)

Answer

- (a) (i) As per section 2(f) of the Central Excise Act, 1944 "manufacture" 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 Central Excise Tariff Act, 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 labelling or re-labelling 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,

and the word "manufacturer" shall be construed accordingly and shall 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.

The processes that qualify to be "manufacture" as per clause (ii) and (iii) of section 2(f) are termed as deemed manufacture.

Thus, if any process which is specified in relation to any goods in the Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture is carried out, such goods will be deemed as manufactured even if as per judicial decisions, the process may not amount to manufacture. For instance, Note 4 of Chapter 73 provides that in case of articles of iron and steel falling under Chapter 73, the process of galvanization shall amount to manufacture. Similarly, if any of specified processes (like re-packing, re-labelling, alteration of retail sale price etc.) is being carried out on goods covered in Third Schedule to the Central Excise Act, 1944, the process will be deemed to be as that of manufacture.

- (ii) The taxable event for levying excise duty is production or manufacture of the excisable goods. Section 2(f) of the Central Excise Act, 1944 *inter alia* provides that manufacture includes any process, incidental and ancillary to the completion of a manufactured product, and which is specified in relation to any goods in the Section or Chapter Notes of the Schedules of the Central Excise Tariff Act, 1985 as amounting to manufacture.

The definition stipulates that manufacture will include any process which is specified in the Section or Chapter Notes of the Central Excise Tariff as amounting to manufacture.

The Finance (No.2) Act, 2004 has inserted Note No. 10 in Section XV of the First Schedule to the Central Excise Tariff Act so as to provide that the process of drawing or redrawing a rod, wire or any other similar article, into wire shall amount to manufacture.

Therefore, in view of the above Section Note, the claim of TCL is not correct in law.

Note: *This issue had come up before the Supreme Court in the case of CCE v. Technowled Industries (2003). The Apex Court held that there was no manufacture of a new product when the gauge of the rod was made thinner and the product was*

finished a little better. Merely because there were two separate entries, it did not mean that the product became excisable.

However, in view of the above-mentioned amendment made by Finance (No.2) Act, 2004 this judgment does not hold good anymore.

- (b) (i) *True.* Credit of input services can be availed only after the output service provider makes payment of input services and the service tax payable on it, as shown in the invoice [Rule 4(7)]. However, in case of excise duty, credit is available as soon as the goods are received in the factory.

The reason for the differential treatment is that a manufacturer (input supplier) can clear the inputs from his factory only after paying the applicable duty irrespective of the time at which he receives the payment against the invoice while the input service provider pays the service tax only after he realizes the payment for taxable services (as the service tax is due upon realization only).

- (ii) *True.* The invoice issued by a dealer is acceptable under the CENVAT Credit Rules, 2004 as an eligible document for availing credit. In order to pass on the credit, the dealer has to obtain registration and file quarterly returns with the Superintendent of Central Excise. Likewise, the document/invoice issued by an input service distributor is also acceptable under the CENVAT Credit Rules, 2004 as an eligible document for availing credit. Similarly, in order to pass on the credit, the input service distributor too has to obtain service tax registration, comply with new rule 4A of Service Tax Rules, 1994 and file half yearly statement giving details of credit received and distributed, with the Superintendent of Central Excise.
- (iii) *False.* The manufacturer shall be allowed to transfer the credit lying unutilized in his accounts provided the transfer takes place with specific provision for transfer of liabilities of such factory [Rule 10(1)] and the said inputs and capital goods are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise. [Rule 10(3)]

Note: *It is also possible to answer as 'True' if it is assumed that there is no specific provision of transfer of the liabilities of such factory or the inputs and the capital goods have not been accounted for to the satisfaction of the Deputy/Assistant Commissioner of Central Excise.*

- (iv) *True.* Where the CENVAT credit in respect of inputs or capital goods is taken wrongly or without taking reasonable steps to ensure that appropriate duty on said inputs or capital goods has been paid as indicated in the invoice, then as per rule 15 of the CENVAT Credit Rules 2004, the person availing credit shall be liable to a penalty not exceeding duty on the inputs in question or Rs.10000/- whichever is greater.
- (c) The second proviso to rule 8(1) of the Central Excise Rules, 2002 lays down that where an assessee is availing the exemption under a Notification based on the value of clearances in a financial year, the duty on goods cleared during a calendar month shall

be paid by the 15th day of the following month. However, in case of goods removed during the month of March the duty shall be paid by the 31st day of March.

Sub-rule (3) of rule 8 provides that if the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Central Excise Act on the outstanding amount. Such interest shall be paid for the period starting from the first day after the due date till the date of actual payment of the outstanding amount. The rate of interest has been specified as 13% vide *Notification No. 66/2003 CE(NT) dated 12.09.2003*.

Therefore, since ABC has paid the duty for the month of March on 15th April, it will have to pay the duty with interest for the delay of 15 days.

The amount of interest shall be computed as follows:

$$= \text{Rs.} 10,000 \times 13/100 \times 15/365 = \text{Rs.} 53.42$$

$$= \text{Rs.} 53.00$$

Question 2

- (a) (i) Define retail sale price in the light of provisions of Section 4A of Central Excise Act, 1944. (4 Marks)
- (ii) What are the conditions under which MRP based valuation shall apply under Central Excise? (4 Marks)
- (iii) What legal/penal actions can be taken in case the retail sale price is not mentioned or is unduly tampered after the removal? (4 Marks)
- (b) Asha Ltd. supplies raw material to a job worker Kareena Ltd. After completing the job-work, the finished product of 5,000 packets are returned to Asha Ltd. putting the retail sale price as Rs.20 on each packet. The product in the packet is covered under MRP provisions and 40% abatement is available on it. Determine the assessable value under Central Excise law from the following details:

	Rs.
Cost of raw material supplied	30,000
Job worker's charges including profit	10,000
Transportation charges for sending the raw material to the job worker	3,000
Transportation charges for returning the finished packets to Asha Ltd.	3,000

(3 Marks)

Answer

- (a) (i) Explanation 1 to section 4A of the Central Excise Act, 1944 defines the retail sale price as 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, as the case may be, and the price is the sole consideration for such sale.

However, in case the provisions of the Central Excise Act, rules or Standards of Weights and Measures Act, 1976 or the Rules made thereunder or under any other law for the time being in force require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.

- (ii) The provisions relating to valuation of excisable goods based on MRP are dealt with in section 4A of the Central Excise Act, 1944. The conditions under which the MRP based valuation shall apply are as follows:
 - (a) the excisable goods to be valued are covered under Standards of Weights and Measures Act, 1976 or related rules or under any other law and such law requires to declare on the package the retail sale price thereof; and
 - (b) the Central Government has notified the said goods as goods in relation to which the payment of excise duty shall be on the basis of the MRP less such deductions/abatements as it may allow in the notification. However, it must be noted that if the goods have been so notified, Standards of Weights and Measures Act or the rules made thereunder must require a declaration of the retail sale price on the package of such goods.
- (iii) If the retail sale price is not mentioned on the excisable goods or is unduly tampered after the removal, then
 - (i) such goods shall be liable to confiscation and
 - (ii) the retail sale price of such goods shall be ascertained in the manner prescribed by the Central Government and such price shall be deemed to be the retail sale price.
- (b) As the product is under MRP scheme, the duty shall be payable only as per the provisions of section 4A of the Central Excise Act i.e. on the basis of MRP less abatement and not on the basis of material cost plus job charges etc. Section 4A overrides section 4 of the Central Excise Act.

Hence, assessable value in this case shall be determined as under:-

	<i>Rs.</i>
Retail sale price of 5000 packets	$= 5000 \times 20 = 1,00,000$
Less: Abatement @ 40%	<u>40,000</u>
Assessable Value	<u>60,000</u>

Question 3

- (a) Answer in brief the following questions relating to export without payment of duty other than to Nepal and Bhutan under Rule 19 of the Central Excise Rules, 2002:
- (i) What is the type of bond to be executed? Who is exempted from furnishing such bond?
 - (ii) What is the export document for export clearance? How many copies are required to be prepared for it?
 - (iii) Is it necessary to prepare an invoice also? If yes, how should it be prepared?
 - (iv) What will be the duty payable, if goods are not exported within six months after clearance? (4 x 2 = 8 Marks)
- (b) Does the bar of unjust enrichment apply to all types of refunds? Does the refund of penalty attract such bar? (2 Marks)
- (c) State the various circumstances where goods are liable for confiscation under the Central Excise Law. Can the assessee get back the confiscated goods and if so how? (5 Marks)

Answer

- (a) Procedures and conditions for export without payment of duty to all countries except Nepal and Bhutan are specified in *Notification No.42/2001 C.E. (N.T.) dated 26.6.2001*. Part-wise answers to the questions are given below:
- (i) A bond in Form B-1 is required to be executed by a merchant exporter in case of export without payment of duty. The bond should be at least equal to the duty chargeable on the goods, with such surety or security as the excise officer may approve. Manufacturer- exporter is exempted from furnishing such bond. He can furnish an annual Letter of Undertaking (LUT) in Form UT-1.
 - (ii) ARE-1 is the export document for export clearance which shall be prepared in five copies (quintuplicate). The fifth copy is the optional copy which the assessee can use for claiming other export incentives.
 - (iii) Yes, the goods have to be cleared from the factory under an invoice which shall be prepared in terms of rule 11 of the Central Excise Rules, 2002. The invoice should be prominently marked as "FOR EXPORT WITHOUT PAYMENT OF DUTY".
 - (iv) Goods must be exported within 6 months from the date of clearance for export, unless extension is granted by Assistant Commissioner/Deputy Commissioner. If goods are not exported within 6 months from the date of clearance for export, the exporter should deposit the applicable excise duty on such goods along with the interest. As per rule 5 of the Central Excise Rules, 2002, the applicable duty shall be computed as per the rate and tariff value applicable on the date of removal of such goods from the factory.

- (b) No, the bar of unjust enrichment does not apply to all types of refunds. Only when the burden of the duty has been shifted by the manufacturer to the buyer, the refund gets hit by such bar.

No, refund of penalty does not attract bar of unjust enrichment [*CCE Chandigarh v. Shivalik Agro Poly Products Ltd. 2004 (173) ELT 64 (Tri-Del.)*].

- (c) Under Rule 25 of the Central Excise Rules, 2002, the excisable goods shall be liable for confiscation if any producer, manufacturer, registered person of a warehouse or registered dealer -

- (i) removes any excisable goods in contravention of Central Excise Rules/Notifications; or
- (ii) does not account for any excisable goods produced or manufactured or stored by him; or
- (iii) contravenes any of the provisions of Rules/Notification with an intent to evade payment of duty; or
- (iv) engages in the manufacture or production or storage of any excisable goods without registration of the factory.

Section 34 of the Central Excise Act provides that whenever confiscation is adjudged under the Central Excise Act or the rules made thereunder, the officer adjudging it, shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit. Therefore, the assessee can get the confiscated goods back by paying redemption fine as prescribed in the order of the officer adjudging such confiscation.

Question 4

- (a) Discuss whether remission of duty shall be granted or not, in the following cases, under the Central Excise Rules, 2002:
- (i) Excisable goods manufactured in the factory are claimed by the manufacturer as unfit for consumption or for marketing.
 - (ii) Duty paid goods were damaged due to breakage in handling.
 - (iii) Finished goods entered in Daily Stock Account (DSA) were stolen from the factory. (3 x 2 = 6 Marks)
- (b) With reference to Rule 12(2) of the Central Excise Rules, 2002, explain in brief the main provisions of the return in form E.R.-4, to be filed with the Central Excise Department by an assessee. What is the maximum penalty leviable for non-submission or late submission of E.R.-4 return? (4 Marks)
- (c) Write a brief note on power of rectification of mistakes given to Appellate Tribunal under Section 35C(2) of Central Excise Act. Whether the power of rectification includes the power to review the order also? (5 Marks)

Answer

(a) Rule 21 of the Central Excise Rules, 2002 *inter alia* provides that where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, the Commissioner may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing. With reference to the said rule, the cases under consideration are discussed as follows:-

- (i) Remission of duty shall be granted as the goods have been claimed as unfit for consumption or for marketing by the manufacturer.
- (ii) Remission cannot be granted on duty paid goods as there is no provision for granting remission of duty after removal of the goods.
- (iii) Remission of duty in case of theft is not allowed as the goods are available for consumption somewhere else [Chapter 18 Part I Para 2.6 of CBE&C's Central Excise Manual, 2001].

(b) Every assessee paying duty of Rs.1 crore or more per annum through PLA is required to file Annual Financial Information Statement for the preceding financial year to which the statement relates by 30th November of the succeeding year in Form E.R.4. The main contents of the return are as under (all information is to be in Rs.lakhs) –

- (i) Financial year to which it relates
- (ii) Registration Number
- (iii) Name of the Assessee
- (iv) Details of Expenditure
- (v) Details of Income
- (vi) CENVAT credit details

The maximum penalty for non-submission or late submission can be Rs.5,000 under rule 27 of the Central Excise Rules, 2002.

(c) Under Section 35C(2) of the Central Excise Act, 1944, the Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it. Such a rectification shall be made when the Commissioner of Central Excise or the other party to the appeal brings the mistake to the notice of the Tribunal. Where such an amendment has the effect of increasing the liability of the other party then such an amendment shall be made only after issuing a notice and giving a reasonable opportunity of being heard to the party concerned.

The Appellate Tribunal u/s 35C is not empowered to review an order passed by it. The power of review is not an inherent power and must be expressly granted – *CCE v. Steel Co. Gujarat Ltd. 2004 (163) ELT 403 (SC)*.

Question 5

- (a) Write short notes on the following:
- (i) Place of Removal
 - (ii) Interest u/s 11AB (3 x 2 = 6 Marks)
- (b) What is Personal Ledger Account or PLA? How is it maintained? (5 Marks)
- (c) Briefly explain the procedure for removal of goods by a unit which is an 100% EOU for Domestic Tariff Area. (4 Marks)

Answer

- (a) (i) As per section 4(3)(c) of the Central Excise Act, 1944, 'place of removal' means:
- (i) a factory or any other place or premises of production or manufacture of the excisable goods;
 - (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
 - (iii) a depot, premises of a consignment agent or any other place or premises from where excisable goods are to be sold after their clearance from the factory;
- from where such goods are removed.
- (ii) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty shall, in addition to the duty, be liable to pay interest. The interest shall be payable at a rate not below 10% p.a and not exceeding 36%p.a. The Central Government may fix the rate of interest by notification in the Official Gazette. *Notification No.66/2003 dtd. 12.09.2003* has specified such rate as 13% per annum.
- The interest shall be paid from the first date of the month succeeding the month in which the duty ought to have been paid, or from the date of such erroneous refund, as the case may be, till the date of payment of such duty.
- However, in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, no interest shall be payable. The duty should be paid within 45 days from the date of issue of such order, instruction or direction, as the case may be. In other cases, the interest shall be payable on the whole of the amount, including the amount already paid.
- However, if in the appeal, the duty demand is increased or decreased, the interest is accordingly increased or decreased.
- (b) Personal ledger Account is an account with the Central Government, which is utilized for payment of duty of excise. The account is credited when the sum is deposited into the treasury and debited on payment of excise duty. Each debit and credit entry should be

made on separate lines and assigned a running serial number for the financial year. The PLA must be prepared in triplicate by writing with an indelible pencil and using double sided carbon. Original and duplicate copies of PLA shall be sent to the Central Excise Officer in charge along with the monthly/quarterly return.

The assessee may make credit in the PLA by making cash payment into the treasury or authorised bank through TR-6 challan. Copy of each such challan shall be sent by the assessee to the Central Excise Officer along with the monthly/quarterly return.

No restrictions exist with regard to any minimum amount, which should necessarily remain in balance to the credit of an assessee in his PLA. With the monthly payment system, there should be enough credit at the time of payment of duty for the month.

Mutilations or erasures of entries once made in the PLA are not allowed. If any correction becomes necessary, the original entry should be scored out and attested by the assessee or his authorized agent.

- (c) Rule 17 of the Central Excise Rules, 2002 provides that where any goods are removed from a 100% EOU to domestic tariff area, such removal shall be made under an invoice as per the procedure specified in rule 11 of the Central Excise Rules, 2002. Further, removal shall be made only after payment of appropriate duty by debiting the account current maintained for this purpose or by utilizing the CENVAT credit.

Such unit is required to maintain appropriate accounts related to production, description of goods, quantity removed and the duty paid in the prescribed form.

Such unit is required to submit a monthly return in Form E.R-2 within 10 days from the end of the month to which the return relates in respect of the excisable goods manufactured in, and receipt of inputs and capital goods in, the unit. The return should be submitted to the Superintendent of Central Excise.

PART – B

Question 6

- (a) Explain briefly with reference to the provisions of the Customs Act, 1962 any **two** of the following:
- (i) Adjudicating Authority
 - (ii) Customs Area
 - (iii) Smuggling. (2 x 2 = 4 Marks)
- (b) State briefly the provisions of refund on anti-dumping duty in certain cases. (2 Marks)
- (c) Assessable value of an item imported is Rs.1,00,000. Basic customs duty is 20%, additional duty of customs is 16%, and education cess is 2% on duty. Compute the amount of total customs duty payable. Also, state the amount of credit available to the importer and how it can be utilised by him. (4 Marks)
- (d) Your client loaded a machine on the vessel for export. He has paid import duty and

central excise duty on the components used in the manufacture. The vessel set sail from Mumbai, but runs into trouble and sinks in the Indian territorial waters. The customs department refuses to grant duty drawback for the reason that the goods have not reached their destination. Advise your client citing case law, if any.

(4 Marks)

- (e) India Car Co. is manufacturing passenger cars and has entered into a joint venture agreement and collaboration with Videshi Car Co. India Car Co. imported from Videshi Car Co. a shipment of 24 CKD packs (completely knocked down condition) of passenger car components. They filed Bill of Entry for clearing the goods, which were claimed to be components of motor cars. They also claimed benefit of a Notification exempting components, including components of motor cars in semi-knocked down packs and completely knocked down packs.

The Adjudicating Authority held that the imported components being complete cars in CKD packs, had the essential character of the finished product and as such the consignment were to be treated as motor cars and not components. It was also held that India Car Co. was not entitled to the benefit of the notification as the notification was only for components.

The questions for consideration are:

- (i) Whether the CKD packs imported into the country could be considered to be motor cars for the purpose of classification and clearance?
- (ii) Whether India Car Co. is entitled to the benefit of exemption notification?

(2 x 3 = 6 Marks)

Answer

- (a)
 - (i) As per section 2(1) of the Customs Act, 1962, 'adjudicating authority' means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal.
 - (ii) As per section 2(11) of the Customs Act, 1962, 'customs area' means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.
 - (iii) As per section 2(39) of the Customs Act, 1962, 'smuggling', in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113.
- (b) According to the provisions of section 9AA of the Customs Tariff Act, 1975, where an importer proves to the satisfaction of the Central Government that he has paid any anti-dumping duty imposed on any article, in excess of the actual margin of dumping in relation to such article, he shall be entitled to refund of such excess duty. However, the importer will not be entitled for refund of provisional anti-dumping duty under section 9AA as it is refundable under section 9A(2) of the said Act.

(c) Computation of customs duty payable

	Rs.
1. Assessable Value	1,00,000
2. Basic Customs Duty @ 20%	<u>20,000</u>
3. Sub-Total	1,20,000
4. Additional Duty of Customs (CVD)	
@ 16.32% of Rs.1,20,000 i.e. (Rs.19,200 +384)	<u>19,584</u>
(16% + 2% Education cess on 16%)	
5. Education Cess 2% on Rs.39,584 [(2) + (4)]	791.68
6. Total Customs Duty Payable	
[(2) + (4) + (5)] Rounded off	40,376

Credit of total CVD of Rs.19,584 will be available to the importer. The cess component of Rs.384 included in Rs.19,584 will be available as CENVAT credit only for paying education cess on final products or taxable services. The balance Rs.19,200 will be available as CENVAT credit for payment of excise duty or service tax as provided in CENVAT Credit Rules, 2004. Education cess of Rs.791.68 paid on imported goods will not be available as CENVAT credit.

- (d) Rule 2(a) of the Customs and Central Excise Duties Drawback Rules, 1971 provides that "drawback", in relation to any goods manufactured in India, and exported, means the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods. Rule 2(c) of the said rules *inter alia* provides that "export" means "taking out of India to a place outside India". Section 2(27) of the Customs Act, 1962 provides that 'India includes the territorial waters of India'.

In case of *CC v. Sun Industries 1988 (35) ELT (241)*, the Supreme Court held that the expression "taking out to a place outside India" would also mean a place in high seas, if that place is beyond territorial waters of India. Therefore, the goods taken out to the high seas outside territorial waters of India would come within the ambit of expression "taking out to a place outside India".

The emphasis in the aforementioned judgment was on the movement of the goods outside the territorial waters of India. It is then that an export may be said to have been taken place. In the instant case, the vessel sunk within territorial waters of India and therefore there is no export. Accordingly, no duty drawback shall be available in this case. Similar decision was given by the Supreme Court in the case of *UOI v. Rajindra Dyeing & Printing Mills Ltd. 2005 (180) ELT 433 (SC)*.

- (e) The facts of the given case are similar to the facts of the case of *CC, Bangalore v. Maestro Motors Ltd. – 2004 (174) ELT 289 (SC)* decided by the Apex Court.
- (i) As per interpretative Rule 2(a) of the General Rules of Interpretation of Customs Tariff, any reference in a heading to an article shall be taken to include a reference

to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or dis-assembled. This rule lays emphasis on the essential character of the goods. Thus goods which have the essential characteristics of finished goods will be classified under the same heading in which the final product has to be classified.

In the *Maestro Motors* case, the passenger car components were imported in CKD packs. Thus, what was imported was completely knocked down cars. The components imported had the essential character of a complete car even though presented in unassembled form. Thus, in view of Rule 2(a) of the General Rules of Interpretation of Customs Tariff, the Supreme Court held that the components in CKD packs would be classified as motor car.

Therefore, in case of India Car Co. also, the CKD packs should be classified as cars for the purpose of classification and clearance.

- (ii) In the *Maestro Motors* case, it was observed by the Supreme Court that a notification has to be interpreted in terms of its language. If in the notification, exemption is granted with reference to tariff items in the First Schedule to the Customs Tariff Act, 1975, then the Rules of Interpretation must apply. In that case even for the purposes of the notification, the goods will be classified in the same manner as they are classified for purposes of payment of customs duty. However, where the language of the notification is plain and clear effect must be given to it.

In this case the notification exempted components, including components of fuel efficient motor cars in semi-knocked down packs and completely knocked down packs. The Apex Court held that for purposes of levy of customs duty, by virtue of interpretative Rule 2(a) of the General Rules of Interpretation of Customs Tariff, the components in a completely knocked down pack would be considered to be cars. However, in view of the clear language of the Notification, the components including components in completely knocked down packs would be exempted.

Thus, in view of the abovementioned judgment, the components in CKD packs imported by India Car Co. would get the exemption under the Notification, even though for purposes of classification and clearance they may be considered to be motor cars.

Question 7

- (a) *Explain the Doctrine of unjust enrichment with respect to refund of duty. Are there any exceptions to it and if so enumerate them?* (5 Marks)
- (b) *When is redemption fine imposed? Whether this fine under Section 125 of the Customs Act, once paid, be claimed as refund, in case the importer decides to abandon the goods?* (5 Marks)

- (c) *Explain briefly the provisions regarding drawback allowable on re-export of duty paid goods as such.* (5 Marks)

Answer

- (a) When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchasers when these goods are sold by the importer. In other words, the burden of duty is passed on to the purchaser. Subsequently, if the importer makes a claim for refund of duty and on acceptance of such claim if he retains the amount of refund with himself without passing it to the purchaser, then this would be called as unjust enrichment.

Therefore, wherever there is an over assessment or excess collection of duty, the refund shall be given only to the person who at the material time of grant of refund, bears the burden of duty and interest, if any. When the person who bears the burden of duty refunded is not identifiable or has not come forward to claim the refund, the refund shall be paid into a fund called 'Consumer Welfare Fund'. The importer or the clearing agent has to prove that he has not passed the burden of duty, in order to claim refund of duty.

Section 28D provides that every person who has paid duty under the Customs Act, unless the contrary is proved by him, shall be deemed to have passed the full incidence of such duty to the buyer.

The doctrine of unjust enrichment does not apply to the refund of duty and interest, if any, paid on such duty if such amount is relatable to:

- (i) drawback of duty payable under sections 74 and 75;
 - (ii) export duty as specified in section 26;
 - (iii) the duty and interest, if any, paid on such duty paid by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest to any other person;
 - (iv) the duty and interest on imports made by an individual for his personal use;
 - (v) the duty and interest borne by the buyer, if he had not passed on the incidence of such duty and interest to any other person;
 - (vi) the duty and interest borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify. However, no notification under this clause shall be issued unless in the opinion of the Central Government the incidence of duty and interest has not been passed on by the persons concerned to any other person.
- (b) Section 125 of the Customs Act empowers a Customs Officer adjudging the confiscation to give an option to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized to pay a fine as the said officer thinks fit, in lieu of confiscation of the imported goods. The provisions in this regard are as follows:

- (a) in case of prohibited goods, the proper officer **may** give an option to pay a fine in lieu of confiscation;
- (b) in case of other goods, the proper officer **shall** give an option of payment of fine, in lieu of confiscation;
- (c) the amount of such fine cannot exceed the market price of the goods confiscated less import duty chargeable (in the case of imported goods) thereon;
- (d) the assessee shall also be liable to pay any duty and charges payable in respect of such goods.

The provisions of section 125 give the importer an option to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Hence, the redemption fine becomes liable only in lieu of confiscation. Now, where the importer has abandoned the goods, the scope for payment of any fine in lieu of confiscation comes to an end. Hence, the redemption fine, if already paid shall be liable to be refunded.

The same decision was given by the Madras High Court in the case of *Purfin Chemicals Pvt. Ltd v CEGAT, Madras (2004) (167) E.L.T. 145 (Mad.)*

- (c) For allowing duty draw back on re-export of duty paid goods, sub-section (1) of section 74 of the Customs Act, 1962 provides that:
 - (i) the goods should have been imported into India;
 - (ii) the import duty should have been paid thereon;
 - (iii) the goods should be capable of being easily identified as the goods, which were originally imported;
 - (iv) the goods should have been entered for export either on a shipping bill through sea or air or on a bill of export through land, or as baggage, or through post and the proper officer, after proper examination of the goods and after ensuring that there is no prohibition or restriction on their export, should have permitted clearance of such goods for export;
 - (v) the goods should have been identified to the satisfaction of the Assistant or Deputy Commissioner of Customs as the goods, which were imported, and
 - (vi) the goods should have been entered for export within two years from the date of payment of duty on the importation thereof.

However, in any particular case, the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period, as it may deem fit. Once these conditions are satisfied, then 98% of the import duty paid on such goods at the time of importation shall be repaid as drawback.

Question 8

- (a) *What is the crucial/relevant date for determination of rate of duty under the Customs Act in the following cases?*
 - (i) *Clearance of Baggage*

- (ii) *Goods cleared for home consumption from a warehouse under Section 68 of the Customs Act*
- (iii) *Goods entered for export under Section 50.* (3 x 2 = 6 Marks)
- (b) *Write short notes on the following with reference to the Customs Act, 1962:*
- (i) *Interest on drawback*
- (ii) *Power to arrest.* (2 x 3 = 6 Marks)
- (c) *Briefly discuss the provisions of the Customs Act, 1962 regarding rejection of an application for advance ruling.* (3 Marks)

Answer

- (a) (i) As per section 78 of the Customs Act, 1962, the relevant date for determination of rate of duty in case of clearance of baggage is the date on which a declaration is made in respect of such baggage under section 77.
- (ii) As per section 15(1)(b) of the Customs Act, 1962, the relevant date for determination of rate of duty in case of goods cleared from a warehouse under section 68 is the date on which a bill of entry for home consumption in respect of such goods is presented under that section.
- (iii) The relevant date for determination of rate of duty in case of goods entered for export under section 50 is the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51 - Section 16(1)(a) of the Customs Act.

(b) (i) Interest on drawback

Section 75A of the Customs Act provides for payment of interest on delayed payment of drawback. Where any drawback payable to a claimant under section 74 or 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, interest @ 6% p.a. shall be paid along with the amount of drawback. Such interest shall be paid from the date after the expiry of the said period of one month till the date of payment of such drawback [Section 75A(1)].

Similarly, if the drawback has been paid to a claimant erroneously, the claimant is required to repay the amount of drawback within a period of two months from the date of such demand. If he fails to do so, he shall have to pay interest @ 15% p.a. along with the amount of drawback. Such interest shall be paid from the date after the expiry of the said period of two months till the date of recovery of such drawback [Section 75A(2)].

(ii) Power to arrest

Section 104 of the Customs Act, 1962 empowers a proper officer (who is empowered by general or special order of Commissioner of Customs) to arrest any person in India or within Indian customs waters, if the official has reason to believe that the person is guilty of an offence punishable under section 135.

Such a person should be informed of the grounds of his arrest and taken to the nearest Magistrate immediately. The Customs Officer is vested with the powers of an Officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The offences under this Act shall not be cognizable. An arrest can be made only as per the provisions of section 46 of the Criminal Procedure Code.

- (c) Under section 28-I(2) of the Customs Act, an application for advance ruling may be rejected on the following grounds:
- (i) if the question raised is already pending before a customs officer, Appellate Tribunal or any Court.
 - (ii) if the question raised is the same as in a matter already decided by the Appellate Tribunal or any Court.

No application shall be rejected without giving an opportunity to the applicant of being heard. On rejection, reasons for such rejection shall be given in the order.

PART – C

Question 9

- (a) (i) *Certain abatement/exemption of the gross amount charged has been notified for computing the value of some taxable services. What are the conditions to be fulfilled to avail such partial exemption?* (2 Marks)
- (ii) *What is the percentage of abatement granted in the following cases?*
- (i) *Services provided by a tour operator*
 - (ii) *Services provided by an outdoor caterer supplying food also*
 - (iii) *A commercial concern providing construction service where the gross amount charged includes the value of goods and material*
 - (iv) *Goods transport agency providing taxable service and paying service tax itself.* (4 Marks)
- (b) *Enumerate the specified services, other than accounting and auditing, provided by a practising Chartered Accountant which are liable to service tax.* (6 Marks)
- (c) *Hotel Marudhar Palace charges 10% of the bill amount as service charges and Department has asked them to pay service tax on it. The assessee has submitted that the amount @ 10% collected from customers is subsequently disbursed among the staff, therefore it is not part of their income and cannot be included in the gross amount charged by them. Examine the case and advise suitably.* (3 Marks)

Answer

- (a) (i) The partial exemption shall be available only when the service provider has not availed –
- (a) CENVAT credit of duty paid on inputs or capital goods under the provisions of CENVAT Credit Rules, 2004; and
 - (b) the benefit of exemption under *Notification No.12/2003-ST, dated 20.06.2003* in respect of value of goods and materials sold by him.
- (ii) Following abatement has been granted in the cases under consideration:
- (i) 60% of the gross amount charged in case of services provided by a tour operator. However, in cases where the tour operator solely provides services in respect of arranging or booking accommodation, an abatement of 90% from gross amount charged has been granted vide *Notification No. 40/97 ST, dated 22.08.1997* as amended by *Notification No. 12/2004 ST, dated 10.09.2004*. The gross amount charged should include the service charges for arranging or booking accommodation as well as the cost of the accommodation.
 - (ii) 50% of the gross amount charged inclusive of charges for supply of food
 - (iii) 67% of the gross amount charged
 - (iv) 75% of the gross amount charged from customer.
- (b) According to *Notification No.59/98-S.T. dated 16th October, 1998*, the following services (other than accounting and auditing) provided by a practising Chartered Accountant are liable to service tax:
- (i) certification that requirements of Schedule XIII to the Companies Act, 1956 have been complied with as regards statutory guidelines for appointment of managerial personnel and payment of managerial remuneration to them without the approval of the Central Government under section 269 and Schedule XIII, of the Companies Act, 1956;
 - (ii) certification of documents to be filed by companies with the Registrar of Companies under the Companies Act, 1956;
 - (iii) certification in Form 1 that the whole of the amount remaining unpaid or unclaimed for a period of three years from the date of transfer to the special account under sub-section (1) and sub-section (2) of section 205A of the Companies Act, 1956 has been transferred to the General Revenue Account of the Central Government under the Companies Unpaid Dividend (Transfer to General Revenue Account of the Central Government) Rules, 1978;
 - (iv) certification for exchange control purposes which a practising chartered accountant can issue as documentary evidence in support of certain applications under the Foreign Exchange Regulation Act, 1973;

- (v) certification of documents under the Exports and Imports Policy (1997-2000) of the Government of India;
 - (vi) certification in respect of valuation of instruments or assets as per rule 8A(7) of the Wealth Tax Rules, 1957;
 - (vii) verification of declarations in prescribed forms of compliances for obtaining a certificate of commencement of business or commencement of other business under section 149 of the Companies Act, 1956;
 - (vii) signing of the annual return of the listed companies under section 161 of the Companies Act, 1956.
- (c) The facts of the case are similar to the case of *Hotel Mela Plaza v. CCE Ghaziabad – 2005 (183) ELT 190 (Tri-Del.)*. The Hotel rendered mandap keeping services and charged 10% of the bill amount as service charges from its customers. It was contended by the assessee (the Hotel) that the amount @ 10% collected from its customers did not form part of its income as that amount was subsequently disbursed among the staff and hence, was not liable to service tax. In this case, the Tribunal observed that section 67 of the Finance Act, 1994 provides that the value of taxable service in relation to the services provided by a mandap keeper shall be the gross amount charged by such keeper from the client for the use of mandap, including facilities provided to the clients in relation to such use and also the charges of catering, if any. The Tribunal held that as the assessee was charging this amount from its customers for providing the service, which was taxable as above, therefore, the 10% service charges would be liable to service tax. Therefore, applying the ratio of the abovementioned judgement to the facts of the present case, it can be concluded that Hotel Marudhar Palace is liable to pay service tax on 10% service charges collected by it from its customers.