SELECT CASES IN DIRECT AND INDIRECT TAX LAWS - 2016

An Essential Reading for the Final Course

[Relevant for May, 2017 and November, 2017 Examinations]

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A WORD ABOUT "SELECT CASES"

Direct Tax Laws and Indirect Tax Laws are the core competency areas of the Chartered Accountancy course. The level of knowledge prescribed at the final level for these subjects is 'advanced knowledge'. For attaining such a level of knowledge, the students have to be thorough not only with the basic provisions of the relevant laws but also constantly update their knowledge on the statutory developments and judicial decisions. The Board of Studies has been bringing out publications in the area of direct and indirect tax laws to help the students update their knowledge on a continuous basis. "Select Cases in Direct and Indirect Tax Laws – An essential reading for Final Course" is one such publication which helps the students in understanding the process of judicial decisions.

The select significant judicial decisions reported during the years 2010 to 2016 (upto April 2016) are summarized and compiled in this edition of the publication. This, read in conjunction with the Study Material, will enable the students to appreciate the significant issues involved in interpreting and applying the provisions of direct and indirect tax laws to practical situations. It will also help them to develop knowledge and expertise in legal interpretation.

Happy Reading and Best Wishes for the forthcoming examinations!

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CENTRAL EXCISE

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1

BASIC CONCEPTS

1. **Does printing on jumbo rolls of GI paper as per design and specification of customers with logo and name of product in colourful form, amount to manufacture?**

   CCE v. Fitrite Packers 2015 (324) ELT 625 (SC)

   Facts of the Case: The assessee purchased duty paid GI paper from the market and carried out printing on it according to the design and specifications of the customer. The printing was done on jumbo rolls of GIP twist wrappers. On the paper, logo and name of the product was printed in colourful form and the same was delivered to the customers in jumbo rolls without slitting. The customer intended to use this paper as a wrapping/packing paper for packing of their goods.

   Point of Dispute: Revenue contended that the process amounted to manufacture and the assessee was liable to pay excise duty thereon. However, the Tribunal, when the matter was brought before it, concluded that printing was only incidental and primary use of GI printing paper roll was for wrapping, which was not changed by the process of printing. Aggrieved by the Tribunal's order, the Revenue appealed before the Supreme Court.

   Supreme Court's Observations: The Supreme Court referred to one of its earlier judgments in the case of *Servo-Med Industries Pvt. Ltd. v. CCEx. 2015 (319) ELT 578*. In this case, the Apex Court had culled out four categories of cases to ascertain whether a particular process would amount to manufacture or not:

   (i) Where the goods remain exactly the same even after a particular process - There is obviously no manufacture involved. Process which remove foreign matter from goods complete in themselves and / or processes which clean goods that are complete in themselves fall in this category.

   (ii) Where the goods remain essentially the same after the particular process – Again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.

   (iii) Where the goods are transformed into something different and / or new after a particular process but the said goods are not marketable - No manufacture of goods takes place. Examples within this group are cases where the transformation of goods having a shelf life which is of extremely small duration.

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(iv) Where the goods are transformed into goods which are different and / or new after a particular process and such goods are marketable as such - It is in this category that manufacture of goods can be said to take place.

The Apex Court observed that GI paper was meant for wrapping and its use did not undergo any change even after printing - the end use thereof was still the same namely wrapping / packaging. However, whereas the blank paper could be used as wrapper for any kind of product, after the printing of logo and name of the specific product thereupon, its end use got confined to only that particular and specific product of the particular company / customer. The printing, therefore, was not merely a value addition but had transformed the general wrapping paper to special wrapping paper.

Supreme Court's Decision: The Supreme Court held that the process of aforesaid particular kind of printing resulted into a product i.e., paper with distinct character and use of its own which it did not bear earlier. The Court emphasised that there has to be a transformation in the original article and this transformation should bring out a distinctive or different use in the article, in order to cover the process under the definition of manufacture. Since these tests were satisfied in the present case, the Apex Court held that the process amounted to manufacture.

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

CCE v. Osnar Chemical Pvt. Ltd. 2012 (276) ELT 162 (SC)

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

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

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

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

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

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

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

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

Supreme Court's Observations: The Supreme Court observed that:

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

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

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

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

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

Grasim Industries Ltd. v. UOI 2011 (273) ELT 10 (SC)

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

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

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

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

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

4. **Are the physician samples excisable goods even when they are being statutorily prohibited from being sold?**

Medley Pharmaceuticals Ltd. v. CCE & C. 2011 (263) ELT 641 (SC)

Point of Dispute: The question which arose for consideration was whether physician samples of patent and proprietary medicines intended for distribution to medical

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practitioner as free samples, satisfied the test of marketability. The appellant contended that since the sale of the physician samples was prohibited under the Drugs and Cosmetics Act, 1940 and the rules made thereunder, the same could not be considered to be marketable.

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

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

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

***Note**: The Review Petition filed against the aforesaid judgement was dismissed by the Supreme Court in 2011 (269) ELT A20 (SC) thereby affirming the said judgement.*

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

Usha Rectifier Corpn. (I) Ltd. v. CCEx. 2011 (263) ELT 655 (SC)

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

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

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

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

(iii) testing equipments were not taken out from the factory premises of the appellant.

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<u>Supreme Court's Observations</u>: 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.

> **<u>Supreme Court's Decision</u>:** 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) ELT 338 (SC)

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

> **<u>Supreme Court's Decision</u>:** 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)

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

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

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

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

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

CCE v. Tarpaulin International 2010 (256) ELT 481 (SC)

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

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

9. Whether the word 'include' used in a statutory definition enlarges the scope of preceding words or restricts their scope?

Ramala Sahkari Chini Mills Ltd. v. CCEx. 2016 (334) ELT 3 (SC)

Supreme Court's Decision: The Supreme Court referring to the case of *Regional Director, Employees' State Insurance Corporation* v. *High Land Coffee Works of P.F.X. Saldanha and Sons & Anr. [(1991) 3 SCC 617]* held that that the word "include" in a statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction.

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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) ELT 341 (Bom.)

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

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

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

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

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

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

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

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

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

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

High Court's Observations: High Court made the following observations:

(i) Supreme Court in its judgement given vide order dated 21.7.2010 in Civil Appeal No. 2791 of 2005 has held that reversal of 8% amount (now 6%) is not applicable in case of bagasse as the same is not a final product, but a waste. Bagasse is never manufactured, but it only emerges as a waste from the crushing of sugarcane for the manufacture of final product, namely, sugar and thus, rule 6(2) and rule 6(3) would not be applicable.

(ii) Explanation added to section 2(d) deems the goods, which are capable of being bought and sold, to be marketable. Earlier also, bagasse was being bought and sold for a consideration and even after the amendment in 2008 it is being bought and sold for a consideration. Hence, it was marketable earlier also and no difference has been made about the marketability of bagasse on account of addition of explanation to section 2(d) of CEA, 1944 inasmuch as it does not cease to be waste and it does not become a manufactured final product for the purposes of rule 6 of CENVAT Credit Rules.

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

Notes:

1. *The appeal(s) filed against aforesaid judgment were dismissed by the Supreme Court in 2015 (322) E.L.T. 769 (S.C.) thereby affirming the said judgement.*

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2. ***Excisability of bagasse and similar other by-products or wastes arising during the course of manufacture of an excisable product has been an issue under dispute.***

Earlier, CBEC vide Circular No. 904/24/2009 CX dated 28.10.2009 [as struck down by Balrampur Chini Mills Ltd. judgment reported above], 941/02/2011 CX dated 14.02.2011 and Instruction issued vide F.No. 17/02/2009 CX (Pt.) dated 12.11.2014 on the subject had clarified that with the amendment in section 2(d) of the Central Excise Act, 1944, the bagasse, aluminium/zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty.

Subsequently, said issue also came for consideration before the Supreme Court in a case of M/s Union of India and Ors v. M/s DSCL Sugar Ltd 2015-TIOL-240-SC-CX dated 15.07.2015. Supreme Court examined the issue and reaffirmed that bagasse is not a manufactured product. The judgement applies to both periods, before and after the insertion of explanation in section 2(d) of the Central Excise Act, 1944 by the Finance Act, 2008. Further, Bombay High Court in case of M/s Hindalco Industries Ltd. v. Union of India 2015 (315) ELT10 (Bom.) came to similar conclusion in relation to dross and skimming of aluminium, zinc or other non-ferrous metal.

In the light of the above judgments, CBEC vide Circular No. 1027/15/2016 CX dated 25.04.2016 rescinded the aforesaid circulars issued by the Board on this subject as they had become non-est.

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2

CLASSIFICATION OF EXCISABLE GOODS

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

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

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

<u>Point of Dispute</u>: The Department contended that the product 'Moisturex' is mainly used for **care** of the skin and thus, the same ought to be classified as cosmetic or toilet preparations under Heading 33.04. It was further contended that even if such cosmetic products contained certain subsidiary pharmaceutical contents or even if they had certain subsidiary curative or prophylactic value, still, they would be treated as cosmetics only. It was also contended that since the product can be purchased without prescription of a medical practitioner, it could not be a medicament.

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

<u>Supreme Court's Observations</u>: 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.

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(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.

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

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

Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd. 2012 (278) ELT 581 (SC)

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

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

Supreme Court's Observations: 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

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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.

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

Note: *The description of entries under sub-heading 6803.00 and sub-heading 6807.10 of the Tariff and the rate applicable to them at the relevant time is given below:*

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

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

CCE v. Wockhardt Life Sciences Ltd. 2012 (277) ELT 299 (SC)

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

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

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<u>Supreme Court's Observations</u>: 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.

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

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

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

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

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

Further, the description of the Tariff Items under chapter heading 3003 and chapter sub-heading 3402.90, at the relevant time was:

Heading No.	***Sub-heading No.***	***Description of goods***	***Rate of duty***
30.03		*Medicaments (including veterinary medicaments)*	
	3003.10	*Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic.*	*15%*
	3003.20	*Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems. Medicaments, including those in Ayurvedic, Unani, Siddha,*	*8%*

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		Homeopathic or Bio-chemic systems.	
34.02		*Organic surface active agents (other than soap): surface-active preparations, washing preparations (including auxiliary washing preparations and cleaning preparation, whether or not containing soap).*	
	3402.90	*Other*	*18%*

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

CCEx. v. Connaught Plaza Restaurant (Pvt) Ltd. 2012 (286) ELT 321 (SC)

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

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

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

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

Supreme Court's Observations: 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.

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

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

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

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

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

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

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

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

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

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

Heading	*Sub-Heading*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
21.05	*2105.00*	*Ice-cream and other edible ice, whether or not containing cocoa*	*16%*
21.08		*Edible preparations, not elsewhere specified or included*	
	2108.91	*-Not bearing a brand name*	*Nil*

Chapter 4 Dairy Produce, etc.

Heading	*Sub-Heading*	*Description of Goods*	*Rate of Duty*
(1)	*(2)*	*(3)*	*(4)*
04.04		*Other dairy produce; Edible products of animal origin, not elsewhere specified or included* *- Ghee :*	
	0404.11	*--Put up in unit containers and bearing a brand name*	*Nil*
	0404.19	*--Other*	*Nil*
	0404.90	*--Other*	*Nil*

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

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3

VALUATION OF EXCISABLE GOODS

1. **Can the value of gunny bags, returned by the buyers, be excluded from the assessable value in the absence of any agreement between the seller and the buyer?**

   Tata Chemicals Ltd v. Collector of Central Excise 2016 (334) ELT 580 (SC)

   Facts of the Case: The assessee manufactured and sold soda ash in gunny bags. The assessee claimed that there was an arrangement between the assessee and the buyers of soda ash that gunny bags in which soda ash was supplied by the assessee can be returned and upon such return the value thereof will be refunded to the buyers.

   Point of Dispute: The issue which arose for consideration was whether the value of the gunny bags in which soda ash was supplied by the assessee was to be included in the assessable value of the finished product.

   Supreme Court's Observations: The Supreme Court, referring to the judgments in *Mahalakshmi Glass Works (P) Ltd. v. Collector 1988 (36) ELT 727 (SC)* and *Triveni Glass Ltd. v. UOI 2005 (181) ELT 289 (SC),* noted that if an arrangement exists between the seller and the buyer of excisable goods for return of packing materials by the buyer to the seller, carrying an obligation on the seller to return the value of the packing material to the buyer on such return; then such value is not to be included in the assessable value of the finished product. Further, in such case, the question of actual return is not relevant. However, on the basis of the materials placed before it, the Apex Court inferred that assessee had not succeeded in establishing that such an arrangement existed. The Court did not find any obligation taken by the assessee to refund the value of the gunny bags to the buyer in terms of any arrangement between the parties.

   Supreme Court's Decision: The Supreme Court held that in the absence of factual foundation in support of the fact that such an arrangement existed between the parties, the value of gunny bags returned by the buyers could not be excluded from the assessable value.

   Note: The above principle has also been endorsed by the Supreme Court in an earlier case. In case of CCE v. Hindustan Safety Glass Works 2004 (181) ELT 178, the Apex Court had decided that even though wooden crates/boxes used for transporting the glass

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sheets may be durable, but if no arrangement is made for making them returnable by buyer, their cost is includible in value of glass sheets.

2. **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) ELT 273 (SC)

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

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

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

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

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

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Notes:

(i) The Review Petition filed against the aforesaid judgement has been dismissed by the Supreme Court in Bharat Roll Industry (Pvt.) Ltd. v. Commissioner - 2015 (317) ELT A187 (SC) thereby affirming the said judgment.

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

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

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

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

(v) The same issue came up again before the Supreme Court in the case of ***CCE v. Maruti Suzuki India Limited 2014 (307) ELT 625 (SC).*** *The summary of the said case is given hereunder:*

<u>Facts of the Case:</u> *The assessee was a prestigious unit manufacturing and selling vehicles in the State of Haryana. Being a prestigious unit, a tax concession was granted to the assessee considered by the High Powered Committee (HPC) under the erstwhile Haryana General Sales Tax Rules, 1975. Therefore, an entitlement certificate was issued to the assessee for implementation of the decision of HPC.*

A show cause notice was issued by the Department on the ground that on the sale of its vehicles during the period in question, the assessee had deposited only 50% of the sales tax collected by it from its customers and retained balance 50% availing

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the tax concession granted to it. The retained sales tax was neither actually paid nor actually payable to the State Government. Therefore, the sales tax retained by the assessee constituted a part of the "transaction value" of the vehicles sold by the assessee to the customers in terms of its definition in section 4(3)(d) of the Central Excise Act, 1944 and excise duty was payable on the same.

The assessee contended that it was not actually exempted from payment of sales tax to the extent of 50% collected from the customers, but that the payment of sales tax was deferred. The 50% sales tax retained for a period of 14 years had to be adjusted against the capital subsidy due to the assessee by the State Government. However, Revenue contended that decision of the HPC did not support the case of the assessee as the entitlement certificate did not mention anything to the effect that it was for the deferment of payment of any sales tax. Thus, the assessee was not supposed to return any amount of sales tax concession to the State Government nor this amount was to be adjusted towards any capital subsidy granted by the State Government.

Supreme Court's Observations: *The Supreme Court concurred with the Revenue's contention that there was no mention in the decision of the HPC about adjustment of this amount of sales tax concession against any scheme or any capital subsidy. The entitlement certificate also did not give any indication of deferment of tax or capital subsidy.*

Further, referring to CBEC Circular dated 30th June, 2000, the Apex Court opined that the assessee retained 50% of the sales tax collected from its customers and it was neither actually paid nor actually payable to the Government. Therefore, the transaction value under section 4(3)(d) shall be calculated by including the amount of sales tax retained by the assessee and they were liable to pay excise duty on such amount.

Supreme Court's Decision: *The Apex Court, overruling the Tribunal's decision, held that since assessee retained 50% of the sales tax collected from customers which was neither actually paid to the exchequer nor actually payable to the exchequer, transaction value under section 4(3)(d) of the Central Excise Act,1944, would include the amount of such sales tax.*

(vi) The relevant paragraphs of the CBEC Circular No. 354/81/2000 TRU dated 30th June, 2000 read as follows:-

"As regards exclusion of taxes while working out assessable value, the definition of transaction value itself mentions that whatever amount is actually paid or actually payable to the Government or the relevant statutory authority by way of excise, sale tax and other taxes, such amount shall be excluded from the transaction value. In other words, if any excise duty or other tax is paid at a concessional rate for a particular transaction, the amount of excise duty or tax actually paid at the concessional rate shall only be allowed to be deducted from price. The assessee

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cannot claim that the excise duty or tax payable at the "normal rate" should be allowed to be deducted. The words "actually paid" have, therefore, been used to (in) the definition of transaction value to reflect the legislative intention as explained above.

The words "actually payable" in the context of the amount of duty of excise, sales tax and other taxes would normally come into play only in those situations where the amount of excise, sales tax or other taxes is not paid at the time of transaction but paid subsequently, for example, sales tax payable under a deferment scheme."

(vii) The aforesaid view has been confirmed in CCEx. v. National Engineering Industries 2015 (320) ELT 27 (SC).

3. 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) ELT 161 (Bom.)

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

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

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

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

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

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

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

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

Notes:

(1) Clause 7 of Circular No. 643/34/2002 dated 01.07.2002 reads as follows:-

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

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

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

(2) ***The Supreme Court in the case of CCEx. v. TVS Motors Co. Ltd. 2016 (331) ELT 3 (SC) has agreed with the aforesaid view of the Bombay High Court.*** *The summary of the said case is given hereunder:*

Facts of the case: *The issue which arose for consideration, in the instant case, was whether PDI charges and ASS charges are to be included in the assessable value. The Department contended that PDI charges and ASS charges are includible in the assessable value by virtue of Circular No. 643/34/2002 CX dated 1-7-2002 wherein it has been clarified that said charges are to be included in the assessable value.*

Supreme Court's Observations: *The Apex Court observed that where manufacturer himself provides the ASS and incurs any expenditure thereon, the same is not deductible from the price charged by him from his buyer. However, where the manufacturer has sold his goods to his dealer and dealer thereafter provides ASS to the customer and incurs expenditure therefor, it cannot be added back to the sale price charged by the manufacturer from the dealer for computing the assessable value. This is more so, where the ASS are provided by the dealer many weeks after the goods have been sold to him by the manufacturer. Such post-sale activity undertaken by the dealer is not relevant for the purpose of excise duty since the goods have already been marketed to the dealer.*

The Apex Court, further, noted that Clause No. 7 of Circular No. 643/34/2002 CX dated 1-7-2002 and Circular No. 681/72/2002 CX dated 12-12-2002 (to the extent it affirms the aforesaid circular) had been struck down by the Bombay High Court in case of Tata Motors Ltd. v. UOI 2012 (286) ELT 161 (Bom.). The Apex Court agreed with the following pertinent observations made by the Bombay High Court in the said case:

(i) The High Court observed that the term 'transaction value', under section 4(3)(d) of the Central Excise Act, 1944, comprises of price actually paid or payable by the buyer and includes additional amount that the buyer is liable to pay to or on behalf of the assessee by reason of sale or in connection of sale whether payable at the time of sale or at any other time including the amount

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charged for or to make provision for certain items such as advertising etc. One such item is servicing.

Department appeared to take the benefit of the term 'servicing' used in the said definition, for the purpose of adding the PDI and ASS to the assessable value by resorting to Clause 7 of the Circular dated 1st July, 2002 and Circular dated 12th December, 2002. However, the records indicated that apart from the price which was paid by the dealer to the manufacturer, no amount was recovered by the manufacturer from the dealer/customer. Thus, the stand of the Department that the expenses incurred for PDI and ASS was to be included in the assessable value of the car was negatived on the ground that the petitioners did not charge the dealer any amount equivalent to the cost incurred towards PDI and ASS.

(iii) The Department contended that the expenses incurred for PDI and ASS must be included in the transaction value for the reason that the warranty given by the manufacturer was linked with such expenses. The High Court rejected Revenue's said claim observing that it only implied that manufacturer would undertake the responsibility to provide the benefit of warranty to customer only when the customer had availed PDI and ASS, but had no bearing on the assessable value.

(iii) 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) of the Central Excise Act, 1944 because the transaction of sale of a car between the manufacturer and the dealer was governed by the provisions of section 4(1)(a) of the Central Excise Act, 1944.

The Apex Court, further referred to Circular No. 354/81/2000-TRU dated 30.06.2000, wherein it was inferred from the definition of 'transaction value' that if any amount is paid or payable by the buyer to or on behalf of the assessee on account of the factum of sale of goods, then such amount cannot be claimed to be not part of the transaction value. The law recognizes such payment to be part of the transaction value i.e. assessable value, for those particular transactions.

Supreme Court's Decision: *In view of the aforesaid discussion, the Apex Court held that PDI and free ASS would not be included in the assessable value under section 4 of the Central Excise Act, 1944, for the purpose of paying excise duty.*

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4

CENVAT CREDIT

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

Flex Engineering Ltd. v. CCEx. 2012 (276) ELT 153 (SC)

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

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

Supreme Court's Observations: 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.

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

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2. **Is a cellular mobile service provider entitled to avail CENVAT credit on tower parts & pre-fabricated buildings (PFB)?**

   Bharti Airtel Ltd. v. CCEx. Pune III 2014 (35) STR 865 (Bom.)

   Facts of the Case: The appellant was engaged in providing cellular telephone services and was paying service tax on the same. The appellant availed CENVAT credit of excise duty paid on the Base Transreceiver Station (BTS) claiming to be a single integrated system consisting of tower, GSM or Microwave Antennas, Prefabricated building (PFB), isolation transformers, electrical equipments, generator sets, feeder cables etc. The appellant treated these systems as "composite system" classifiable under Chapter 85.25 of the Central Excise Tariff Act [CETA].

   Department's Contentions: The Department allowed the credit on antenna but objected to availment of CENVAT credit on other items viz. the tower and parts thereof and the PFB on the following grounds:

   (i) Each of the goods of the BTS had independent functions and hence, they could not be treated and classified as single unit.

   (ii) Tower was fixed to the earth and after its installation became immovable and therefore, could not be said to be goods. Even in CKD or SKD condition, the tower and parts thereof would fall under Chapter heading 7308 of the Central Excise Tariff Act which is not specified in clause (i) of Rule 2(a)(A) of the Credit Rules, 2004 (CCR) as capital goods.

   (iii) Tower and parts thereof were not directly utilised for output service as the same had been basically a structural support for certain equipment.

   Appellant's Contentions: The appellant contended that the goods in question were clearly covered within the ambit of the definition of "capital goods" under rule 2(a)(A) of the CCR. The appellant submitted that tower is an accessory of antenna and that without towers antennas cannot be installed and as such the antennas cannot function and hence, the tower should be treated as parts and components of the antenna.

   Alternatively, the goods in question would fall within the definition of "input" under rule 2(k) of CCR. Since, the towers and shelters were received in knocked down condition (CKD) and were used for providing telecom services, the same qualified as "inputs" in terms of rule 2(k) of the CCR. The appellant submitted that since rule 2(k)(2) *[now 2(k)(iv)]* uses the words "all goods" which are "used for providing any "output service", these goods completely fell within the purview of rule 2(k) so as to mean inputs.

   However, the Tribunal, when the matter was brought before it, rejected the appellant's plea that the towers and parts thereof and the PFB were capital goods under CCR as

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also the alternate plea of the appellant that the said goods were inputs falling under rule 2(k) of the CCR.

High Court's Observations: When the appellant moved the High Court, the High Court observed as under:

(i) A combined reading of rule 2(a)(A)(i), 2(a)(A)(iii) and 2(a)(2) indicates that only the category of goods in rule 2(a)(A) falling under clause (i) and (iii) and used for providing output services can qualify as capital goods in the relevant context. All capital goods are not eligible for credit and only those relatable to the output services would be eligible for credit.

(ii) The appellant's contention that they were entitled for credit of the duty paid on account of BTS being a single integrated/composite system classifiable under Chapter 85.25 of the CETA Tariff Act, is not acceptable. Since the various components of the BTS had independent functions, it could not be classified as single integrated/composite system so as to be capital goods. In that case, tower and parts thereof and PFB would not fall under clause (i) of rule 2(A)(a) of CCR.

(iii) The other contention of the appellant of tower being an accessory of antenna is also without substance as the antenna can be installed irrespective of tower. It would be misconceived and absurd to accept that tower is a part of antenna. An accessory or a part of any goods would necessarily mean such accessory or part which would be utilized to make the goods a finished product or such articles which would go into the composition of another article. The towers are structures fastened to the earth on which the antennas are installed and hence, cannot be considered to be an accessory or part of the antenna.

(iv) Therefore, the goods in question namely the tower and part thereof and the PFB did not fall within the definition of capital goods and hence, the appellants could not claim the credit of duty paid on these items.

(v) The alternative contention of the appellant that the tower and parts thereof and the PFB would also fall under the definition of 'input' under rule 2(k), could also not be sustained.

(vi) Since the tower and parts thereof were fastened and were fixed to the earth and after their erection became immovable, they could not be termed as goods. The towers were admittedly immovable structures and non-marketable and non-excisable and hence, could neither be regarded as capital goods under rule 2(a) nor could be categorized as 'inputs' under rule 2(k) of the CCR.

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(vii) Even in the CKD or SKD condition, the tower and parts thereof would fall under the Chapter heading 7308 of the Central Excise Tariff Act which is not specified in clause (i) of rule 2(a)(A) of CCR so as to be capital goods.

High Court's Decision: The High Court rejected the appeals of the appellant and upheld the findings of the Tribunal holding that the mobile towers and parts thereof and shelters / prefabricated buildings are neither capital goods under rule 2(a) nor 'inputs' under rule 2(k) of the CCR. Hence, CENVAT credit of the duty paid thereon by a cellular mobile service provider was not admissible.

Note: Similar view has been endorsed in case of Vodafone India Ltd. v. CCEx. 2015 (324) ELT 434 (Bom.).

3. Can a commercial training and coaching institute claim CENVAT credit in respect of the input services of catering, photography and tent services used to encourage the coaching class students, maintenance and repair of its motor vehicle and travelling expenses?

Bansal Classes v. CCE & ST 2015 (039) STR 0967 (Raj.)

Facts of the case: The assessee is engaged in providing taxable commercial training and coaching services to students. It organises celebrations during the academic sessions whereby the services of catering, photography and tents are used. During these celebrations, students successful in coaching are rewarded so as to encourage the existing students and to motivate the new students. Further, it hires examination hall on rent basis for the purpose of conducting examination for students under the coaching. It also undertakes the maintenance and repair of vehicles used by it and incurs travelling expenses for the business tours.

It has availed CENVAT credit on the aforesaid services availed by it. However, Revenue alleged that CENVAT credit on such services was not admissible as these are not covered under the definition of input services under rule 2(l) of the CENVAT Credit Rules, 2004 since not used in/ in relation to providing output services.

When appealed before Tribunal, it held that assessee is eligible for CENVAT credit in respect of service tax paid on renting of immovable property service of hiring of examination hall, but disallowed the CENVAT credit availed with respect to other activities. The assessee appealed to High Court against the said order.

High Court's observations: The High Court agreed with the view taken by the Tribunal that once the students pass their coaching classes, the activities of catering, photography and tent services cannot be said to have been used to provide the output service of commercial training or coaching. Similarly, the assessee maintains and repairs its motor

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vehicle during the course of the business and there is no material to show that maintenance and repairs have any nexus to commercial training or coaching. Likewise, the travelling expenses incurred by assessee for the business tours cannot be related to provision of commercial training or coaching.

High Court's decision: The High Court upheld the Tribunal's decision. Thus, the assessee is not eligible for CENVAT credit of the service tax paid on catering, photography and tent services, maintenance and repair of its motor vehicle and travelling expenses.

4. Whether assessee is entitled to claim CENVAT credit of service tax paid on house-keeping and landscaping services availed to maintain their factory premises in an eco-friendly manner?

Commr. of C. Ex., & S.T., LTU v. Rane TRW Steering Systems Ltd. 2015 (039) STR 13 (Mad.)

Facts of the case: Assessee had availed credit of service tax paid on house-keeping and gardening services. However, Revenue disallowed the credit and also imposed penalty on the ground that the assessee was not eligible to avail credit of service tax on these services.

High Court's observations: The High Court noted that principle enunciated in case of *CCE v. Millipore India Pvt. Ltd. 2012 (26) S.T.R. 514 (Kar.)* is applicable to the case on hand. In this case, the Karnataka High Court held that landscaping of factory or garden certainly would fall within the concept of modernization, renovation, repair, etc., of the office premises. At any rate, the credit rating of an industry is depended upon how the factory is maintained inside and outside the premises. The environmental law expects the employer to keep the factory without contravening any of those laws. That apart, now the concept of corporate social responsibility is also relevant. It is to discharge a statutory obligation, when the employer spends money to maintain their factory premises in an eco-friendly manner, certainly, the tax paid on such services would form part of the costs of the final products.

High Court's decision: The High Court agreeing with and following the ratio laid down in the aforesaid decision held that where an employer spends money to maintain their factory premises in an eco-friendly manner, the tax paid on such services would form part of the cost of the final products. Therefore, housekeeping and gardening services would fall within the ambit of input services and the assessee is entitled to claim the benefit of CENVAT credit on the same.

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5. **In case the assessee pays the service tax that he was not liable to pay, can it claim the CENVAT credit of such service tax?**

   CCEx. & S.T. v. Tamil Nadu Petro Products Ltd. 2015 (40) STR 878 (Mad.)

   Facts of the Case: The assessee paid the service tax on an input service, even at a time when there was no liability on it to pay the service tax. Since it made the payment under the impression that it was liable to pay such service tax, it claimed CENVAT credit to that extent.

   Point of Dispute: Department contended that in such a case, the only course open to the assessee was to claim refund and not to make use of CENVAT credit.

   High Court's Decision: The High Court held that if upon a misconception of the legal position, the assessee had paid the tax that it was not liable to pay and such assessee also happens to be an assessee entitled to CENVAT credit, the availing of the said benefit cannot be termed as illegal.

6. **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) ELT 62 (Kar.)

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

   High Court's Observations: 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.

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

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

Ashok Kumar H. Fulwadhya v. UOI 2010 (251) ELT 336 (Bom.)

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

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

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

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

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

High Court's Observations: 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.

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

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

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9. Can CENVAT credit availed on inputs (contained in the work-in-progress destroyed on account of fire) be ordered to be reversed under rule 3(5C) of the CENVAT Credit Rules, 2004?

CCE v. Fenner India Limited 2014 (307) ELT 516 (Mad.)

Facts of the Case: The respondent assessee was engaged in manufacturing of Oil Seals. On account of fire accident in the factory, the work in progress stocks were burnt and rendered unfit for usage. The assessee had availed CENVAT credit on the raw materials, which were to be used for production of Oil Seals.

A show cause notice was issued to the assessee demanding the CENVAT credit availed on raw materials destroyed along with the interest and penalty though Department did not dispute the fact that inputs on which CENVAT credit had been taken were destroyed by fire when work was in progress. The assessee contended that since inputs were put in use for the manufacture of final products, question of reversing the credit did not arise. However, Revenue, by relying upon rule 3(5C) of the CENVAT Credit Rules, 2004 submitted that the assessee was bound to reverse the credit taken on the inputs.

High Court's Observations: The High Court observed that, it was not in dispute that the inputs on which the CENVAT credit had been availed were destroyed in a fire accident when the work was in progress. Once the fact was not disputed, then the assessee could not be called upon to reverse the credit.

The High Court placed reliance upon the view taken by the Gujarat High Court in the case of *CCE v. Biopac India Corporation Limited 2010 (258) E.L.T.56 (Gujarat H.C.),* wherein it was held that the goods destroyed in fire after being used for many years cannot be said as not used in the manufacture of final product and the assessee need not reverse the credit availed on such inputs.

The High Court further noted that rule 3(5C) can be invoked where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002. Thus, only in such case, the CENVAT credit taken on the inputs used in the manufacture of production of said goods shall be reversed.

High Court's Decision: The High Court held that CENVAT credit would need to be reversed only when the payment of excise duty on final product is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, which deals with the remission of duty. In the present case, the assessee has not claimed any remission and no final product has been removed, hence, assessee need not reverse the CENVAT credit taken on inputs (contained in the work-in-progress) destroyed in fire.

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EXPORT PROCEDURES

1. **Whether rule 18 of Central Excise Rules, 2002 (CER) allows export rebate of excise duty paid on both inputs as well as the final product manufactured from such inputs?**

   Spentex Industries Ltd v. CCE 2015 (324) ELT 686 (SC)

   Rule 18 of CER stipulates that where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods **OR** duty paid on material used in the manufacturing or processing of such goods. The issue in the instant case was that the word 'OR' used in between the two kinds of duties in respect of which rebate can be granted, postulates grant of one of the two duties or both the duties.

   Supreme Court's Observations: The Apex Court made the following significant observations:

   (i) Rules 18 and 19 of CER provide two alternatives to an exporter for getting the benefit of exemption from paying excise duty.

   (ii) Under rule 19 of CER, the exporter is not required to pay any excise duty at all. When the exporter opts for this method, he is not required to pay duty either on the final product, i.e., on excisable goods or on the material used in the manufacture of those goods. The intention thus, is that goods meant for exports are free from any excise duty.

   (iii) Once this scheme is kept in mind, it cannot be the intention of the Legislature to provide rebate only on one item in case a particular exporter opts for other alternative under rule 18, namely, paying the duty in the first instance and then claiming the rebate. Giving such restrictive meaning to rule 18 would not only be anomalous but would lead to absurdity as well and would defeat the very purpose of grant of remission from payment of excise duty in respect of export goods. It may also lead to invidious discrimination and arbitrary results.

   (iv) The Central Government has issued necessary notifications under rule 18 for rebate in respect of both the duties, i.e., on intermediate product as well as on the final product. Further, and which is more significant, these notifications providing detailed procedure for claiming such rebates contemplate a situation where excise duty may have been paid both on the excisable goods and on material used in the

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manufacture of those goods and enable the exporter to claim rebate on both the duties.

(v) It is to be borne in mind that it is the Central Government which has framed the Rules as well as issued the notifications. If the Central Government itself is of the opinion that the rebate is to be allowed on both the forms of excise duties, the rule in question has to be interpreted in accordance with this understanding of the rule maker.

(vi) Though, the principle is that the word 'or' is normally disjunctive and 'and' is normally conjunctive, there may be circumstances where these words are to be read as *vice versa* to give effect to manifest intention of the Legislature as disclosed from the context.

The Supreme Court also referred to the order passed by the Revision Authority on the said issue (when the matter was brought before it vide a revision petition) wherein the Authority had held that the word 'OR' occurring in rule 18 cannot be given literal interpretation as that leads to various disastrous results. Therefore, 'or' has to be read as 'and' to carry out the objectives of the rule 18 and also to bring it at par with rule 19 and also because that is what was intended by the rule maker in the scheme of things.

Supreme Court's Decision: The Supreme Court held that normally the two words 'or' and 'and' are to be given their literal meaning. However, wherever use of such a word, viz., 'and'/'or' produces unintelligible or absurd results, the Court has power to read the word 'or' as 'and' and *vice versa* to give effect to the intention of the Legislature which is otherwise quite clear. The Apex Court held that the exporters/appellants are entitled to both the rebates under rule 18 and not one kind of rebate.

Note: This case is in line with the Government's policy of neutralising the duty element (both Customs and Central Excise) on the goods exported with a view to promote exports of domestic products and make then internationally competitive. Further, Review Petition filed against the aforesaid judgement has been dismissed by the Supreme Court in 2016 (336) E.L.T. A136 thereby affirming the said judgment.

2. Can rebate under rule 18 of the Central Excise Rules, 2002, be claimed of the excise duty paid on the goods exported when the duty drawback of excise duty paid on inputs and service tax paid on input services used in manufacture of such export goods has already been availed?

Raghav Industries Ltd v. UOI 2016 (334) ELT 584 (Mad.)

Facts of the Case: The petitioner manufactured the synthetic yarn and blended textile yarn and exported the same on payment of excise duty by utilizing the CENVAT credit of duty paid on capital goods used in manufacture of such yarn. It filed the claim for rebate of the excise duty paid on such finished goods under rule 18 of the Central Excise Rules, 2002. The yarn is made up of the duty paid raw materials, viz., polyester staple fiber/

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polyester viscose staple fiber. The petitioner did not avail the CENVAT credit of the duty paid on the raw materials.

Point of Dispute: The petitioner, relying on the judgment of Apex Court in case of *Spentex Industries Ltd.,* submitted that rule 18 of the Central Excise Rules, 2002 provides for simultaneous rebate of duty paid on the excisable goods exported as well as rebate of duty paid on the raw materials used in the manufacture of said export goods. Since the petitioner had not claimed refund of excise duty paid on the raw materials and the yarn exported by it was covered under Duty Drawback Scheme, it claimed duty drawback of the excise duty paid on inputs and service tax paid on input services.

The Department rejected the rebate claim contending that since petitioner had availed duty drawback for the central excise and service tax portions, grant of rebate of the duty paid on export goods would amount to granting double benefit.

High Court's Observations: The High Court observed that after clearing the goods on payment of duty under claim for rebate, the petitioner should not have claimed drawback for the central excise and service tax portions; or they should have paid back the drawback amount availed before claiming rebate. Since this was not done, availing both the benefits would certainly result in double benefit.

While sanctioning rebate, since the export goods were one and the same, the benefits availed by the petitioner on the said goods under different schemes were required to be taken into account for ensuring that the sanction did not result in undue benefit to the claimant. The 'rebate' of duty paid on excisable goods exported and 'duty drawback' of the duty paid on inputs and service tax paid on input services, used in manufacture of export goods are governed by rule 18 of the Central Excise Rules, 2002 and the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 respectively . Both the rules intend to give relief to the exporters by offsetting the duty paid. When the petitioners had availed duty drawback of customs, central excise and service tax with respect to the exported goods, they were not entitled for the rebate under rule 18 of the Central Excise Rules, 2002 as it would result in double benefit.

In the *Spentex Industries Ltd.* judgment relied upon by the petitioner, the Supreme Court had held that the benefit of rebate on the inputs on one hand as well on the finished goods exported on the other hand would fall within the provisions of rule 18 of Central Excise Rules, 2002 and the exporters were entitled to both the rebates under the said rule. However, in the case on hand, the benefits claimed by the petitioners were covered under two different statutes - one under Customs, Central Excise Duties and Service Tax Drawback Rules 1995 issued under Section 75 of the Customs Act, 1962 and the other under rule 18 of the Central Excise Rules, 2002 issued under the Central Excise Act, 1944. Since the issue involved was covered under two different statutes, the said judgment was not applicable to the facts of the present case.

Further, as per the proviso to rule 3 of the Central Excise Duties and Service Tax Drawback Rules, 1995, the petitioner was not entitled to claim both the benefits.

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High Court's Decision: The High Court held that the Department had rightly rejected the rebate claim filed by the petitioner because when the petitioners had availed duty drawback with respect to the exported goods, they were not entitled for the rebate under rule 18 of the Central Excise Rules, 2002 as it would result in double benefit.

3. **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.)

High Court's Observations: 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.

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

The High Court ruled that non-production of ARE-1 forms *ipso facto* cannot invalidate rebate claim. In such a case, exporter can demonstrate by cogent evidence that goods were exported and duty paid and satisfy the requirements of rule 18 of Central Excise Rules, 2002 read with *Notification No. 19/2004 CE (NT)*.

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

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

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(i) *For the purpose of sealing of goods intended for export, at the place of dispatch, the exporter has to present the goods along with four copies of an application in form ARE-1 to the Superintendent or Inspector of Central Excise having jurisdiction over the factory or the warehouse.*

(ii) *The Superintendent/Inspector has to verify the identity of the goods mentioned in the application and the particulars of the duty paid or payable, and if found in order, he has to seal each package or the container and endorse each copy of the application.*

(iii) *The original and duplicate copies of the application are returned to the exporter by the Superintendent of Central Excise. The triplicate copy is sent to the officer with whom a rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in the official records.*

(iv) *On arrival of goods at the place of export, the goods have to be presented together with the original and duplicate copies of the application (the quadruplicate copy being optional) to the Commissioner of Customs or a duly appointed officer.*

(v) *The Commissioner of Customs or his officer examines the consignment with the particulars cited in the application and upon finding them to be correct and exportable in accordance with the law for the time being in force, he is required to allow the export of the goods and to certify on the copies of the application that the goods have been duly exported, citing the shipping bill number, date and other particulars of export.*

(vi) *The Commissioner of Customs or his officer shall return the original copy of the application to the exporter and forward the duplicate copy, either by post or by handing over to the exporter in a tamper proof sealed cover, to the officer specified in the application from whom the exporter wants to claim rebate.*

(vii) ***The exporter has to lodge a claim of rebate of duty paid on all excisable goods along with the original copy of the application to the jurisdictional Assistant/Deputy Commissioner or Maritime Commissioner, as the case may be.***

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

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DEMAND, ADJUDICATION AND OFFENCES

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

Hans Steel Rolling Mill v. CCEx. Chandigarh 2011 (265) ELT 321 (SC)

Supreme Court's Observations: 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.

Supreme Court's Decision: 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.

Note: *This case was maintained by the Supreme Court in Prince Agro & Allied Industries v. Commissioner 2012 (282) ELT A45 (SC).*

2. In case the revenue authorities themselves have doubts about the dutiability of a product, can extended period of limitation be invoked alleging that assessee has suppressed the facts?

Sanjay Industrial Corporation v. CCE 2015 (318) ELT 15 (SC)

Facts of the Case: In this case, the appellant was engaged in the business of cutting larger steel plates into smaller sizes and shapes as per the requirement of the customers. After cutting the plates as per the customer's specifications, same were supplied to them. This process is known as profile cutting.

The appellant did not pay excise duty on the belief that the aforesaid process did not amount to manufacture as per section 2(f) of the Central Excise Act, 1944. Department issued a show cause notice demanding the excise duty and penalty alleging that the activity carried out by the appellant amounts to "manufacture". It had invoked the

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extended period of limitation under section 11A holding that it was a case of suppression and misrepresentation facts by the appellant.

Point of Dispute: The primary contention of the appellant was that penalty could not be imposed invoking extended period of limitation as there was no suppression or misrepresentation of facts by them. It referred to order-in-original in case of *M/s Pioneer Profile Industries, Pune* involving the same process wherein although the Commissioner held that process of profile cutting amounted to manufacture, but did not impose the penalty because the question as to whether this process amounted to manufacture was in doubt earlier.

Supreme Court's Observations: Referring the order of the Commissioner in case of *M/s Pioneer Profile Industries, Pune,* the Apex Court inferred that even Department had the doubts relating to excisability of process of profile cutting. In view thereof, if the appellant also had nurtured the belief that the process carried out by him did not amount to manufacture and did not pay excise duty, this conduct of the appellant was a bonafide conduct and could not be treated as willful suppression of facts.

Supreme Court's Decision: The Supreme Court held that since Revenue authorities themselves had the doubts relating to excisability of process of profile cutting, the *bona fides* of the appellant could not be doubted. Hence, extended period of limitation could not be invoked and penalty was set aside.

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

Jay Kumar Lohani v. CCEx 2012 (28) STR 350 (MP)

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

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

High Court's Observations: 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.

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

4. 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) ELT 200 (Del.)

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

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

(i) producer;

(ii) manufacturer;

(iii) registered person of a warehouse; or

(iv) a registered dealer

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

Since, the respondents were neither producers nor manufacturers of the said zarda, neither were they the registered persons of a warehouse in which the said zarda had been stored nor were the registered dealers, penalty under rule 25(1) (higher of duty payable on excisable goods in respect of which contravention has been committed or ₹ 2,000 (now ₹ 5,000), could not be imposed on the respondents.

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

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[1] With effect from 01.03.2015, penalty under rule 25(1) can also be imposed on an importer who issues an invoice on which CENVAT credit can be taken.

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

Subject to the provisions of section 11AC of the Central Excise Act, if any producer, manufacturer, registered person of a warehouse, or an importer who issues an invoice on which CENVAT credit can be taken, or a registered dealer-

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

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

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

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

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

5. 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) ELT 15 (All.)

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

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

High Court's Observations: 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

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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.

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

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REFUND

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

   ICMC Corporation Ltd. v CESTAT, CHENNAI 2014 (302) ELT 45 (Mad.)

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

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

   CCEx v. Superintending Engineer TNEB 2014 (300) ELT 45 (Mad.)

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

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

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

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APPEALS

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

Commissioner of C. Ex., Mumbai-III v. Tikitar Industries 2012 (277) ELT 149 (SC)

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

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

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

Note: *It is important to note here that section 35R of the Central Excise Act, 1944 empowers the CBEC to issue orders or instructions or directions fixing monetary limits for the purposes of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of Chapter VIA of the Central Excise Act, 1944. The Central Excise Officer who has not been able to file an appeal/ application/revision/reference against any decisions/order on account of such monetary limits, will not be precluded from filing any appeal/application/revision/reference in any other case involving the same or similar issues or questions of law. The other party to the appeal will not be able to contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.*

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

CCE v. RDC Concrete (India) Pvt. Ltd. 2011 (270) ELT 625 (SC)

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

Supreme Court's Observations: 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.

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

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

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

3. **Can an appeal be filed before the Supreme Court against an order of the CESTAT relating to clandestine removal of manufactured goods and clandestine manufacture of goods?**

CCE v. Fact Paper Mills Private Limited 2014 (308) ELT 442 (SC)

Supreme Court's Decision: The Supreme Court held that the appeals relating to clandestine removal of manufactured goods and clandestine manufacture of goods are not maintainable before the Apex Court under section 35L of the Central Excise Act, 1944.

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4. **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) ELT 16 (Bom.)

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

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

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

   ***Note:** Gujarat High Court has taken a contrary view in case of Texcellence Overseas v. Union of India 2013 (293) ELT 496 (Guj.) as reported below in case no. 5:-*

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

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

   Facts of the Case: The petitioner was granted a refund by way of order-in-original and the same was also upheld by the CESTAT. However, a fresh show cause notice was issued on the ground that refund was erroneously granted. The show cause notice, this time was adjudicated in favour of the Department. The petitioner challenged this order before Commissioner (Appeals) five months after the said order was passed. As per section 35 of the Central Excise Act, 1944, an appeal needs to be filed with the Commissioner (Appeals) within 60 days from the date of the communication of the order sought to be appealed against. However, the Commissioner (Appeals) is empowered to condone the delay for a period of 30 days if he is satisfied with the sufficiency of the cause of the delay. Therefore, the Commissioner (Appeals) and Tribunal (when the matter was brought before it) rejected the appeal on the grounds of limitation as the same was filed beyond three months from the date of the impugned order.

   High Court's Observations: The High Court observed that none of the appellate authorities decided the question on merit after the second round of litigation began and therefore, the question of merger* would not arise until the matter is decided on merits.

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Treating these circumstances as extraordinary, the High Court sought to uphold the petitioner's challenge to the impugned order.

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

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

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

What is Doctrine of Merger?

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

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

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

Habib Agro Industries v. CCEx. 2013 (291) ELT 321 (Kar.)

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

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

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REMISSION OF DUTY AND DESTRUCTION OF GOODS

1. **Can excise duty be remitted for the loss of molasses where the molasses were stored in an open pit instead of being stored in a steel storage tank?**

   U.P. State Sugar Corporation Ltd. v. CCE 2016 (334) ELT 434 (All.)

   Facts of the Case: The assessee had three tanks for storage of molasses with a combined capacity of 1,20,000 quintals. However, only 1,07,828 quintals of molasses were kept therein. Thus, additional 12,172 quintals could also be kept therein.

   Instead, the assessee stored 28,956.20 quintals in an open pit. During the summer conditions, as a result of rise in temperature, the molasses stored in the open pit turned into black carbonized lumps and became waste.

   Point of Dispute: The assessee applied for remission of duty on such molasses in terms of rule 21 of the Central Excise Rules, 2002 claiming that molasses had been lost by natural phenomenon beyond its control.

   The Tribunal gave a finding that the act of assessee in not fully utilising the steel tanks for storing molasses and storing them in the open pit could not be said to be a *bonafide* act. Thus, it granted the remission of only part of quantity of the molasses, but declined to grant the remission of balance quantity which could have been kept in the steel tank.

   High Court's Decision: The High Court held that the assessee was duty bound to keep the molasses in the three tanks to their fullest capacity. Since assessee had not utilized the three tanks to the fullest capacity, the Tribunal had been justified in granting remission of only part of the quantity of the molasses and refusing to grant remission on the balance quantity which could have been stored in the steel tank.

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EXEMPTION BASED ON VALUE OF CLEARANCES (SSI)

1. **Whether an assessee using a foreign brand name, assigned to it by the brand owner with right to use the same in India exclusively, is eligible for SSI exemption?**

   CCE v. Otto Bilz (India) Pvt. Ltd 2015 (324) ELT 430 (SC)

   Facts of the case: The assessee was availing the benefit of SSI exemption notification and was using a brand name 'BILZ' of a foreign company. The foreign company had assigned the said brand name in favour of the assessee under an agreement with right to use the said trade mark in India exclusively. The Revenue contended that since the assessee was using a brand name of a foreign company, it was ineligible to seek exemption under the aforesaid Notification.

   Supreme Court's Decision: The Supreme Court held that because of the aforesaid assignment, the assessee was using the trade mark in its own right as its own trade mark and therefore, it could not be said that it was using the trade mark of another person. The assessee was entitled to SSI exemption.

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

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

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

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

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exemption would be available on cookies sold loosely as they did not bear the brand name.

Supreme Court's Observations: 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.

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

3. Should the clearances of two divisions of the assessee having separate central excise registration, be clubbed for determining the turnover for claiming SSI exemption?

Premium Suiting (P) Ltd v. CCEx. 2016 (331) ELT 589 (All.)

Facts of the case: The assessee had two divisions – textile division wherein cloth was manufactured and chemical division wherein Polymer Vinyl Acetate, etc. were

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manufactured. Both the divisions were in separate factories. The assessee claimed the benefit of SSI exemption notification.

<u>Point of Dispute</u>: The Department alleged that clearances of the two divisions should be clubbed together for the purposes of granting the benefit under SSI notification since both factories had common directors and were housed in the same premises. Further, for the purpose of Income-tax and sales tax, they had a common PAN and Sales Tax Registration and their Income-Tax Assessment and the Sales Tax Assessment were also common.

The assessee contended that the clearances of two divisions could not be clubbed as two factories had separate entrances and managing staff. Moreover, central excise registration for two divisions was separate.

<u>High Court's Observations</u>: The High Court, referring to the SSI exemption notification, noted that a manufacturer is entitled for SSI exemption if the aggregate value of clearances of all excisable goods for home consumption from one or more factories of a manufacturer or from a factory by one or more manufacturers does not exceed the specified turnover in the preceding financial year.

The Court observed that in the instant case, two divisions-chemical and textile- were of one manufacturer was evident from the fact that common balance sheet was being filed. The fact that two factories had separate entrances, managing staff and central excise registration, was irrelevant.

Therefore, the clearances of two divisions manufacturing an excisable goods had to be clubbed while considering turnover for the SSI exemption. Since the aggregate clearances exceeded the specified turnover limit, the assessee was not entitled for SSI exemption.

<u>High Court's Decision:</u> The High Court affirmed the Tribunal's decision of clubbing the clearances of the goods of the two divisions of the assessee and that the assessee could not avail the SSI exemption.

4. 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.)

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

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

High Court's Observations: 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.

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

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

5. **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) ELT A48 (P & H)

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

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

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

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

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Note: *The afore-mentioned judgement has been further affirmed by the Supreme Court in CCEX v. Elex Knitting Machinery Co. 2012 (283) ELT A18.*

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

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

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

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

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

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NOTIFICATIONS, DEPARTMENTAL CLARIFICATIONS AND TRADE NOTICES

1. Can the benefit of exemption notification be granted to assessee where one of the conditions to avail the exemption is not strictly followed?

CCE v. Honda Siel Power Products Ltd. 2015 (323) E.L.T. 644 (S.C.)

Facts of the case: The assessee was availing the benefit of an exemption notification. One of the conditions to avail the benefit of said notification was that duty was to be paid in either of two modes of payment of duty – in cash or through account current. However, the assessee cleared the goods through utilization of CENVAT credit which was not the prescribed mode mentioned as per said condition.

Point of dispute: The issue which arose for consideration was as to whether the assessee was entitled to avail the benefit of said notification.

Supreme Court's Decision: The Apex Court observed that the assessee was required to fulfill the condition in *stricto senso* viz. to pay the duty either in cash or through account current if it wanted to avail the benefit of exemption notification and not through adjustment of CENVAT credit which was not the mode prescribed in the aforesaid condition. *It is trite that exemption notifications are to be construed strictly and even if there is any doubt same is to be given in favour of the Department.*

The Supreme Court held that once it is found that the conditions had not been fulfilled the obvious consequence would be that the assessee was not entitled to the benefit of said notification.

2. 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.)

High Court's Observations: 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

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Circular and the time-limit as provided under section 11A of the Act is not available to the Department.

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

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

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

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

a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

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SETTLEMENT COMMISSION

1. **(i) Where a settlement application filed under section 32E(1) of the Central Excise Act, 1944 (herein after referred to as 'Act') is not accompanied with the additional amount of excise duty along with interest due, can Settlement Commission pass a final order under section 32F(1) rejecting the application and abating the proceedings before it ?**

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

   Vadilal Gases Limited v Union of India 2014 (301) ELT 321 (Guj.)

   High Court's Observations: 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

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

Notes:

1. *Res judicata means the principle that a matter may not, generally, be relitigated once it has been judged on the merits.*
2. *The relevant extracts of provisions of section 32-O and 32L of the Act are given hereunder:*

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

Where,

(i) an order of settlement passed under sub-section (5) of section 32F provides for the imposition of a penalty on the person who made the application under section 32E for settlement, on the ground of concealment of particulars of his duty liability; or

(ii) after the passing of an order of settlement under the said sub-section (5) of section 32F in relation to a case, such person is convicted of any offence under this Act in relation to that case; or

(iii) the case of such person is sent back to the Central Excise Officer having jurisdiction by the Settlement Commission under section 32L,

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

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

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

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SERVICE TAX

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1

BASIC CONCEPTS OF SERVICE TAX

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

Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran 2012 (26) STR 289 (SC)

Facts of the Case: The respondent was a partnership firm carrying on the business of clearing and forwarding agents. The appellant appointed the respondent as the handling contractor and entered into a formal contract with it. One of the terms and conditions of the contract read as follows:-

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

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

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

Supreme Court's Decision: 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.

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

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

2. Does preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete amount to provision of service?

Commissioner v. GMK Concrete Mixing Pvt. Ltd. 2015 (38) STR J113 (SC)

Facts of the Case: In this case, the assessee was engaged in preparation of ready mix concrete (RMC). While carrying out such dominant objects, other ancillary and incidental activities like pouring, pumping and laying of concrete were also carried out. The Revenue contended that the whole activity carried out by the assessee was not a sale transaction, as it also included element of service in it. Hence, the assessee was liable to pay service tax. The Department was of the view that the activities like pouring, pumping and laying of concrete is a significant part of the transaction and not incidental to transaction of sale.

The Tribunal, when the matter was brought before it, held that agreement to supply RMC does not constitute any taxable service. Aggrieved by such an order, the Revenue, preferred an appeal before the Supreme Court.

Supreme Court's Decision: The Supreme Court upheld the decision of the Tribunal wherein it was held that the contract between the parties was to supply RMC and not to provide any taxable services. Therefore, since the Finance Act, 1994 is not a law relating to commodity taxation, the adjudication was made under mistake of fact and law fails. By this judgment, the Supreme Court dismissed the appeal filed by the Revenue.

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

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

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

The primary contentions of the petitioners were as follows:-

(a) Under the agreement, there was no provision for payment of service tax. Therefore, the demand for payment of service tax was illegal. Further, service tax was payable

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by the service provider viz. Municipality and there was no authority with which the Municipality could pass it on to the petitioners.

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

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

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

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

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

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

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

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

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

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

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4. **Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person, results in outdoor caterer service?**

Indian Coffee Workers' Co-operative Society Ltd. v. CCE&ST 2014 (34) STR 546 (All.)

Facts of the Case: The assessee entered into agreements with National Thermal Power Corporation Limited (NTPC) for running and maintenance of a guest house and with Lanco Infratech Limited (LANCO) for running and maintenance of catering services for its Township. The assessee charged amounts in cash from individual customers for food, eatables and beverages supplied according to rates stipulated in the menu card. The assessee did not pay any service tax as it was of the view that it did not provide any service to NTPC or LANCO but only sold goods in their canteens to individual customers (not to NTPC and LANCO). NTPC and LANCO just provided a place for running the canteen on rent and reimbursed certain expenses for maintenance and running. Thus, there should not be any service tax liability on this activity.

However, the Revenue demanded service tax from the assessee by treating the activity of the assessee as outdoor catering services since he was engaged in providing services in connection with catering at a place other than his own. The Revenue was of the opinion that the fact that food, beverages or edibles were consumed by employees of NTPC and LANCO or by those who use the guest house or facility, made no difference to the position that the service was provided by the assessee to NTPC or LANCO, and attracted service tax.

High Court's Observations: The High Court opined that the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. Further, since the assessee provides the services as a caterer at a place other than his own, he is an outdoor caterer.

The High Court clarified that taxable catering service could not be confused with who had actually consumed the food, edibles and beverages which were supplied by the assessee. Taxability or the charge of tax does not depend on whether and to what extent the person engaging the service consumes the edibles and beverages supplied, wholly or in part. What is material is whether the service of an outdoor caterer is provided to another person and once it is, as in the present case, the charge of tax is attracted.

Further the High Court elaborated that the charge of tax in the cases of VAT is distinct from the charge of tax for service tax. The charge of service tax is not on the sale of goods but on a taxable service provided. Hence, the fact that the assessee had paid VAT on the sale of goods on the supply of food and beverages to those who consume them at the canteen, would not exclude the liability of the assessee for the payment of service tax in respect of the taxable service provided by the assessee as an outdoor caterer.

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<u>High Court's Decision</u>: Based on the observation made above, the High Court held that the assessee was liable for payment of service tax as an outdoor caterer.

Note: *Though the above judgment is based on the definition of 'outdoor caterer' and taxable outdoor catering services as existing prior to 1st July 2012, the principle in the judgment will hold true even for the period beginning from 1st July 2012. Under the current position of law, service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the activity, is liable to service tax as declared service.*

5. Whether the course completion certificate/training offered by approved Flying Training Institute and Aircraft Engineering Institutes is recognized by law (for being eligible for exemption from service tax) if the course completion certificate/ training/ is only for the purpose of eligibility for obtaining ultimate licence/approval for certifying repair/maintenance/airworthiness of aircrafts?

CCE & ST v. Garg Aviations Limited 2014 (35) STR 441 (All.)

<u>Facts of the Case</u>: The assessee was running a Flying Training Institute and Aircraft Maintenance Engineering Institute. It was engaged in providing training and coaching to individuals in the field of flying of aircraft for obtaining Commercial Pilot License from the Director Civil Aviation (DGCA), New Delhi. It also provided training for obtaining Basic Aircraft Maintenance Engineering Licence.

<u>Point of Dispute</u>: The Department demanded service tax on this training activity. However, the assessee contended that since the services were leading to the grant of diploma/certificate recognised by the law, the services were exempt and thus, were not chargeable to service tax. The assessee cited the case of *Indian Institute of Aircraft Engineering v. Union of India 2013 (30) STR 689*, in which the Delhi High Court, in the similar matter held that such services were not chargeable to service tax being exempt.

<u>High Court's Observations</u>: The High Court referred to the judgment of the Delhi High Court in *Indian Institute of Aircraft Engineering v. Union of India,* wherein the Delhi High Court made the following observations:

(i) The expression 'recognized by law' is a very wide one. The legislature has not used the expression "conferred by law" or "conferred by statute". Thus, even if the certificate/degree/diploma/qualification is not the product of a statute but has approval of some kind in 'law', it would be exempt.

(ii) The Aircraft Act, 1934 (the Act) and the Aircraft Rules, 1937 (the Rules) and the Civil Aviation Requirements (CAR) issued by the DGCA under Rule 133B of the Rules, having provided for grant of approval to such institutes and having laid down conditions for grant of such approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA

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examination, have recognized the course completion certificate and the qualification offered by such Institutes.

(iii) The certificate/training/qualification offered by Institutes which are without approval of DGCA would not confer the benefit of such relaxation. Thus, the certificate/training/qualification offered by approved Institutes, has by the Act, Rules and the CAR been conferred some value in the eyes of law, even if it be only for the purpose of eligibility for obtaining ultimate licence/approval for certifying repair/maintenance/airworthiness of aircrafts.

(iv) The Act, Rules and CAR distinguish an approved Institute from an unapproved one and a successful candidate from an approved institute would be entitled to enforce the right, conferred on him by the Act, Rules and CAR, to one year relaxation against the DGCA in a Court of law. The inference can only be one, that the course completion certificate/training offered by such Institutes is recognized by law.

(v) An educational qualification recognized by law will not cease to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken.

The Delhi High Court held that the recognition accorded by the Act, Rules and CAR supra to the course completion certificate issued by the institutes as the petitioner cannot be withered away or ignored merely because the same does not automatically allow the holder of such qualification to certify the repair, maintenance or airworthiness of an aircraft and for which authorization a further examination to be conducted by the DGCA has to be passed/cleared.

High Court's Decision: The High Court upheld the decision of the Tribunal and held that the Revenue had not been able to persuade the Court to take a contrary view as taken by the Delhi High Court in *Indian Institute of Aircraft Engineering.* The appeal filed by the Revenue would not give rise to any substantial question of law. Hence, the appeal filed was dismissed and the assessee was held not to be liable to pay service tax.

Note: *The above case is in context of the taxable service category of 'commercial coaching or training services' and the related exemption as they stood prior to 1st July 2012. However, as the broad position of the taxable service and the related exemption (which is now covered under the negative list) remains the same, the principle in the judgment may hold true in the present position of law also.*

6. Whether section 66E(i) of the Finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food or any other article for human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity, is *ultra vires* the Article 366(29A)(f) of the Constitution?

Hotel East Park v. UOI 2014 (35) STR 433 (Chhatisgarh)

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Questions of Law: The substantial questions of law which arose before the High Court were:

(a) Whether any service tax can be charged on sale of an item or *vice versa*?

(b) Whether in view of Article 366(2A)(f) service is subsumed in sale of foods and drinks and whether such Article is violated by section 66E(i) of the Finance Act, 1994?

High Court's Observations: The High Court observed as under:

(i) With reference to question (a) above, the High Court observed that a tax on the sale and purchase of food and drinks within a State is in exclusive domain of the State. The Parliament cannot impose a tax upon the same. Similarly, there is no entry in List II or List III of the Seventh Schedule to the Constitution under which service tax can be imposed. There is no legislative competence with the States to impose a tax on any service.

(ii) With reference to question (b) above, the High Court observed that Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service. Section 65B(44) as well as section 66E(i) of the Finance Act, 1994, charge service tax only on the service part and not on the sales part. It indicates that the sale of the food has been taken out from the service part.

(iii) The quantum of services to be taxed is explained under rule 2C of the Service Tax (Determination of Value) Rules, 2006 read with *Notification No. 25/2012 ST* notified by the Central Government. Rule 2C presumes a fixed percentage of bill value as the value of taxable service on which service tax should be charged. However, there is no provision in VAT Act to bifurcate the amount of bill into sale and service.

High Court's Decision: The High court held that section 66E (i) of the Finance Act, 1994 is *intra vires* the Article 366(29A)(f) of the Constitution of India.

Further, the High Court held that no VAT can be charged over the amount meant for service and that the amount over which service tax has been charged should not be subject to VAT. The High Court directed the State Government to frame such rules and issue clarifications to this effect to ensure that the customers are not doubly taxed over the same amount. The rules may be in conformity with the bifurcation as provided under the Finance Act, 1994 or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which service tax is being assessed.

Notes:

(i) Clause 19 of the Mega Exemption Notification No. 25/2012 ST exempts the services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having a facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year.

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(ii) Rule 2C of the Service Tax (Determination of Value) Rules, 2006 clarifies that in case of a restaurant, service is presumed to be 40% of the bill value and in case of outdoor catering, it is presumed to be 60% of the bill value. It shows that the value of the food is taken to be 60% of the bill in the case of restaurant and 40% of the bill in case of catering service.

(iii) Article 366 (29A)(f) of the Constitution provides that "tax on the sale or purchase of goods" includes a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

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

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

Facts of the Case: The petitioner, Mayo College, was a society running internationally renowned schools. It allowed other schools to use the name 'Mayoor School', its logo and motto, and as a consideration thereof received collaboration fees from such schools which comprised of a non-refundable amount and annual fee. The schools were required to observe certain obligations/terms and unimpeachable confidentiality.

Points of Dispute: The department contended that the petitioner was engaged in providing franchise service to schools that were running their institutes using its school name "Mayoor School". Therefore, a show cause notice proposing recovery of service tax along with interest and penalty was issued against them.

The petitioners submitted that they did not provide any franchise services to the said schools, rather they provided their expertise for the establishment and development of these schools. The agreement entered into between the petitioners and the said schools also did not reveal that any franchise service was provided by the petitioner to these schools. It was contended by the petitioners that they were a non-profit society carrying on non-commercial activities and that their main obligation was to maintain the high standard of the education in the said schools. Further, they did not collect any 'franchise fees' from the said schools and therefore, were not liable to pay service tax.

High Court's Decision: 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.

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2

PLACE OF PROVISION OF SERVICE

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

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

As per *Notification No. 12/2005 ST dated 19.04.2005*, rebate is granted of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India. Condition 3.1 of the Notification stipulated that the provider of taxable service to be exported has to file a declaration with the jurisdictional Assistant/Deputy Commissioner of Central Excise describing the taxable service intended to be exported with description, value and the amount of service tax/excise duty and cess payable on input services/inputs actually required to be used in providing taxable service to be exported, prior to date of export of such taxable service.

Facts of the Case: In the instant case, the appellant rendered IT-enabled services such as technical support services, customer-care services, back-office services etc. to clients outside the country. It involved attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers in respect of the products or services of multinational corporations. For rendering such services, the appellant used input services such as night transportation, recruitment, training, bank charges etc. The appellant claimed rebate of the service tax paid by it on such input services, used in providing the output services which were exported during a particular time period, under the said notification. However, the declaration required under para 3.1 of the notification was filed only after the export of the services i.e., after the particular time period during which the services were exported and for which the rebate claim was filed.

The appellant filed two claims under the said notification claiming rebate in respect of service tax paid on such input services. In respect of the services rendered by the appellant between 16.03.2005 and 30.09.2005, the claim for rebate was filed on 15.12.2005 and in respect of the services rendered between 01.10.2005 and 31.12.2005, the claim was filed on 17.03.2006. The declaration required to be filed in terms of para 3.1 of the Notification was however filed by the appellant only on 05.02.2007.

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The rebate claims were rejected by the Department on the ground that the prescribed procedure, as laid down in *Notification No.12/2005*, for obtaining the rebate was not followed by the appellant.

High Court's Observations: 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.

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

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

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EXEMPTIONS AND ABATEMENTS

1. Is exemption in relation to service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorized operation) of final products considering these services as the services used in authorised operations of SEZ?

Commissioner of Service Tax v. Zydus Technologies Limited 2014 (35) STR 515 (Guj.)

Facts of the Case: The assessee had manufacturing operations in the SEZ. The Development Commissioner of SEZ granted an extension of one year to the assessee to start manufacturing operations (which were authorised operations of the SEZ). The assessee procured certain services (scientific and technical consultancy) during this period (before beginning of the manufacture) in order to enable it to undertake manufacturing activity.

Later, when the assessee applied for refund of service tax paid on such input services under *Notification No. 9/2009 ST dated 03.03.2009,* the refund was denied on the ground that since the services were received before the authorised operations (i.e., manufacturing) started, the said input services would not be considered to have been used in authorised operations of SEZ unit, and thus, would not get qualified for refund.

Point of Dispute: The Revenue submitted that as per sub-section (2) of section 4 and sub-section (9) of section 15 of the Special Economic Zones Act, 2005 meaning of "authorized operations" can be concluded as "such operation so authorized shall be mentioned in the letter of approval". Thus, since the manufacturing of the goods mentioned in the letter of approval had not started, it could not be said that the authorized operation of SEZ had started.

The assessee contended that it is necessary for SEZ to procure taxable services right from the budding stage and it is only after having obtained such support service of business that the unit would start functioning for production.

When the CESTAT held that the assessee shall be entitled to refund as claimed, the matter was brought before the High Court by the Department.

High Court's Observations: The High Court relied on its decision passed in the case of *Cadila Healthcare Ltd 2013 (30) STR 3 (Guj.)* and held that no error has been committed by the CESTAT in holding that the assessee shall be entitled to refund; as though the

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operations of the assessee did not reach to the commercial production stage, the input services of scientific and technical consultancy procured by them were in relation to the manufacture which would take place at a later date.

High Court's Decision: In the instant case, the High Court referring to their previous decision in case of *CCEx. v. Cadila Healthcare Ltd*. held that the services rendered for a period prior to actual manufacture of final product is commercial activity/production and assessee is entitled to exemption by way of refund claimed.

Note: *Though the above judgment is with reference to SEZ Exemption Notification No. 9/2009 ST, the principle discussed appears to be relevant in context of the present SEZ Exemption Notification No. 12/2013 ST also.*

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SERVICE TAX PROCEDURES

1. 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.)

High Court's Decision: 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.

Notes:

1. *The view taken in the said judgment has been incorporated by CBDT in Circular No. 1/2014 dated 13.01.2014.*
2. *Section 194J of the Income-tax Act, 1961 provides for deduction of income tax equal to 10% of any sum paid as fees for professional services/technical services, by any person, not being an individual or HUF, who is responsible for paying such sum to a resident, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.*

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7

DEMAND, ADJUDICATION AND OFFENCES

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

Chitra Builders Private Ltd. v. Addnl Comm of CEx. & ST 2013 (31) STR 515 (Mad.)

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

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

(i) Since the petitioner was not liable to pay service tax, collection of said amount from the petitioner, was arbitrary and illegal.

(ii) Department had no jurisdiction to search the premises of the petitioner, or of its Directors, as it was neither carrying on its business nor was not registered, within the jurisdiction of the Commissionerate who had issued the search warrant.

(ii) The petitioner further alleged that as per a deposition recorded under coercion on the date of search, the sum of ₹ 2 crores had been paid to the Department, voluntarily, as part of the arrears of service tax due from the company. However, tax could not be collected from the petitioner without a proper assessment order being passed, in accordance with the procedures established by law.

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

High Court's Observations: 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.

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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.

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

2. 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.)

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

High Court's Decision: It held that mere contravention of provision of Chapter V or rules framed thereunder does not enable the service tax authorities to invoke the extended period of limitation. The contravention necessarily has to be with the intent to evade payment of service tax.

3. 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) STR 113 (Del.)

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

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

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

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4. 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.)

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

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

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

<u>High Court's Observations</u>: 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.

<u>High Court's Decision</u>: 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.

Notes:

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

   The High Court held that payment made by the assessee the second time could not be considered as duty deposited or paid. Hence, repayment of such amount could

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not be seen as a refund claim made under section 11B. Consequently, such amount is repayable to the assessee by the Department.

2. *Bombay High Court took a contrary view in Andrew Telecom India Pvt. Ltd v. CCE Goa 2014 (34) STR 562 held that if tax has been paid treating it as tax by mistake, the refund claim has to be filed under section 11B of Central Excise Act, 1944 only and limitation under the section would apply. The undisputed position was that the amount was paid by the appellant as service tax. That tax was not imposable or leviable on export of services was a clarification made by the Department and relying on that clarification, the refund of duty or service tax was claimed. The High Court clarified that this was squarely a case falling within the provisions of the Central Excise Act, 1944 and therefore, the rule of limitation under section 11B was applied. That was applied when the application for refund was made invoking section 11B of the Central Excise Act, 1944. The High Court categorically pointed out that when this was the provision invoked, same applied with full force including the rule of limitation prescribed therein.*

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

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

Facts of the Case: The appellant, a Co-operative Society, rendered rent-a-cab service to M/s. ONGC. The members of the society were essentially agriculturists who formed the society after they lost their land when ONGC plant was being set up. At the time, when the appellant started rendering the service to the ONGC, there was no service tax levy on rent-a-cab service. However, service tax was imposed on rent-a-cab service subsequently. A show cause notice was issued on the appellants proposing to recover service tax with applicable penalty and interest. The appellants paid the entire disputed amount and thereafter regularly paid the service tax. The issue under consideration before the High Court, therefore, was only in relation to the imposition of penalty.

The appellant contended that they did not pay service tax at the relevant point of time as it being a new levy; they were unaware of legal provisions. Also, there were divergent views of different Benches of Tribunal, which had added to the confusion, and the issue was debatable.

Further, it was pointed out by the appellant that since initially there was no condition relating to payment of service tax in the service contract with the ONGC-as there was no levy at that point of time - ONGC denied paying service tax when the same was subsequently imposed on the service rendered by them. However, with due negotiation and arbitration, it was decided that the disputed amount would first be paid by the appellant and the same would be reimbursed by ONGC. Thus, there had also been confusion regarding the liability of the appellant. However, such contention was not accepted by the Department.

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<u>High Court's Observations</u>: 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.

<u>High Court's Decision</u>: 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.

6. Whether the recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent upon the downward revision of charges already paid, and whether the question of unjust enrichment arises in such situation?

CCus CEx & ST v. Indian Farmers Fertilizers Coop. Limited 2014 (35) STR 492 (All)

<u>Revenue's Contentions</u>: The CESTAT answered the above question against the Revenue so this appeal was filed with the High Court by the Revenue. It was the contention of the Revenue that the respondent being recipient of service was not entitled to file a refund claim under section 11B as the expression "any person" in section 11B of the Central Excise Act, 1944 does not include the recipient of the service. The Revenue submitted before the High Court that the principles of unjust enrichment as provided in section 11B were not considered

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by the CESTAT while allowing the refund claim and that the refund claim filed was not within the period of limitation of one year under section 11B.

High Court's Observations: The High Court relied on the case of *Mafatlal Industries Ltd. v. Union of India 1997 (89) ELT 247* wherein the Supreme Court held that "*Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund.*"

The High Court observed that since the respondent, being the recipient of taxable service, had borne the incidence of service tax themselves; there was no question of unjust enrichment. Hence, the respondent was entitled to claim refund of excess service tax paid consequent upon the downward revision of the charges payable by it.

Further, the High Court pointed out that the fact that respondent had not filed the refund claim with the period of limitation was not challenged by the Revenue in the grounds of appeal before the first appellate authority [Commissioner (Appeals)] or in the form of cross objections before the Tribunal. The High Court relied on the Supreme Court's decision in the case of *Commissioner of Customs* v. *Toyo Engineering India Limited 2006 (201) ELT 513 (SC)* wherein it was held that the Revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

High Court's Decision: The High Court upheld the decision of the CESTAT that since the burden of tax has been borne by the respondent as a service recipient, question of unjust enrichment will not arise as per section 11B of the Central Excise Act 1944 (as applicable to service tax under section 83 of Finance Act,1994).

Further, the High Court held that once the finding of the adjudicating authority that the claim for refund was filed within the period of limitation was not challenged by the Revenue before the first appellate authority and CESTAT, Revenue could not assert to contrary and first time urge a point in an appeal before this Court which was not raised in grounds of appeal before authorities below.

7. Can the expression 'suppression of facts' be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally?

Naresh Kumar & Co. Pvt. Ltd v. UOI 2014 (35) STR 506 (Cal.)

High Court's Decision: The High Court held that willful suppression cannot be assumed and/or presumed merely on failure to declare certain facts unless it is preceded by deliberate non-disclosure to evade the payment of tax. The extended period of limitation can be invoked on clear exposition that there has been a conscious act on the part of the assessee to evade the tax by non-disclosing the fact which, if disclosed, would attract service tax under sections 66 (now section 66B) & 67 of the Finance Act, 1994.

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The non-disclosure of the fact which, even if, disclosed would not have attracted the charging section cannot be brought within the ambit of suppression of fact for the purpose of extension of limitation period.

8. **Can service tax be demanded by a speaking order without issuing a show cause notice but after issuing a letter and giving the assessee an opportunity to represent his case along with personal hearing?**

CCE v. Vijaya Consultants, Engineers and Consultants 2015 (040) STR 0232 (AP)

Facts of the Case: The Deputy Commissioner issued an order to the respondent demanding service tax. The appeal before the Commissioner (Appeals) challenging the order of the Deputy Commissioner ended up in dismissal confirming the order of the Deputy Commissioner. The CESTAT, on consideration of the arguments of the respondent and perusal of the record, found that the respondent was never issued a show cause notice as required under section 73 of the Finance Act, 1994. Hence the Tribunal set aside the order of the adjudicating authority. Aggrieved by this order, Revenue preferred appeal to High Court.

Appellant's (Revenue) Contentions: Revenue contended that the CESTAT was not justified in setting aside the speaking order passed by the competent adjudicating authority and confirmed by appellate authority, on the short ground of non-issuance of show cause notice as the respondent was suitably put on notice vide a letter. Thereafter the respondent had filed a 20 page explanation and fully utilized opportunity of personal hearing. The Revenue was of the view that since the respondent was afforded an opportunity of personal hearing before the case was decided, speaking order was passed after observing the principles of natural justice. Therefore, there was a substantial compliance on the part of the Revenue and the non-issuance of show cause notice was only a technical breach on their part.

Respondent's (assessee) Contentions: The respondent submitted that there was a categorical finding of the Tribunal that there was fundamental breach of compliance of the statutory provision (i.e., non-issuance of SCN) which is the basic requirement to initiate the very proceedings under service tax law. Therefore, the order of the Tribunal was unassailable and did not call for any interference by this Court.

High Court's Observations: The High Court observed that a perusal of section 73 of the Finance Act, 1994 leaves no doubt that there is a requirement of issuance of notice stating whether the noticee falls within the category of section 73(1)(a) or (1)(b) of the Act *[now section 73(1) and proviso to section 73(1)]* and further specify the amount of service tax that is payable.

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The High Court observed that in the present case no notice was issued to the respondent and reliance was placed on a letter. The letter did not satisfy the requirements of the notice as there was no allegation that a specified amount was required to be paid as service tax and even no period was mentioned therein.

<u>High Court's Decision</u>: The High Court held that by no stretch of imagination, the said letter could be treated as a show cause notice satisfying the requirement of section 73 of the Act. The High Court further held that the procedural requirement of issuance of notice and calling for explanation cannot be dispensed with as otherwise the demand of money in the name of tax would be in violation of the very procedure prescribed under the Act. The High Court thus, dismissed the appeal.

9. Based on the contractual arrangement, can the assessee ask the Department to recover the tax dues from a third party or wait till the assessee recovers the same?

Delhi Transport Corporation v. Commissioner Service Tax 2015 (038) STR 673 (Del.)

<u>Facts of the Case</u>: The appellants entered into contracts with seven various agencies for display of advertisements, *inter alia*, on bus-queue shelters and time-keeping booths. The terms of the contract clearly stated that it would be the responsibility of the contractors/advertisers to pay directly to the concerned authority the tax/levy imposed by such authority in addition to the license fee.

The Department issued show cause notice asking the appellant to pay service tax along with interest and penalties on the service of display of advertisements rendered by them.

<u>Appellant's Contentions:</u> The appellant argued that they were under a *bona fide* belief that the liability to remit service tax stood transferred to the recipient qua the agreements; this caused the failure to file returns and remit service tax. They relied upon *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran 2012 (26) STR 289 (SC)* to urge that having entered into the contracts in the nature mentioned above, it was a legitimate expectation that the service tax liability would be borne by the contractors/advertisers and, thus, there was no justification for the appellant being held in default or burdened with penalties.

<u>High Court's Observations:</u> The High Court observed that there is no dispute that services provided are taxable and that the appellant is liable to pay service tax thereupon. Further, the reliance of the appellant on *Rashtriya Ispat Nigam Limited's* case regarding transferring of service tax liability by way of a contract was correct. The High Court, however, observed that the said ruling of Supreme Court cannot detract from the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax.

The High Court agreed with the observations of CESTAT that the plea of "*bona fide* belief" is devoid of substance. The appellant was a public sector undertaking and should have been more vigilant in compliance with its statutory obligations. It could not take

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cover under the plea that contractors engaged by it having agreed to bear the burden of taxation, there was no need for any further action on its part. For purposes of the taxing statute, the appellant was an assessee, and statutorily bound to not only get itself registered but also submit the requisite returns as per the prescription of law and rules framed thereunder.

High Court's Decision: The High Court held that undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. However, on account of such contractual arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party (the other party) or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors (the other party).

Note: In the case of Rashtriya Ispat Nigam Limited[2], the Supreme Court held that the provisions concerning service tax are relevant only between the appellant as an assessee (service receiver in this case) under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent (service provider) as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

10. Whether the order served on a member of the family of the assessee, is a proper service of order?

Jyoti Enterprises v. CCEx. & ST 2016 (41) STR 0019 (All.)

Facts of the Case: The order-in-original, in assessee's case, was passed by the Department. However, the assessee was unaware of the order passed and came to know about it two years later when the Department started recovery proceedings.

Point of Dispute: The assessee argued that there was no proper service of order by the Department. However, Department submitted that the order was served 2 years ago at the residential premises of the assessee to a person named Virendra Yadav who represented himself to be assessee's nephew.

The assessee contended that the order was required to be served to the person for whom it was intended, namely, the assessee or its authorised agent. Since Virendra Yadav was neither the authorised representative nor the order was served upon the assessee, there was no proper service of the order.

High Court's Observation: The High Court observed that if the order is served on a member of the family of the assessee, it is duly served and there is sufficient service of the order. No assertion was made by the assessee that Virendra Yadav was not a family member or that he was not connected with the business. The assessee had nowhere

[2] Reported in Chapter 1:Basic Concepts of Service Tax

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stated that Virendra Yadav was not her nephew. Further, nothing has been stated that the address where the service of the original order was made was incorrect.

High Court's Decision: The High Court held that the order in original was duly served upon the assessee.

11. Can the period of limitation be computed from the date of forwarding of the order where such order has not been received by the assessee?

Enestee Engineering Pvt. Ltd. v. UOI 2016 (41) STR 0061 (Bom.)

Facts of the Case: The adjudication order was passed and was forwarded to the assessee. However, assessee did not receive the same. It learned about the order only after receipt of a letter from the Superintendent, nearly after two years, directing it to pay the dues as per said order. Thereafter, a copy of that order was made available to the assessee.

Point of Dispute: The appeal filed by the assessee against the said order was rejected by the Commissioner (Appeals) as well as by the Tribunal, as being barred by limitation.

The assessee contended that the appeal could not be held to be barred by limitation as no order was received by it.

High Court's Observation: The High Court noted that the period of limitation prescribed under erstwhile section 85(3) [now section 85(3A)] of the Finance Act, 1994 to prefer an appeal against order-in-original is 3 months [now 2 months]. The said period begins from the date of receipt of the decision or the order of adjudicating authority. Further, section 37C(2) of the Central Excise Act, 1944 stipulates that every decision/order passed or any summons/notice issued under the said Act is deemed to have been served on the date on which such decision, order or summons is tendered or delivered by post or is affixed in the prescribed manner.

Thus, a perusal of section 37C (as supported by erstwhile section 85(3) [now section 85(3A)] of the Finance Act, 1994) shows insistence upon the service of such adjudication order upon the assessee. Hence, the observation in the Tribunal's order that the order-in-original had been forwarded to the assessee on a particular date was not sufficient in the eyes of law to start computing the period of limitation.

The High Court observed that neither the order of Commissioner (Appeals) nor the order of Tribunal recorded a finding that the adjudication order was actually tendered to the assessee on a particular date or received by him on a particular date.

High Court's Decision: The High Court quashed and set aside both the orders - order of Commissioner (Appeals) and the order of Tribunal, and placed back the matter for fresh consideration before Commissioner (Appeals).

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8

OTHER PROVISIONS

1. Can the Commissioner (Appeals) remand back a case to the adjudicating authority under section 85 of the Finance Act, 1994?

Commissioner of Service Tax v. Associated Hotels Ltd. 2015 (37) STR 723 (Guj.)

Point of Dispute: The question of law which was raised in this case was that whether the Commissioner (Appeals), exercising powers under section 85 of the Finance Act, 1994, has the power to remand the proceedings back to the adjudicating authority.

The Department contended that due to the amendment made in section 35A(3) of the Central Excise Act, 1944, in the year 2001*, the powers of remand which were previously specifically granted to the Commissioner (Appeals) were taken away. It was argued by the Department that since section 85(5) of the Finance Act, 1994 provides that the Commissioner (Appeals) while hearing the appeals under section 85 of the Act, follows the same procedure and exercises same powers which he does while hearing the appeals under the Central Excise Act, 1944, Commissioner (Appeals) does not have the power to remand the proceedings back to the adjudicating authority *in service tax matters also.*

High Court's Observation: The High Court observed that section 85(4) of the Finance Act, 1994 is worded widely and gives ample powers to the Commissioner while hearing and disposing of the appeals to pass such orders as he thinks fit including an order enhancing tax, interest or penalty. Such powers would, therefore, inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority.

Further, the High Court rejected the Department's contention that by virtue of section 85(5) of the Finance Act, 1994, the limitation on power of Commissioner (Appeals) to remand a proceeding as contained in section 35A(3) of Central Excise Act, 1944 also applied to appeals under section 85 of Finance Act, 1994. This is so because, even though sub-section (5) of section 85 requires the Commissioner (Appeals) to follow the same procedure and exercise same powers in making orders under section 85, as he does while hearing the appeals under the Central Excise Act, 1944, sub-section (5) itself starts with the expression "subject to the provisions of this Chapter".

The High Court held that sub-section (4) of section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal under

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section 85. The scope of such powers flowing from sub-section (4), therefore, cannot be curtailed by any reference to sub-section (5) of section 85 of the Finance Act, 1994.

High Court's Decision: The High Court, therefore, held that section 85(4) of the Finance Act, 1994 gives ample powers to the Commissioner (Appeals) while hearing and disposing of the appeals and such powers inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority.

Notes:

**1. Section 35A(3) of the Central Excise Act, 1944 was amended with effect from 11-5-2001. Prior to the amendment, the said provision read as under:*

"The Commissioner (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."

After 11-5-2001, the amended section 35A(3) reads as under :

"The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."

2. The Delhi High Court in the case of Commissioner v. World Vision 2011 (24) STR 650 (Del.) has also held that under section 85(4) of Finance Act, 1994, the Commissioner (Appeals) has the power to remand back the case to the adjudicating authority for fresh consideration.

2. Whether the period of limitation or the period within which delay in filing an appeal can be condoned, specified in terms of months in a statute, means a calendar month or number of days?

CCus & CEx. v. Ashok Kumar Tiwari 2015 (37) STR 727 (All.)

Facts of the Case: The assessee received the adjudication order on 08.10.2011 and filed an appeal against the said order before Commissioner of Central Excise (Appeals) on 09.04.2012 along with an application for condonation of delay. However, the Commissioner dismissed the appeal as being time barred and declined to condone the delay. Tribunal, on appeal, decided that the delay should be condoned in assessee's case. It observed that period of limitation of 3 months prescribed under section 85(3) of the Finance Act, 1994 meant 3 calendar months and not 90 days and proviso to said sub-section empowered Commissioner to condone the delay for sufficient cause so as to allow the appeal to be presented within a further period of 3 months.

Point of Dispute: The issue which came up for consideration before High Court was whether the period of limitation or the period within which delay in filing an appeal can be

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condoned, specified in terms of months in a statute, means a calendar month or number of days.

<u>High Court's Observations</u>: The High Court opined that where the legislature intends to define the period of limitation with regard to the number of days, it does so specifically. Section 85 of the Finance Act, 1994 has defined the period of limitation as well as the power to condone the delay with regard to a stipulation in terms of months and such a stipulation can only mean a calendar month. Once the legislature has used the expression "three months" both in the substantive part of sub-section (3) of section 85 as well as in its proviso*, it would not be open for the High Court to substitute the words "3 months" by the words "90 days" and if it does so, it would amount to rewriting the legislative provision, which is impermissible.

The High Court noted that section 3(35) of the General Clauses Act, 1897 also defines the expression "month" to mean a month reckoned according to the British calendar. Further, the day on which order was received by the assessee, i.e. 08.10.2011 had to be excluded while computing the period of limitation in view of section 9 of said Act**. Since the original period of limitation and the period within which delay could be condoned expired on a public holiday, i.e. 08.04.2012, the assessee filed the appeal on the next working day, i.e. 09.04.2012.

<u>High Court's Decision</u>: In the given case, the Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay in filing of appeal by the assessee as the same had been filed within the stipulated time prescribed for the same.

Notes:

**1. Sub-section (3) of section 85 of the Finance Act, 1994 stipulates the period of limitation for filing an appeal with Commissioner of Central Excise (Appeals). Further, proviso to said section stipulates the period within which delay in filing said appeal can be condoned. Provisions of section 85(3) and its proviso were applicable till 27.05.2012. However, with effect from 28.05.2012, sub-section (3) of section 85 and its proviso ceased to have effect and sub-section (3A) to said section and its proviso were inserted by the Finance Act, 2012.*

While sub-section (3) and its proviso stipulated the original period of limitation as three months and the extent to which delay could be condoned also as three months, as per sub-section (3A), the original period of limitation is two months and delay can be condoned within a further period of one month.

Although the aforesaid judgment is based on sub-section (3) of section 85, the principle derived in the said ruling i.e., where legislature specifies period of limitation as well as period within which delay in filing an appeal can be condoned in terms of months, such a stipulation can only mean a calendar month and not number of days, is applicable to sub-section (3A) of section 85 also.

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***2. Supreme Court, in case of M/s. Econ Antri Ltd v. M/s. Rom Industries Ltd. & Anr, has held that while computing the period of limitation, the day on which the offence is committed/ date of cause of action has to be excluded.*

3. Can an appeal filed in time but to the wrong authority be rejected by the appellate authority for being time barred?

Chakiat Agencies v. UOI 2015 (37) STR 712 (Mad.)

Facts of the Case: In the instant case, the assessee filed an appeal to Commissioner, but mistakenly gave it to the adjudicating officer who had passed the original order. The appellate authority rejected the appeal on the ground that the appeal was not received in time in his office.

Point of Dispute: The Department contended that although appeal was received in time by the adjudicating officer, appellate authority rejected the appeal as the same was not received in its office in time.

High Court's Observations: The High Court noted that the appeal had been preferred in time, but reached different wing of the same building. Since the appeal was received by the adjudicating officer who has passed the original order, he ought to have sent it to the other wing of the same building, but he had not done the same. Therefore, the order passed by the appellate authority cancelling the appeal on the ground that it was not received in time, could not be accepted.

The High Court, further, referred to Andhra Pradesh High Court judgment in *Radha Vinyl Pvt. Ltd. v. Commissioner of Income Tax and Another* case where in similar circumstances it was held that although the appeal had been addressed to the wrong officer, Department could not deny the fact that the appeal was pending before it. Either the Department should have returned the appeal papers to the assessee to enable him to file appeal before the appropriate authority or should have handed over the appeal papers to the competent authority. Consequently, now the Department could not say that the appeal was not filed with the competent authority.

High Court's Decision: In the light of the above discussion, the High Court directed the appellate authority to entertain the appeal of the assessee and to pass appropriate orders on merits and in accordance with law, after affording him an opportunity of being heard.

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CUSTOMS & FOREIGN TRADE POLICY

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1

BASIC CONCEPTS

1. 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) ELT 209 (AP)

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

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

Notes:

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

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2

LEVY OF AND EXEMPTIONS FROM CUSTOMS DUTY

1. In case of import of crude oil, whether customs duty is payable on the basis of the quantity of oil shown in the bill of lading or on the actual quantity received into shore tanks in India?

Mangalore Refinery & Petrochemicals Ltd v. CCus. 2015 (323) ELT 433 (SC)

Facts of the Case: The assessee imported crude oil. On account of ocean loss, the quantity of crude oil shown in the bill of lading was higher than the actual quantity received into the shore tanks in India. The assessee paid the customs duty on the actual quantity received into the shore tanks.

Point of Dispute: The Department contended that the quantity of crude oil mentioned in the various bills of lading should be the basis for payment of duty, and not the quantity actually received into the shore tanks in India. This was stated on the basis that duty was levied on an *ad valorem* basis and not on a specific rate. The assessee contended that it makes no difference as to whether the basis for customs duty is at a specific rate or is *ad valorem*, inasmuch as the quantity of goods at the time of import alone is to be looked at.

Tribunal's Observations: The Tribunal accepted the Department's contentions on the basis of the following reasons:

(i) Duty ought to be levied on the total payment made by the assessee irrespective of the quantity received.

(ii) An *ad valorem* duty would necessarily lead to this result but duty levied at the specific rate would not. The quantity of goods to be considered in the latter case will only be the quantity of crude oil received in the shore tank.

(iii) Section 14 of the Customs Act, 1962 kicks in when the duty is on an *ad valorem* basis and sections 13 and 23 of the Act do not stand in the way because it is not the question of demanding duty on goods not received, but it is the demand of duty on the transaction value. In spite of the "ocean loss", the assessee has to make payment on the basis of the bill of lading quantity.

Supreme Court's Observations: The assessee raised the issue before the Supreme Court. The Apex Court noted the following:

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(i) The levy of customs duty under section 12 of the Act is only on goods imported into India. Goods are said to be imported into India when they are brought into India from a place outside India. Unless such goods are brought into India, the act of importation which triggers the levy does not take place.

(ii) If the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods. This is for the reason that the import of goods does not take place until they become part of the land mass of India and until the act of importation is complete which under sections 13 and 23 happen only after an order for clearance for home consumption is made and/or an order permitting the deposit of goods in a warehouse is made.

(iii) Under section 23(2), the owner of the imported goods may also at any time before such orders have been made relinquish his title to the goods and shall not be liable to pay any duty thereon. In short, he may abandon the said goods even after they have physically landed at any port in India but before any of the aforesaid orders have been made. This again is for the good reason that the act of importation gets complete when goods are in the hands of the importer after they have been cleared either for home consumption or for deposit in a warehouse.

(iv) Further, as per section 47 of the Customs Act, the importer has to pay import duty only on goods that are entered for home consumption. Obviously, the quantity of goods imported will be the quantity of goods at the time they are entered for home consumption.

The Supreme Court stated that Tribunal's reasoning for concluding that the bill of lading quantity alone should be considered for the purpose of valuing the imported goods is incorrect in law. The Apex Court examined each of the reasons given by the Tribunal as under:

(i) The Tribunal lost sight of the fact that a levy in the context of import duty can only be on imported goods, that is, on goods brought into India from a place outside of India. Till that is done, there is no charge to tax.

(ii) The taxable event in the case of imported goods is "import". The taxable event in the case of a purchase tax is the purchase of goods. The quantity of goods stated in a bill of lading would perhaps reflect the quantity of goods in the purchase transaction between the parties, but would not reflect the quantity of goods at the time and place of importation. A bill of lading quantity, therefore, could only be validly looked at in the case of a purchase tax but not in the case of an import duty.

(iii) The Tribunal wholly lost sight of sections 13 and 23 of the Act. Where goods which are imported are lost, pilfered or destroyed, no import duty is leviable thereon until they are out of customs and come into the hands of the importer. It is clear, therefore, that it is only at this stage that the quantity of the goods imported is to be looked at for the purposes of valuation.

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(iv) The basis of the judgment of the Tribunal is on a complete misreading of section 14 of the Customs Act. First and foremost, the said section is a section which affords the measure for the levy of customs duty which is to be found in section 12 of the said Act. Even when the measure talks of value of imported goods, it does so at the time and place of importation, which again is lost sight of by the Tribunal.

(v) The Tribunal's reasoning that somehow when customs duty is *ad valorem* the basis for arriving at the quantity of goods imported changes, is wholly unsustainable. Whether customs duty is at a specific rate or is *ad valorem* does not make the least difference to the statutory scheme. Customs duty whether at a specific rate or *ad valorem* is not leviable on goods that are pilfered, lost or destroyed until a bill of entry for home consumption is made or an order to warehouse the goods is made. This is for the reason that the import is not complete until what has been stated above has happened.

Supreme Court's Decision: The Supreme Court set aside the Tribunal's judgment and declared that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty.

2. Would countervailing duty (CVD) on an imported product be exempted if the excise duty on a like article produced or manufactured in India is exempt?

Aidek Tourism Services Pvt. Ltd. v. CCus. 2015 (318) ELT 3 (SC)

Supreme Court's Decision: Supreme Court held that rate of additional duty leviable under section 3(1) of the Customs Tariff Act, 1975 would be only that which is payable under the Central Excise Act, 1944 on a like article. Therefore, the importer would be entitled to payment of concessional/ reduced or nil rate of countervailing duty if any notification is issued providing exemption/ remission of excise duty with respect to a like article if produced/ manufactured in India.

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CLASSIFICATION OF GOODS

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

   Keihin Penalfa Ltd. v. Commissioner of Customs 2012 (278) ELT 578 (SC)

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

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

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

2. **Whether the mobile battery charger is classifiable as an accessory of the cell phone or as an integral part of the same?**

   State of Punjab v. Nokia India Private Limited 2015 (315) ELT 162 (SC)

   In this case, the assessee classified the mobile battery charger as an integral part of the main product i.e. Nokia mobile phone. It contended that cell phone could not be operated without the charger. Further, mobile battery chargers were provided free with the cell phone in a composite package. Therefore, it applied the concessional rate of tax on the mobile battery charger also, as applicable on the mobile phone. However, it also admitted that whenever it sold the chargers separately, tax was not charged at the concessional rate.

   According to Department, a battery charger was not a part of the cell phone but merely

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an accessory thereof. Thus, concessional rate of tax applicable on cell phones was not applicable to the mobile battery chargers.

Supreme Court's Observations: The Supreme Court decided the case in favour of Revenue and against the assessee holding that the battery charger is not a part of the mobile/cell phone but an accessory to it, on the basis of the following observations:

(i) Had the charger been a part of cell phone, cell phone could not have been operated without using the battery charger. However, as a matter of fact, it is not required at the time of operation. Further, the battery in the cell phone can be charged directly from the other means also like laptop without employing the battery charger, implying thereby, that it is nothing but an accessory to the mobile phone.

(ii) As per the information available on the website of the assessee, it had invariably put the mobile battery charger in the category of an accessory which means that in the common parlance also, the mobile battery charger is understood as an accessory.

(iii) A particular model of Nokia make battery charger was compatible with many models of Nokia mobile phones and also many models of Nokia make battery chargers are compatible with a particular model of Nokia mobile phone, imparting various levels of effectiveness and convenience to the users.

(iv) Rule 3(b) of the General Rules for Interpretation of the First Schedule of the Customs Tariff Act, 1975 can also not be applied in the assessee's case as merely making a composite package of cell phone and mobile battery charger will not make it composite goods for the purpose of interpretation of the provisions.

Supreme Court's Decision: The Apex Court held that mobile battery charger is an accessory to mobile phone and not an integral part of it. Further, battery charger cannot be held to be a composite part of the cell phone, but is an independent product which can be sold separately without selling the cell phone.

Note: *Though the above judgement has been rendered in context of VAT laws, the principle of classification of mobile charger may hold good in case of customs classification matter as well.*

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

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

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

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

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

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5

VALUATION UNDER THE CUSTOMS ACT, 1962

1. **Can the value of imported goods be increased if Department fails to provide to the importer, evidence of import of identical goods at higher prices?**

   Gira Enterprises v. CCus. 2014 (307) ELT 209 (SC)

   Facts of the Case: The appellant imported some goods from China. On the basis of certain information obtained through a computer printout from the Customs House, Department alleged that during the period in question, large number of such goods were imported at a much higher price than the price declared by the appellant. Therefore, Department valued such goods on the basis of transaction value of identical goods as per erstwhile rule 5 [now rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] and demanded the differential duty alongwith penalty and interest from the appellant. However, Department did not provide these printouts to the appellant.

   The appellant contended that Department's demand was without any basis in law, without any legally admissible evidence and opposed to the principles of natural justice as the computer printout which formed the basis of such demand had not been supplied to them. Resultantly, the appellant had no means of knowing as to whether any imports of comparable nature were made at the relevant point of time.

   Supreme Court's Observations: Supreme Court observed that since Revenue did not supply the copy of computer printout, which formed the basis of the conclusion that the appellants under-valued the imported goods, the appellants obviously could not and did not have any opportunity to demonstrate that the transactions relied upon by the Revenue were not comparable transactions.

   Supreme Court's Decision: The Supreme Court held that mere existence of alleged computer printout was not proof of existence of comparable imports. Even if assumed that such printout did exist and content thereof were true, such printout must have been supplied to the appellant and it should have been given reasonable opportunity to establish that the import transactions were not comparable. Thus, in the given case, the value of imported goods could not be enhanced on the basis of value of identical goods as Department was not able to provide evidence of import of identical goods at higher prices.

   ***Note**: This case establishes the principle that the onus to prove that identical goods have been imported at a price higher than the value of the goods declared by the importer, lies with the Department.*

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7

IMPORTATION, EXPORTATION AND TRANSPORTATION OF GOODS

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

   CCus v. Shreeji Overseas (India) Pvt. Ltd. 2013 (289) ELT 401 (Guj.)

   High Court's Observation and Decision: The aforesaid question came up for consideration before the High Court. The High Court noted that though section 46 does not provide for any time-limit for filing a bill of entry by an importer upon arrival of goods, section 48 permits the authorities to sell the goods after following the specified procedure, provided the same are not cleared for home consumption/ warehoused/ transhipped within 30 days of unloading the same at the customs station. The High Court however held that the time-limit prescribed under section 48 for clearance of the goods within 30 days cannot be read into section 46 and it cannot be inferred that section 46 prescribes any time-limit for filing of bill of entry.

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

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

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9

DEMAND & APPEALS

1. **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) ELT 321 (SC)

   Supreme Court's Decision: The Apex Court held 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.

2. **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. CCus. (General) 2012 (285) ELT 321 (SC)

   Facts of the Case: The Commissioner of Customs (General), in his order-in-original, dropped the proceedings which were initiated against the appellant. The Committee of Chief Commissioners of Customs constituted under section 129A(1B) of the Customs Act, 1962 reviewed his order and directed him to apply to the Tribunal for determination of certain points. The Commissioner, accordingly, made an application under section 129D(4) of the Act before the Tribunal. As the said application could not be made within the prescribed period and was delayed by 10 days, an application for condonation of delay was filed with a prayer for condonation. However, Tribunal rejected the application for condonation of delay on the ground that Tribunal had no power to condone the delay caused in filing the application under section 129D(4) by the Department beyond the prescribed period of three months.

   Point of Dispute: The question which arose for consideration before this Court was whether it was competent for the Tribunal to invoke section 129A(5) where an application under section 129D(4) had not been made by the Commissioner within the prescribed time and to condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.

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<u>Supreme Court's Observations:</u> 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.

<u>Supreme Court's Decision:</u> In light of the above discussion, the High Court ruled that the Tribunal was competent to invoke section 129A(5) where an application under section 129D(4) had not been made within the prescribed time and condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.

Note: *The provisions of **section 129A(5) and 129D(4)** of the Customs Act, 1962 have been outlined below:-*

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

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

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

Uniworth Textiles Ltd. vs. CCEx. 2013 (288) ELT 161 (SC)

Facts of the Case: Assessee, an EOU, purchased electricity generated by the captive power plant of its sister unit. The furnace oil required for running the captive power plant was imported by the sister unit and the same was exempt from payment of customs duty under a relevant exemption notification. Later, the sister unit informed the assessee that it could not supply the electricity to the assessee as it would run the captive power plant for its own use only. Consequently, as a temporary measure, for overcoming this difficulty, the assessee imported furnace oil and supplied the same to sister unit for generation of electricity, which it continued to receive as before. The assessee also claimed exemption on import of furnace oil under the same notification as was claimed by its sister unit.

As the assessee was procuring furnace oil for captive power plant of another unit, it sought a clarification from the Development Commissioner seeking as to whether import of furnace oil and receipt of electricity would be liable to duty. The Development Commissioner replied in favour of the assessee quoting letter by Ministry of Commerce and thereafter, the assessee claimed the exemption. However, irrespective of the clarification from the Development Commissioner, a show cause notice demanding duty was issued on the assessee **more than six months** after he had imported furnace oil on behalf of it sister unit. The contention of the Revenue was that the entitlement of duty free import of fuel for its captive power plant lies with the owner of the captive power plant, and not the consumer of electricity generated from that power plant.

Supreme Court's Observations: 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.

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The Tribunal's finding that the assessee had not brought anything on record to prove their claim of bona fide conduct did not find favour with the Apex Court. The Supreme Court reiterated that the burden of proving any form of mala fide lies on the shoulders of the one alleging it.

Supreme Court's Decision: The Supreme Court held that mere non-payment of duties could not be equated with collusion or wilful misstatement or suppression of facts as then there would be no form of non-payment which would amount to ordinary default. The Apex Court opined that something more must be shown to construe the acts of the assessee as fit for the applicability of the proviso.

***Note**: Section 28 of the Customs Act, 1962 as stated in the above case is based on the old provisions of law. As per the amended section 28, the time limit for issuing a demand notice in case of inadvertent non-payment of duty is two years from the relevant date and such provisions find place in sub-section (1) of section 28.*

Issue of demand notice by invoking the extended period of limitation (five years from the relevant date) in case of deliberate default is covered under sub-section (4) of section 28. However, it may be noted that the principle enunciated in the above case will hold good even after the amendment made in section 28.

4. Can a writ petition be filed before a High Court which does not have territorial jurisdiction over the matter?

Neeraj Jhanji v. CCE & Cus. 2014 (308) ELT 3 (SC)

Facts of the Case: In this case, the assessee filed a writ petition before the Delhi High Court *against the* order in original passed by the Commissioner of Customs of Kanpur. However, the jurisdictional High Court for the petitioner would have been Allahabad High Court. When the Revenue raised objection over the territorial jurisdiction of the High Court, the assessee withdrew the appeal from the Delhi High Court and filed the appeal with the Allahabad High Court with the application for condonation of delay. The Allahabad High Court, however, dismissed the application for condonation of delay and also dismissed the appeal as time barred. Then, the assessee filed a special leave petition with the Supreme Court.

Supreme Court's Decision: The Supreme Court observed that the very filing of writ petition by the petitioner in Delhi High Court against the order in original passed by the Commissioner of Customs, Kanpur indicated that the petitioner had taken chance in approaching the High Court at Delhi which had no territorial jurisdiction in the matter. The filing of the writ petition before Delhi High Court was not at all bona fide.

***Note:** In the aforementioned case, the Apex Court has disapproved the practice of Forum Shopping as adopted by the petitioner. Forum Shopping is the practice adopted by the litigants to have their legal case heard in the Court which would provide most favourable decision.*

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5. 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) ELT 24 (All.)

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

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

6. 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) ELT 547 (Bom.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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7. **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) ELT 498 (Kar.)

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

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

<u>High Court's Observations</u>: 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.

<u>High Court's Decision</u>: 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.

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REFUND

1. **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.)

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

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

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

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The High Court further stated that a conjoint reading of section 25(1) and section 27 of the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest.

High Court's Decision: The High Court, therefore, held that :

(i) It would be a misconception of the provisions of the Customs Act, 1962 to state that notification issued under section 25 of the Customs Act, 1962 does not have any specific provision for interest on delayed payment of refund.

(ii) When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.

(iii) Paragraph 4.3 of the *Circular No. 6/2008 Cus. dated 28.04.2008* being contrary to the statute has to be struck down as bad.

Notes:

1. *This case clarifies that refund of special CVD arising as a result of exemption granted by way of exemption notification is governed under section 27 of the Customs Act, 1962 and thus, the provisions relating to payment of interest on delayed refund of duty as contained in section 27A of the Customs Act also become applicable in respect of delayed refunds of special CVD which is granted to give effect to the exemption contained in an exemption notification. Thus, it appears that the provisions applicable to normal refunds of duty/tax may apply to refunds of duty/tax arising as a result of exemption granted by way of exemption notifications as well.*
2. *Appeal was filed against the aforesaid judgment before Division Bench wherein the stay was granted.*
3. *Circular No. 6/2008 Cus. dated 28.04.2008 has also been struck down by Riso India Pvt. Ltd. 2015 TIOL 2384 HC Del. Cus.*

2. Is limitation period of one year applicable for claiming the refund of amount paid on account of wrong classification of the imported goods?

Parimal Ray v. CCus. 2015 (318) ELT 379 (Cal.)

Facts of the Case: The petitioners imported tunnel boring machines which were otherwise fully exempt from customs duty. However, owing to erroneous classification of such machines, they paid large amount of customs duty.

After expiry of more than 3 years, the petitioners filed a writ petition claiming the refund of the amount so paid. The said refund claim was rejected on the ground that the

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petitioners failed to make a proper application of refund under section 27 of the Customs Act, 1962 within the stipulated period of 1 year of payment of duty.

High Court's Observations and Decision: The High Court observed that the provisions of section 27 apply only when there is over payment of duty or interest under the Customs Act, 1962. When the petitioners' case is that tunnel boring machines imported by it were not exigible to any duty, any sum paid into the exchequer by them was not duty or excess duty but simply money paid into the Government account. The Government could not have claimed or appropriated any part of this as duty or interest. **Therefore, there was no question of refund of any duty by the Government. The money received by Government could more appropriately be called money paid by mistake by one person to another, which the other person is under obligation to repay under section 72 of the Indian Contract Act, 1872.**

A person to whom money has been paid by mistake by another person becomes at common law a trustee for that other person with an obligation to repay the sum received. This is the equitable principle on which section 72 of the Contract Act, 1872 has been enacted. Therefore, the person who is entitled to the money is the beneficiary or *cesti qui trust**. **When the said amount was paid by mistake by the petitioner to the Government of India, the latter instantly became a trustee to repay that amount to the petitioner.** The obligation was a continuing obligation. When a wrong is continuing there is no limitation for instituting a suit complaining about it.

The High Court, therefore, allowed the writ application and directed the respondents (Department) to refund the said sum to the petitioner.

Notes:

(i) The principle enunciated in this case is that law of limitation under Customs Act is applicable to duty or interest paid under that Act. However, any sum paid to the exchequer by mistake is not duty or excess duty but is simply money paid to the account of Government. Therefore, limitation of one year applicable to refunds of customs duty will not apply to refunds of amount paid to the Government by mistake. The High Court elaborated that under the Limitation Act, 1963, money paid by mistake can be recovered up to three years from the time the plaintiff discovers the mistake or could have discovered the same with reasonable diligence.

(ii) A cestui que trust is a person for whose benefit a trust is created; a beneficiary. Although legal title of the trust is vested in the trustee, the cestui que trust is the beneficiary who is entitled to all benefits from a trust.

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

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

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

Supreme Court's Observations: 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.

Supreme Court's Decision: Hence, it held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

2. 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) ELT 42 (Bom.)

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

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High Court's Decision: 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.

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

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

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

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

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<u>Revisionary Authority's Decision</u>: 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.

4. 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.)

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

<u>High Court's Observations</u>: 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.

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

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

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

(i) to perform any service in connection with the ship's husbandry or dispatch including the rendering of administrative work related thereto; or

(ii) to book, advertise or canvass for cargo for or on behalf of a shipping line; or

(iii) to provide container feeder services for or on behalf of a shipping line.

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

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

(2) No such order shall be given until –

(a) the person-in-charge of the conveyance has answered the questions put to him under section 38;

(b) the provisions of section 41 have been complied with;

(c) the shipping bills or bills of export, the bills of trans-shipment, if any, and such other documents as the proper officer may require have been delivered to him;

(d) all duties leviable on any stores consumed in such conveyance, and all charges and penalties due in respect of such conveyance or from the person-in-charge thereof have been paid or the payment secured by such guarantee or deposit of such amount as the proper officer may direct;

(e) the person-in-charge of the conveyance has satisfied the proper officer that no penalty is leviable on him under section 116 or the payment of any penalty that may be levied upon him under that section has been secured by such guarantee or deposit of such amount as the proper officer may direct;

(f) in any case where any export goods have been loaded without payment of

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export duty or in contravention of any provision of this Act or any other law for the time being in force relating to export of goods,

(i) such goods have been unloaded, or

(ii) where the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that it is not practicable to unload such goods, the person-in-charge of the conveyance has given an undertaking, secured by such guarantee or deposit of such amount as the proper officer may direct, for bringing back the goods to India.

5. 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) ELT 49 (P&H)

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

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

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

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

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

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

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

Notes:

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

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

(iii) Bombay High Court departed from Akanksha Syntex (P) Ltd's in the case of Akanksha Syntex (P) Ltd. v. Union of India 2013 (296) ELT 178 (Bom.)

(iv) In Jayant Hansraj Shah's case the Bombay High Court took a contrary view and rejected the plea of the petitioner of unconditional release of the seized goods with the following observations :-

"The procedure for confiscation of the goods can be resorted to if the goods are not provisionally released. If the owner in terms of section 110A applies for provisional release and an order is passed it can be said that the goods continue to be under

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

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

6. **Whether mere dispatch of a notice under section 124(a) would imply that the notice was "given" within the meaning of section 124(a) and section 110(2) of the said Customs Act, 1962?**

Purushottam Jajodia v. Director of Revenue Intelligence 2014 (307) ELT 837 (Del.)

Facts of the Case: As per section 110(2) of the Customs Act, 1962, a notice under section 124(a) is required to be **"given"** to the person from whose possession they were seized informing him the grounds on which goods are proposed to be confiscated, within 6 months (extendable upto one year) of seizure of the goods. Otherwise, goods need be returned to such person.

However, in the present case, the notice under section 124(a) was dispatched by registered post on the date of expiry of stipulated period under section 110(2) and received by the petitioner after the expiry of such period.

The petitioner contended that since said notice had not been received before the expiry of the said period of six months (extendable upto one year), goods should be returned to him. Relying on Supreme Court's decision in case of *K. Narsimhiah v. H.C. Singri Gowda AIR 1966 SC 330* and Gujarat High Court's decision in case of *Ambalal Morarji Soni v. Union of India AIR 1972 GUJ 126*, it submitted that by the use of the word "given" used in section 110(2), the legislative intent was clear that the notice had to be received by the person concerned or the notice had to be offered/tendered and refused by the person concerned. Mere dispatch by post would not be covered by the word "given" as

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appearing in the above mentioned provisions of the said Act. Further the expression "given" was distinct and different from the word "issued" or "served".

Revenue, referring to section 153(a), submitted that the moment a notice is tendered or sent by registered post or by an approved courier, that amounts to service of the notice and the actual receipt by the noticee is not a relevant consideration. Since the notice had been sent by registered post within the stipulated period as prescribed under section 110(2) of the said Act, the goods were not liable to be released. They primarily placed reliance on decision of Calcutta High Court in case of *Kanti Tarafdar 1997 (91) ELT 51 (Cal.)* and Madhya Pradesh High Court in case of *Ram Kumar Aggarwal 2012 (280) ELT 13 (M.P.).*

High Court's Observations: The Delhi High Court observed that section 124(a) clearly stipulates that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or person from whom goods have been seized is "given a notice" in writing, "informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty". In case such notice is not given within the stipulated period of six months or the extended period of a further six months, seized goods have to be released.

The object of section 124(a) is that the person from whom the goods have been seized had to be informed of the grounds on which the confiscation of the goods is to be founded. This can happen only when such person receives the notice and is capable of reading and understanding the grounds of the proposed confiscation. On a conjoint reading of section 110(2) and section 124(a) of the said Act, the Court opined that the notice contemplated in these provisions can only be regarded as having been "given" when it is actually received or deemed to be received by the person from whom the goods have been seized.

The Delhi High Court was in complete agreement with the Supreme Court's decision in case of *K. Narsimhiah* as followed by Gujarat High Court in case of *Ambalal Morarji Soni.* However, it disagreed with the decision of Calcutta High Court in case of *Kanti Tarafdar.* The Delhi High Court pointed out that the decision in the said case was arrived at on the (wrong) premise that section 124 requires that a notice be "issued" as against a notice being "given" when the body of the provision of section 124 nowhere uses the expression "issue of show cause notice". The Delhi Court elaborated that it is only the heading of that section which uses that expression (**issue** of show notice) and the body of section 124(a), on the contrary, uses the exact same expression "given" as used in section 110(2) of the said Act. Therefore, the Delhi High Court was of the view that very basis of the Calcutta High Court's decision in *Kanti Tarafdar* is incorrect. The Delhi High Court also disagreed with the Calcutta High Court's observation that the word "given" used in section 110(2) and section 124(a) is in any manner controlled by section 153. The Delhi High Court opined that in the context of the present cases, section 153 would only define the mode and manner of service and not the time of service or when a notice can be said to have been "given".

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Further, Delhi High Court was of the view that Madhya Pradesh High Court, in case of *Ram Kumar Aggarwal,* wrongly concluded that when the legislature had used the words "notice is given" it would "obviously mean that the notice must be issued within six months of the date of seizure". The Delhi High Court, on the other hand, opined that expression "notice is given" does not logically translate to the conclusion that "notice must be issued within the stipulated period".

High Court's Decision: The High Court held that since the petitioners did not receive the notice under section 124(a) within the time stipulated in section 110(2) of the Act, such notice will not considered to be "given" by the Department within the stipulated time, i.e. before the terminal date. Consequently, the Department was directed to release the goods seized.

Note: *Section 124(a) of the Customs Act, 1962, inter alia, stipulates that no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person is* ***given*** *a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty.*

Further, section 110(2) of the Act stipulates that where no such notice is ***given*** *within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.*

7. In case of seizure of goods under section 110 of the Customs Act, 1962, can the show cause notice [required to be issued under section 124(a) within six months of seizure] be issued to the Customs House Agent [now Custom Broker] of the importer instead of importer himself?

Santosh Handlooms v. CCus. 2016 (331) ELT 44 (Del.)

The issue which arose for consideration was whether in case of seizure of goods under section 110 of the Customs Act, 1962, the show cause notice [required to be issued under section 124(a) within six months of seizure] can be issued to the Customs House Agent [now Custom Broker] of the importer instead of importer himself.

High Court's observations: The High Court made the following significant observations:

(i) Finance Act, 2012 had consciously amended section 153 of the Customs Act, 1962 to do away with the service of orders, decisions, summons and notices on the agent. The CHA [now Custom Broker], is an agent, who operates under a special contract with an importer or exporter, and in this context is authorized to perform various functions to clear the goods from customs. It is no part of the general duty cast upon the CHA to accept service of notices, summons, orders or decisions of the customs authorities, unless he has been specially authorized to do so.

(ii) A conjoint reading of the definition of a Custom Broker in regulation 2(c) along with regulation 11(a) of the Custom Brokers Licensing Regulations, 2013, implies that it

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is no part of the usual and ordinary duty of the CHA to accept service of orders, summons, decisions or notices issued by the custom authorities.

In case CHA represents that he has such an authority, he would have to produce the same before the concerned statutory authority. In the given case, the Department neither sought production of the authority from CHA nor did CHA supply any such documents to the custom authorities, which could, in the ordinary course, had persuaded the Department to serve the notice on the CHA.

Therefore, in the ordinary course, the customs authorities were required to follow the provisions of section 153 of the Customs Act, 1962, which required the service to be effected on the importer i.e. the petitioner in this case.

(iii) With regard to Department's reliance on sections 146 and 147 of the Customs Act, 1962, the Court observed that.

(a) section 146 statutorily recognizes the appointment of a CHA and safeguards this appointment by providing that only that person will act as a CHA who holds a licence granted in that behalf in accordance with the Custom Brokers Licensing Regulations, 2013,

(b) section 146A, *inter alia*, provides that a CHA who has obtained his licence under section 146 of the Customs Act, can act as an authorized representative of a person who is entitled to/is required to appear before an officer of customs or Appellate Tribunal in connection with proceedings under the Customs Act.

As regards business relating to entry/departure of conveyance is concerned or import/export of goods to a custom station is concerned, a CHA regularly acting for and on behalf of the owner/importer/exporter of goods, may have the implied authority to act in the matter. However, that will not authorise the CHA to dawn the robe of an authorized representative, as envisaged in section 146 of the Customs Act.

(c) section 147 is an omnibus section which generally covers all acts of agency. Acts of agency, which involve business of entry/departure of conveyance or import/export of goods at the custom stations, would be covered under section 147 of the Customs Act. Other acts would also be covered, provided there is due authorization conferred on the agent to act on behalf of the owner, importer or exporter of goods.

The CHA has no general authority to act in respect of every act that the owner, importer/exporter is called upon to do or may be required to do under the provisions of the Act. Keeping in view of this object and/or the purpose, the legislature has consciously provided that service of orders, decisions or summons or notices, can only be effected in the manner provided in clause (a) of section 153 by serving it upon the person for whom it is intended, in this case, the noticee. The intention for notice being served only on the intended person is to enable him to take a decision as to who would thereafter be

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entitled or authorized to appear for him before the concerned statutory authority.

<u>High Court's Decision</u>: In the light of above discussion, the High Court held that the show cause notice served on CHA [now Custom Broker] is not tenable in law.

Notes:

1. *Definition of Custom Broker as per* ***regulation 2(c) of the Custom Brokers Licensing Regulations, 2013*** *reads as under:*

   "Custom Broker" means a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station.

   Further, ***regulation 11(a) of the Custom Brokers Licensing Regulations, 2013*** *reads as under:*

   A Customs Broker shall obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be.

2. *The aforesaid judgment has been further affirmed in 2016 (337) ELT 44 (Del.).*

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SETTLEMENT COMMISSION

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

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

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

2. **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) ELT 486 (Guj.)

   High Court's Observation and Decision: 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.

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

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

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

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

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

High Court's Observations: 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.*

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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**.

High Court's Decision: 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**.

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MISCELLANEOUS PROVISIONS

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

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

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

   During the pendency of this writ petition, the principal amount of the sale proceeds was paid to the assessee but the interest on the same was not paid. It was the contention of the Department that the amount paid to the assessee represented the balance of sale proceeds of the goods auctioned or disposed of after adjustments under section 150 of the Act. Since the amount paid did not represent the amount of duty or interest, the provisions of sections 27 and 27A of the Customs Act relating to claim for refund of duty and interest on delayed refunds respectively would not be applicable.

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

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

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

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

2. 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) ELT 63 (Del.)

Facts of the Case: A demand notice was raised against the petitioner in respect of the customs duty payable by a company of which she was a former director. She had resigned from the Board of the company long time back. The Customs Department sought to attach the properties belonging to the petitioner for recovery of the dues of the company. The petitioner contended that the action of the Department was not justified as the said properties belonged to her and not to the company.

Revenue contended that as director, the petitioner could not distance herself from the company's acts and omissions; she had to shoulder its liabilities. It was in furtherance of such obligation that the authorities acted within their jurisdiction in issuing the impugned notice.

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<u>High Court's Observations</u>: 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.

<u>High Court's Decision</u>: 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.

Notes:

1. *As per the provisions of section 179 of the Income-tax Act, 1961 and section 18 of the Central Sales Tax, 1956, in case of a private company in liquidation, where any tax dues of the company under the relevant statutes cannot be recovered, every person who was a director of the said company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. Thus, Revenue authorities are empowered to proceed against the directors of the company for recovery of dues from the company under the said statutes.*

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

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

   The High Court observed that duty and penalty were the arrears of the company because company was the person engaged in the manufacture of goods and registered as manufacturer. As per section 142 of the Customs Act, 1962 read along with the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, Central Government could recover dues belonging only to a defaulter. Thus, the recovery proceedings could be taken only against the

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company, as it alone was the defaulter. There was no provision to recover the arrears of the company from its directors and or shareholders under the Customs Act.

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

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

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

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

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