Summary of Important Case Laws on Indirect Taxes for December 2015 Examination

CASE LAWS - CENTRAL EXCISE

1. Whether the process of generation of metal scrap or waste during the repair of worn out machineries/parts of cement manufacturing plant amounts to manufacture?

Solution:

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

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.

2. Are the physician samples excisable goods in view of the fact that they are statutorily prohibited from being sold?

Solution:

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

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.

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

Solution:

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

The Supreme Court observed that 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. Moreover, 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. Hence, the Apex Court held that duty was payable on such testing equipments.

4. Can a product with short shelf-life be marketable?

Solution:

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

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.

5. 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?

Solution:

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

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.

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

Solution:

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

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.

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

Solution:

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

The High Court pronounced that cutting and embossing did not transform aluminium foil into distinct and identifiable commodity. It did not change the nature and substance of foil. The said process did not render any marketable value to the foil, but only made it usable for packing. There were no records to suggest that cut to shape/embossed aluminium foils used for packing cigarettes were distinct marketable commodity. Hence, the High Court held that the process did not amount to manufacture as per section 2(f) of the Central Excise Act, 1944. Only the process which produces distinct and identifiable commodity with marketable value can be called manufacture.

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

Solution:

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

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.

9. Whether the addition and mixing of polymers and additives to base bitumen with a view to improve its quality, amounts to manufacture?

Solution:

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

The Supreme Court held that since (i) the said process merely resulted in the improvement of quality of bitumen and no distinct commodity emerged, and (ii) 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.

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

Solution:

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

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. They had been imported in finished and completed form.

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

Solution:

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

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

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

Solution:

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

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. If that be the case, then, in a classification dispute, an entry which was beneficial to the assessee was required to be applied. Further, tariff heading specifying goods according to its composition should be preferred over the specific heading. Sub-heading 6807.10 was specific to the goods in which more than 25% by weight, red mud, press mud or blast furnace slag was used as it was based

entirely on material used or composition of goods. Therefore, the Court opined that the goods in issue were appropriately classifiable under Sub-heading 6807.10 of the Tariff.

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

Solution:

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

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. The Apex Court, therefore, stated that the product is basically and primarily used for prophylactic purposes i.e., to prevent the infection or diseases, even though the same contains very less quantity of the prophylactic ingredient. The Apex Court held that the product in question can be safely classified as a "medicament" which would fall under Chapter Heading 3003, a specific entry and not under Chapter Sub-Heading 3402.90, a residuary entry.

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

Solution:

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

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".

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

Solution:

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

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

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

Solution:

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

The High Court held that Clause No. 7 of Circular dated 1st July, 2002 and Circular dated 12th December, 2002 (where it confirms 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.

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

The Court was of the opinion that the manufacturing process in the present case gets completed on testing of the said machines. Hence, the afore-stated goods viz. the flexible plastic films used for testing the F&S machines are inputs used in relation to the manufacture of the final product and would be eligible for CENVAT credit.

21. The assessee claimed the CENVAT credit on the duty paid on capital goods which were later destroyed by fire. The Insurance Company reimbursed the amount inclusive of excise duty. Is the CENVAT credit availed by the assessee required to be reversed?

Solution:

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

The High Court observed 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. At the same time, it did not provide a reason to the Excise Department to demand reversal of credit or default to pay the said amount. 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 payment as contended by the Department. The High Court, therefore, answered the substantial question of law in favour of the assessee.

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

The High Court held that technical testing and analysis services availed for testing of clinical samples prior to commencement of commercial production were directly related to the manufacture of the final product and hence, were input services eligible for CENVAT credit. With respect to the services provided by foreign commission agents, the High Court held that since the agents were directly concerned with sales rather than sales promotion, the services provided by them were not covered in main or inclusive part of definition of input service as provided in rule 2(l) of the CENVAT Credit Rules, 2004.

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

Solution:

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

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

registration of two units situated within a common boundary wall would not make them two different factories.

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

Solution:

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

The High Court held that the procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations subject to which a rebate can be granted and the procedure governing the grant of a rebate. It was held by the High Court that while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory. The High Court ruled that non-production of ARE-1 forms ipso facto cannot invalidate rebate claim. In such a case, exporter can demonstrate by cogent evidence that goods were exported and duty paid and satisfy the requirements of rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE (NT).

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

Solution:

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

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

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

Solution:

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

The High Court elucidated that mens rea (guilty mind) is an essential part for levy of penalty under section 11AC of the Central Excise Act, 1944. Where a provision of statute is not clear and there are divergent judicial pronouncements, it cannot be said that there is mens rea on

the part of the assessee if he chooses to follow his course of action in the light of one of the judicial pronouncements.

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

The High Court held that Tribunal could not permit the assessee to pay 25% penalty beyond the time prescribed under the first and second proviso to erstwhile section 11AC [now section 11AC(1)(c)].

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

Solution:

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

The Department aggrieved by the said order filed an appeal with High Court wherein it contended that rule 25(1)(c) 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.

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

Solution:

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

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.

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

The High Court referred to the case of Raj Chemicals v. UOI 2013 (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

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

Solution:

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

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

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

Solution:

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

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

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

Solution:

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

The Supreme Court held that since the Revenue had not questioned the correctness or otherwise of the findings on the conclusion reached by the first appellate authority, it might

not be open for the Revenue to contend this issue further by issuing the impugned show cause notices on the same issue for further periods.

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

Solution:

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

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.

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

Solution:

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

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.

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

Solution:

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

The Tribunal, when the matter was brought before it, decided the case in favour of assessee and against the Revenue. It held that the appellant was eligible to claim benefit of the SSI exemption as the proprietor of Elex Knitting Machinery Co. was one of the partners in Elex Engineering Works. Thus, being the co-owner of the brand name of "ELEX", he could not be said to have used the brand name of another person, in the manufacture and clearance of the goods in his individual capacity. The said decision of the Tribunal has been affirmed by the High Court in the instant case.

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

Solution:

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

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, having common management and accounts etc. Therefore, High Court was of the considered view that the clearance of the common goods under the same brand name manufactured by both the firms had been rightly clubbed.

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

Solution:

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

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.

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

Solution:

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

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.

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

Solution:

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

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

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

Solution:

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

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

CASE LAWS - SERVICE TAX

1. Can service tax be levied on the services rendered in connection with a chit fund business?

Solution:

Delhi Chit Fund Association v. UOI 2013 (30) S.T.R. 347 (Del.)

The High Court inferred that since in a chit fund business, the subscription is tendered in any one forms of money as defined under section 65B(33), it would be a transaction in money and would fall in the exclusionary part of the definition. Otherwise also, in view of Explanation 2 read along with the exclusionary part, the services rendered by the foreman of the chit business for which a separate consideration is charged would be out of the clutches of the definition. Thus, either way, the services of a foreman of a chit business do not constitute a taxable service. Consequently, the High Court quashed Notification No. 26/2012-S.T. dated 20.06.2012 to the extent of the entry in serial No. 8 thereof.

2. 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?

Solution:

Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran 2012 (26) S.T.R. 289 (S.C.)

The Supreme Court observed that on reading the agreement between the parties, it could be inferred that service provider (contractor) had accepted the liability to pay service tax, since it arose out of discharge of its obligations under the contract. With regard to the submission of shifting of service tax liability, the Supreme Court held that service tax is an indirect tax which may be passed on. Thus, assessee can contract to shift its liability. The Finance Act, 1994 is relevant only between assessee and the tax authorities and is irrelevant in determining rights and liabilities between service provider and service recipient as agreed in a contract between them. There is nothing in law to prevent them from entering into agreement regarding burden of tax arising under the contract between them.

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?

Solution:

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

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.

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

4. Whether the activity of running guest houses for the pilgrims is liable to service tax?

Solution:

Tirumala Tirupati Devasthanams, Tirupati v. Superintendent of Customs, Central Excise, Service Tax 2013 (30) S.T.R. 27 (A.P.)

The High Court observed that as per erstwhile section 65(105)(zzzzw) of the Finance Act, 1994, service provided to any person by a hotel, inn, guest house, club or camp-site, by whatever name called, for providing of accommodation for a continuous period of less than three months is a taxable service. Therefore, the High Court held that since the petitioner was running guest houses by whatever name called, whether it was a shelter for pilgrims or any other name, it was providing the taxable services and was thus liable to pay service tax.

5. Can a software be treated as goods and if so, whether its supply to a customer as per an "End User Licence Agreement" (EULA) would be treated as sale or service?

Solution:

Infotech Software Dealers Association (ISODA) v. Union of India 2010 (20) STR 289 (Mad.)

The High Court held that though software is goods, the transaction may not amount to sale in all cases and it may vary depending upon the terms of EULA.

6. Whether service tax is chargeable on the buffer subsidy provided by the Government for storage of free sale sugar by the assessee?

Solution:

CCE v. Nahar Industrial Enterprises Ltd. 2010 (19) STR 166 (P & H)

The High Court noted that apparently, service tax could be levied only if service of storage and warehousing was provided. Nobody can provide service to himself. In the instant case, the assessee stored the goods owned by him. After the expiry of storage period, he was free to sell them to the buyers of its own choice. He had stored goods in compliance with the directions of the Government of India issued under the Sugar Development Fund Act, 1982. He had received subsidy not on account of services rendered to Government of India, but had received compensation on account of loss of interest, cost of insurance etc. incurred on account of maintenance of stock. Hence, the High Court held the act of assessee could not be called as rendering of services.

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?

Solution:

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

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.

8. 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?

Solution:

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

The High Court noted that the appellant was also required to describe, value and specify the amount of service tax payable on input services actually required to be used in providing taxable service to be exported. The High Court opined that except the description of the input services, the appellant could not provide the value and amount of service tax payable as any estimation was ruled out by the use of the word "actually required" and the bill/invoice for the input services were received by the appellant only after the calls were attended to. Further, the High Court also observed that one-to-one matching of input services with exported services was impossible since every phone call was export of taxable service but the invoices in respect of the input-services were received only at regular intervals, viz. monthly or fortnightly etc. Thus, the High Court was of the view that in the very nature of things, and considering the peculiar features of the appellant's business, it was difficult to comply with the requirement "prior" to the date of the export. Furthermore, the

High Court elaborated that if particulars in declaration were furnished to service tax authorities within a reasonable time after export, along with necessary documentary evidence, and were found to be correct and authenticated, object/purpose of filing of declaration would be satisfied. The High Court, therefore, allowed the rebate claims filed by the appellants and held that the condition of the notification must be capable of being complied with as if it could not be complied with, there would be no purpose behind it.

9. Whether expenditure like travel, hotel stay, transportation and the like incurred by service provider in course of providing taxable service should be treated as consideration for taxable service and included in value for charging service tax?

Solution:

Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India 2013 (29) S.T.R. 9 (Del.)

The High Court further observed that rule 5(1) may also result in double taxation, if expenses like air travel tickets, had already been subjected to service tax. The High Court was of the view that double taxation can be imposed only when it is clearly provided for and intended. It can never be enforced by implication. The High Court, therefore, held that rule 5(1) of the Rules runs counter and is repugnant to sections 66 and 67 of the Act and to that extent it is ultra vires the Finance Act, 1994.

10. 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?

Solution:

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

The High Court held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and is not included in the fees for professional services or technical services, the service tax component would not be subject to TDS under section 194J of the Income-tax Act, 1961.

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

Solution:

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

the High Court held that section 5A(2) is not ultra vires. It is in consonance with section 72A of the Finance Act, 1994.

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

Solution:

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

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 by following the procedures established by law. However, in the present case, no such procedures had been followed. Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability; it had failed to show that the petitioner was actually liable to pay service tax. Thus, the High Court elucidated 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.

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

Solution:

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

The High Court 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.

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

Solution:

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

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

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

Solution:

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

The High Court held that section 72 could per se not be considered as an ex parte assessment procedure as ordinarily understood under the Income-tax Act, 1961. Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. Thus, said order is not akin to an ex parte order. Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.

16. Whether penalty is payable even if service tax and interest has been paid before issue of the show cause notice?

Solution:

CCE & ST v. Adecco Flexione Workforce Solutions Ltd. 2012 (26) S.T.R 3 (Kar)

The Karnataka High Court held that the authorities had no authority to initiate proceedings for recovery of penalty under section 76 when the tax payer paid service tax along with interest for delayed payments promptly. As per section 73(3), no notice shall be served against persons who had paid tax with interest; the authorities can initiate proceedings against defaulters who had not paid tax and not to harass persons who had paid tax with interest on their own. If the notices were issued contrary to this section, the person who had issued notice should be punishable and not the person to whom it was issued.

17. 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?

Solution:

CCE (A) v. KVR Construction 2012 (26) STR 195 (Kar.)

The High Court of Karnataka, distinguishing the landmark judgment by Supreme Court in the case of Mafatlal Industries v. UOI 1997 (89) E.L.T. 247 (S.C.) relating to refund of duty/tax, held that service tax paid mistakenly under construction service although actually exempt, is payment made without authority of law. Therefore, mere payment of amount would not make it 'service tax' payable by the assessee. The High Court opined that once there was lack of authority to collect such service tax from the assessee, it would not give authority to the Department to retain such amount and validate it. Further, provisions of section 11B of the Central Excise Act, 1944 apply to a claim of refund of excise duty/service tax only, and could not be extended to any other amounts collected without authority of law. In view of the above, the High Court held that refund of an amount mistakenly paid as service tax

could not be rejected on ground of limitation under section 11B of the Central Excise Act, 1944.

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

Solution:

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

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.

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

Solution:

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

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

CASE LAWS – CUSTOMS

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?

Solution:

Tirupati Udyog Ltd. v. UOI 2011 (272) E.L.T. 209 (A.P.)

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.

2. Whether remission of duty is permissible under section 23 of the Customs Act, 1962 when the remission application is filed after the expiry of the warehousing period (including extended warehousing period)?

Solution:

CCE v. Decorative Laminates (I) Pvt. Ltd. 2010 (257) E.L.T. 61 (Kar.)

The High Court held that the circumstances made out under section 23 were not applicable to the present case since the destruction of the goods or loss of the goods had not occurred before the clearance for home consumption within the meaning of that section. When the goods are not cleared within the period or extended period as given by the authorities, their continuance in the warehouse will not permit the remission of duty under section 23 of the Act.

3. 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?

Solution:

Keihin Penalfa Ltd. v. Commissioner of Customs 2012 (278) E.L.T. 578 (S.C.)

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.

4. (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?

Solution:

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

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.

5. 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?

Solution:

CCus v. Shreeji Overseas (India) Pvt. Ltd. 2013 (289) E.L.T. 401 (Guj.)

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.

6. Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption?

Solution:

Paras Fab International v. CCE 2010 (256) E.L.T. 556 (Tri. – LB)

The Tribunal held that the entire premises of a 100% EOU has to be treated as a warehouse if the licence granted under to the unit is in respect of the entire premises. Imported goods warehoused in the premises of a 100% EOU (which is licensed as a Customs bonded warehouse) and used for the purpose of manufacturing in bond as authorized under section 65 of the Customs Act, 1962, cannot be treated to have been removed for home consumption.

7. 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 requantification of short-levy of customs duty?

Solution:

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

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

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

Solution:

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

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.

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

Solution:

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

The High Court 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.

10. 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?

Solution:

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

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.

11. 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?

Solution:

Thakker Shipping P. Ltd. v. Commissioner of Customs (General) 2012 (285) E.L.T. 321 (S.C.)

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.

12. 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?

Solution:

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

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.

13. 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?

Solution:

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

The High Court 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.

14. 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?

Solution:

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

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.

15. 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?

Solution:

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

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

Solution:

CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)
The Apex Court held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

17. 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?

Solution:

Manish Lalit Kumar Bavishi v. Addl. DIR. General, DRI 2011 (272) E.L.T. 42 (Bom.)
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.

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

Solution:

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

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.

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

Solution:

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

The Court 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.

20. 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?

Solution:

Sanghvi Reconditioners Pvt. Ltd. V. UOI 2010 (251) ELT 3 (SC)

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.

21. Does the Settlement Commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the Revenue?

Solution:

Union of India v. Cus. & C. Ex. Settlement Commission 2010 (258) ELT 476 (Bom.)

The High Court 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.

22. 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?

Solution:

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

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.

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

Solution:

Anita Grover v. CCEx. 2013 (288) E.L.T. 63 (Del.)

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.