INTERMEDIATE : PAPER - 11

INDIRECT TAXATION

INTERMEDIATE

STUDY NOTES

The Institute of Cost Accountants of India
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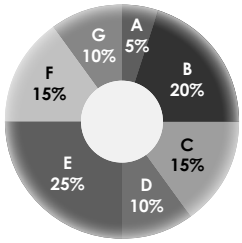
Syllabus

Syllabus Structure

The syllabus comprises the following topics and study weightage:

A	Cannons of taxations – Indirect Taxes	5%
B	Central Excise	20%
C	Customs Laws	15%
D	EXIM Policy	10%
E	Service Tax	25%
F	Central Sales Tax Act & VAT Act	15%
G	International Taxation & Transfer Pricing	10%



ASSESSMENT STRATEGY

There will be written examination paper of three hours.

OBJECTIVES

To provide an in depth study of the various provisions of indirect taxation laws and their impact on business decision-making

Learning Aims

The syllabus aims to test the student's ability to:

- Understand the basic principles underlying the Indirect Taxation Statutes (with reference to Central Excise Act, Customs Act, Service Tax, Value Added Tax, Central Sales Tax)
- Compute the assessable value of transactions related to goods and services for levy and determination of duty liability
- Identify and analyze the procedural aspects under different applicable statutes related to indirect taxation
- Apply the Generally Accepted Cost Accounting Principles and Techniques for determination of arm's length price for domestic and international transactions

Skill Set required

Level B: Requiring the skill levels of knowledge, comprehension, application and analysis.

1. Canons of Taxation – Indirect Taxes	5%
2. Central Excise	20%
3. Customs Laws	15%
4. EXIM POLICY	10%
5. Service Tax	25%
6. Central Sales Tax Act & VAT Act	15%
7. Basic Concepts of International Taxation & Transfer Pricing in the context of Indirect Taxation	10%

1. Canons of Taxation – Indirect Taxes

(a) Features of Indirect Tax, Constitutional Validity

(b) Indirect Tax Laws, administration and relevant procedures

2. Central Excise

(a) The Central Excise Law – Goods, Excisable Goods, Manufacture and manufacturer, Classification, Valuation, Related Person, Captive Consumption, CAS 4 CENVAT, Basic Procedure, Export, SSI, Job Work

(b) Assessments, Demands, Refund, Exemptions, Power of Officers

(c) Adjudication, Appeals, Settlement Commission, Penalties.

(d) Central Excise Audit and Special Audit under 14A and 14AA of Central Excise Act

(e) Impact of tax on GATT 94, WTO, Anti Dumping processing

(f) Tariff Commission and other Tariff authorities

3. Customs Laws

(a) Basic concepts of Customs Law

(b) Types of customs duties, Anti-Dumping Duty, Safeguard Duty

(c) Valuation, Customs Procedures, Import and Export Procedures, Baggage, Exemptions, Warehousing, Demurrage, Project Import and Re-imports

(d) Penalties and Offences

4. EXIM POLICY

(a) EXIM Policy

(b) Export Promotion Schemes, EOU

(c) Duty Drawback

(d) Special Economic Zone

5. Service Tax

(a) Introduction, Nature of Service Tax, Service Provider and Service Receiver

(b) Registration procedure, Records to be maintained

(c) Negative List of Services, Exemptions and Abatements

(d) Valuation of Taxable Services

(e) Payment of service Tax, Returns of Service Tax

(f) CENVAT Credit Rules, 2004

(g) Place of Provision of Service Rules, 2012

(h) Other aspects of Service Tax

(g) Special Audit u/s 72A of the Finance Act, 1994 for Valuation of Taxable Services

6. Central Sales Tax Act & VAT Act

(a) Central Sales Tax

(i) Introduction, Definitions, salient features of CST Act

(ii) Stock Transfer, Branch transfer, Inter State Sale

(iii) Various forms for filing of returns under CST

(iv) Procedures under Central Sales Tax (CST)

(b) Value Added Tax (VAT)

(i) Introduction, definitions, salient features of Sate VAT Act

(ii) Treatment of stock & branch transfer under State VAT Act

(iii) Filing of return under State VAT Act

(iv) Accounting & Auditing VAT

7. Basic Concepts of International Taxation & Transfer Pricing in the context of Indirect Taxation

(a) International Taxation & Transfer Pricing issues in the context of Indirect Taxation

(b) Indirect Taxation issues in cross-border services

(c) General Anti-Avoidance Rule (GAAR) – concept and application

(d) Advance Pricing Agreement (APA) – concept and application

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Study Note - 1

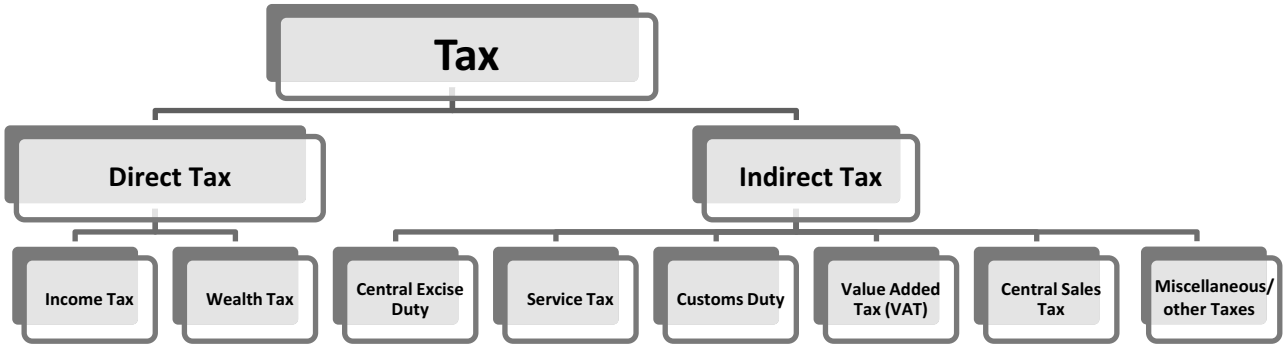
CANONS OF TAXATION- INDIRECT TAXES

This Study Note includes

1.1 Basis for Taxation
1.2 Direct Taxes and Indirect Taxes
1.3 Features of Indirect Tax
1.4 Constitutional Validity
1.5 Administration and Relevant Procedures

1.1 BASIS FOR TAXATION

India is a socialist, democratic and republic state. Constitution of India is supreme law of land. All other laws, including the Income Tax Act, are subordinate to the Constitution of India. The Constitution provides that 'no tax shall be levied or collected except by Authority of Law'. The Constitution includes three lists in the Seventh Schedule providing authority to the Central Government and the State Governments to levy and collect taxes on subjects stated in the lists.



1.2 DIRECT TAXES AND INDIRECT TAXES

A) **Direct Taxes:** They are imposed on a person's income, wealth, expenditure, etc. Direct Taxes charge is on person concern and burden is borne by person on whom it is imposed.

Example- Income Tax, Wealth Tax.

B) **Indirect Taxes:** They are imposed on goods/ services. The Immediate liability to pay is of the manufacturer/ service provider/ seller but its burden is transferred to the ultimate consumers of such goods/ services. The burden is transferred not in form of taxes, but, as a part of the price of goods/ services.

Example- Excise Duty, Customs Duty, service Tax, Value-Added Tax (VAT), Central Sales Tax (CST).

1.3 FEATURES OF INDIRECT TAXES

Government need funds for various purposes like maintenance of law and order, defence, social/ health services, etc. Government obtains funds from various sources, out of which one main source is taxation. Justice Holmes of US Supreme Court, has, long ago, rightly said that tax is the price which we pay for a civilized Society.

Direct Tax & Indirect Taxes: -

Particulars	Direct Taxes	Indirect Taxes
Meaning	Direct Taxes are those taxes where the incidence and impact falls on the same person.	Indirect Tax is a tax where incidence and impact fall on two different person.
Nature of tax	Direct Tax progressive in nature.	Indirect Taxes is regressive in nature.
Taxable Event	Taxable Income / Taxable Wealth of the Assessees.	Purchase / Sale / Manufacture of goods and provision of services.
Levy & Collection	Levied and collected from the Assessee.	Levied & collected from the consumer but paid / deposited to the Exchequer by the Assessee / Dealer.
Shifting of Burden	Directly borne by the Assessee. Hence, cannot be shifted.	Tax burden is shifted or the subsequent / ultimate user.
Collected	After the income for a year is earned or valuation of assets is determined on the valuation date.	At the time of sale or purchases or rendering of services.
Disadvantages of Direct taxes / Advantages of Indirect Taxes	It is psychologically very difficult for a person to pay some amount after it is received in his hands. Hence, there is psychological resistance [This is the reason why even Income Tax Act is widening the scope of "Tax Deduction at Source'' (TDS) and TCS. Thus, a direct tax is converted to an indirect tax].	Since the price of commodity or service is already inclusive of indirect taxes, the customer i.e. the ultimate tax payer does not feel a direct pinch while paying indirect taxes and hence, resistance to indirect taxes is much less compared to resistance to direct taxes. ***Manufacturer's/ Dealer's Psychology favours indirect taxes***- The manufacturer/ trader who collects the taxes in his Invoice and pays it to Government, has a psychological feeling that he is only collecting the taxes and is not paying out of his own pocket (though this feeling may not be always correct).
	Direct taxes are mainly on income/ wealth of individuals, firms or corporate bodies, where millions of transactions are carried out in lakhs of places and keeping an eye over all such transactions is virtually impossible.	Indirect taxes are easier to collect as indirect taxes are mainly on goods/ commodities/ services, for which record keeping, verification and control is relatively easy (at least in organized sector). Manufacturing activities are carried out mainly in organized sector, where records and controls are better.

Particulars	Direct Taxes	Indirect Taxes
	Tax evasion is comparatively more in direct taxes where it is on unorganized sector, since control is difficult.	Tax evasion is comparatively les in indirect taxes in organized sector due to convenience of control.
	Collection cost of direct taxes as percentage of tax collected are higher in indirect taxes compared to indirect taxes.	Collection costs of indirect taxes as percentage of tax collected are lower in indirect taxes compared to direct taxes.
	Direct taxes can control such wasteful expenditure only indirectly by taxing higher income group people.	Government can levy higher taxes on luxury goods, which reduces the wasteful expenditure.
	Government can judiciously use the direct taxes to support development in desirable areas, while discouraging in backward areas, infrastructure development etc.	Government can judiciously use the indirect taxes to support development in desirable areas, while discouraging it in others, e.g. reducing taxes on goods manufactured in tiny or small scale units; lowering taxes in backward areas etc.
Advantages of Direct taxes/ Disadvantages of Indirect taxes	Direct taxes are 'progressive', as they depend on paying capacity. Rich person is taxed more compared to poor person.	Indirect taxes do not depend on paying capacity. Since the indirect tax is uniform, the tax payable on commodity is same, whether it is purchased by a poor man or a rich person. Hence, the indirect taxes are termed as 'regressive'. (This argument is only partially correct; as it is possible to levy lower taxes on goods of daily consumption while levying higher taxes on luxury goods and the regressive effect can be reduced in many circumstances.)
	Direct taxes do not affect prices of goods and service.	Tax on goods and services increases its prices, which reduces demand of goods and services. Lesser demand means lower growth of industrialization.
	High income tax rates increase tax evasion and havala transactions.	High customs/ excise duty increases smuggling, havala trade and mafia gangs, which is harmful in many ways. Similarly, high excise duty leads to evasion.
	Direct taxes do not have such effect.	Higher customs duty and excise duty increases cost of modern machinery and technology.
	Direct taxes are not inflationary.	Indirect taxes increase the prices of products and hence are often perceived as inflationary.

Recovery from buyer is not essential condition for levy of indirect taxes- In general, indirect taxes are recovered from buyer, it is not an essential feature of indirect taxes. Tax on goods or services will be valid even if it is not recovered or recoverable from buyer.

1.4 CONSTITUTIONAL VALIDITY

Central Excise is a duty on excisable goods manufactured or produced in India, other than alcoholic liquor. Duty liability is principally on 'manufacturer', except in a few cases. In majority of cases, duty rate w.e.f. 17.03.2012 is 12% plus Education Cess of 2% and Secondary and Higher Education Cess of 1%. Thus, generally, duty is 12.36%. There are some exclusions, partial or full exemptions and higher duties in some cases. As per Appendix IV of CETA, the rate of additional duty on Goods of Special Importance is 8% in majority of the cases. (Section 3(1) of The Additional Duties of Excise (Goods of Special Importance) Act, 1957.

Power of Taxation under Constitution of India is as follows :

(a) The Central Government gets tax revenue from Income Tax (except on Agricultural Income), Excise (except on alcoholic drinks) and Customs.

(b) The State Governments get tax revenue from sales tax, excise from liquor and alcoholic drinks, tax on agricultural income.

(c) The Local Self Governments e.g. municipalities, etc. get tax revenue from entry tax and house property tax.

Article 265 provides that no tax shall be levied or collected except by authority of Law. The authority for levy of various taxes, as discussed above, has been provided for under Article 246 and the subject matters enumerated under the three lists set out in the Schedule-VII to the Constitution.

1.5 ADMINISTRATION AND RELEVANT PROCEDURES

In India, Constitution which came into effect on 26th January, 1950 is supreme and all laws and Government actions are subordinate to our Constitution. Clear understanding of concepts is vital for any discussion on taxation matters as power to levy and collect tax is derived from Constitution. If it is found that any Act, Rule, Notification or Government order is not according to the Constitution, it is illegal and void and it is called ultra vires the Constitution.

India is Union of States – The structure of Government is federal in nature. Article 1(1) of Constitution of India reads, 'India, that is Bharat, shall be a Union of States'.

Government of India (Central Government) has certain powers in respect of whole country. India is divided into various States and Union Territories and each State and Union Territory has certain powers in respect of that particular State. Thus, there are States like Gujarat, Maharashtra, Tamilnadu, Kerala, Uttar Pradesh, Punjab etc. and Union Territories like Pondicherry, Chandigarh etc.

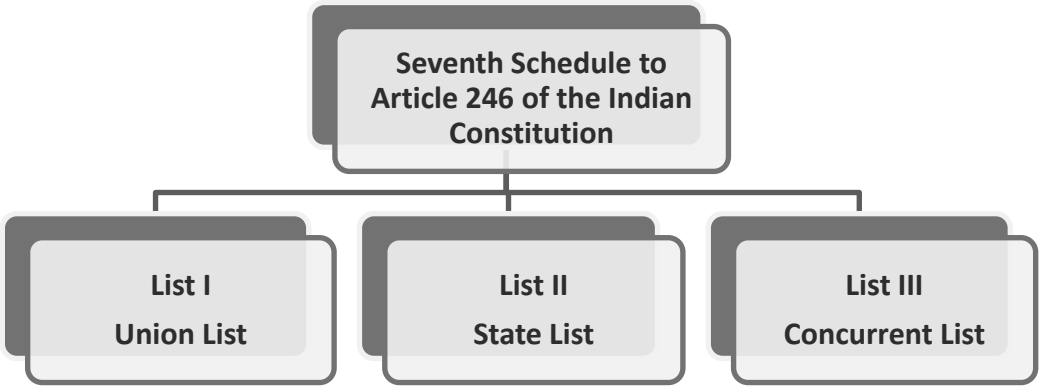
Sources and Authority of Taxes in India

Powers of Central or State Government to levy tax		
Article	**Empowers**	**For**
246(1)	Central or State Government	Levy of various taxes
246(1)	Central Government	Levy taxes in List I of the Seventh Schedule of the Constitution.
246(3)	State Government	Levy taxes in List II of the Seventh Schedule of the Constitution.
—	Central and State Government	List III of Seventh Schedule.

Bifurcation of powers between Union and States – Article 246(1) of Constitution of India states that Parliament has exclusive powers to make laws with respect to any of matters enumerated in List I in the Seventh Schedule to Constitution (called 'Union List'). As per Article 246(3), State Government has exclusive powers to make laws for State with respect to any matter enumerated in List II of Seventh Schedule to Constitution.

Seventh Schedule to Constitution consists of following three lists:

- List I (Union List) contains entries under exclusive jurisdiction of Union Government.
- List II (State List) contains entries under exclusive jurisdiction of States.
- List III (Concurrent List) contains entries where both Union and State Governments can exercise power. [In case of Union Territories, Union Government can make laws in respect of all the entries in all three lists].



Taxation under Constitution

Union List (List I)	State List (List II)
Only Union Government can make laws.	Only State Government can make laws.
Given in Schedule Seven of Constitution	Given in Schedule Seven of Constitution.
Important taxes in Union List	**Important taxes in State List**
Entry No. 82 – Tax on income other than agricultural income. **Entry No. 83** – Duties of customs including export duties. **Entry No. 84** – Duties of excess on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption, opium, narcotic drugs, but including medicinal and toilet preparations containing alcoholic liquor, opium or narcotics. **Entry No. 85** – Corporation Tax. **Entry No. 86** – Taxes on the capital value of assets, exclusive of agricultural land, of individuals and companies; taxes on capital of companies **Entry No. 92A** – Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of interstate trade or commerce. **Entry No. 92B** – Taxes on consignment of goods where such consignment takes place during interstate trade or commerce. **Entry No. 92C** – Tax on services [Amendment passed by Parliament on 15-1-2004, but not yet made effective]. **Entry No. 97** – Any other matter not included in List II, List III and any tax not mentioned in list II or list III. (These are called 'Residual Powers'.)	**Entry No. 46** – Taxes on agricultural income. **Entry No. 51** – Excise duty on alcoholic liquors, opium and narcotics. **Entry No. 52** – Tax on entry of goods into a local area for consumption, use or sale therein (usually called Entry Tax or Octroi). **Entry No. 54** – Tax on sale or purchase of goods other than newspapers except tax on interstate sale or purchase. **Entry No. 55** – Tax on advertisements other than advertisements in newspapers. **Entry No. 56** – Tax on goods and passengers carried by road or inland waterways. **Entry No. 59** – Tax on professions, trades, callings and employment.

List III : Concurrent List
Both union and State Government can exercise power
Given in Schedule Seven of constitution
Entry No.17A – Forest Income
Entry No. 25 – Education Income

Study Note - 2

CENTRAL EXCISE ACT, 1944

This Study Note includes

2.1 Constitutional Background
2.2 Laws Relating to Central Excise
2.3 Central Excise Act, 1944
2.4 Duties Leviable
2.5 Levy, Collection & Exemptions from Excise Duty
2.6 Goods
2.7 Excisability of Plant & Machinery, Waste and Scrap
2.8 Manufacture
2.9 Manufacturer
2.10 Classification of Goods
2.11 Valuation of Goods
2.12 Valuation in case of Job Work –Rule 10A
2.13 Some Critical Issues in Central Excise
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2.19 Refund & Other Important Provisions
2.20 Other Procedures in Central Excise
2.21 Excise Audit
2.22 Warehousing
2.23 Export Benefits and Procedures
2.24 Excise on Small Scale Industries
2.25 Demands and Penalties
2.26 Appeals
2.27 Important Provisions of Central Excise Act, 1944
2.28 Important Provisions of Central Excise Rules, 2002
2.29 Important Rules of Central Excise Valuation Rules, 2000
2.30 Rules of Classification

2.1 CONSTITUTIONAL BACKGROUND

Central Excise is a duty on excisable goods manufactured or produced in India, other than alcoholic liquor. Duty liability is principally on 'manufacturer' of excisable goods in India, except in a few cases. In majority of cases, duty rate is 12% plus Education Cess of 2% and Secondary and Higher Education Cess of 1%. Thus, generally, duty is 12.36%. There are some exclusions, partial or full exemptions and higher duties in some cases. As per Appendix IV of CETA, the rate of additional duty on Goods of special Importance is 8% in majority of the cases. (Section 3(1) of The Additional Duties of Excise (Goods of Special Importance) Act, 1957.

Power of Taxation under Constitution of India is as follows:

(a) The Central Government gets tax revenue from Income Tax (except on Agricultural Income) as a part of Direct Taxes, Excise, Service (except on alcoholic drinks) and Customs as a part of Indirect Taxes.

(b) The State Governments get tax revenue from sales tax, excise from liquor and alcoholic drinks, tax on agricultural income.

(c) The Local Self Governments e.g. municipalities, etc. get tax revenue from entry tax and house property tax.

Article 265 provides that no tax shall be levied or collected except by authority of Law. The authority for levy of various taxes, as discussed above, has been provided for under Article 246 and the subject matters enumerated under the three lists set out in the Schedule-VII to the Constitution.

Difference between Direct and Indirect Taxes:

Direct Taxes	**Indirect Taxes**
Payer of tax and sufferer of tax one and same (i.e. impact and incidence on the same person)	Payer of tax not sufferer of tax whereas sufferer of tax is not paying directly to the Government (i.e. impact on one head and incidence on other head)
Income based taxes	Transaction based taxes
Rate of taxes are different from person to person	Rate of duties are not different from person to person
Entire revenue goes to Central Government of India	Revenue source to Central Government of India as well as State Governments
Central Board of Direct Taxes (CBDT) is an important part of Department of Revenue, Ministry of Finance (India). It plays a vital role in planning & implementing direct taxes policy in India. It also monitors direct taxes law followed by Income Tax Departments	Central Board of Excise and Customs (CBE&C) is an important part of Department of Revenue, Ministry of Finance (India). It plays a vital role in planning & implementing indirect taxes policy in India. It also monitors indirect taxes law followed by Excise and Customs Departments

Note: these differences are illustrative but not exhaustive.

2.2 LAWS RELATING TO CENTRAL EXCISE

Central Excise Act,1944(CEA) : The basic act which provides the constitutional power for charging of duty, valuation , powers of officers, provisions of arrests, penalty, etc.

Central Excise Tariff Act, 1985 (CETA): This classifies the goods under 96 chapters with specific codes assigned.

Central Excise Rules, 2002: The procedural aspects are laid herein. The rules are implemented after issue of notification.

Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000: The provisions regarding the valuation of excisable goods are laid down in this rule.

Cenvat Credit Rules, 2004: The provisions relating to Cenvat Credit available and its utilization are mentioned.

Central Excise law extended to ''designated areas'' in continental shelf and exclusive Economic Zone of India i.e., upto 200 nautical miles from the base line of India and represents the limit till which India can be engaged in economic exploitation.

2.3 CENTRAL EXCISE ACT, 1944

The duty of Central Excise is levied if the following conditions are satisfied:

(1) The duty is on goods.

(2) The goods must be excisable.

(3) The goods must be manufactured or produced.

(4) Such manufacture or production must be in India.

In other words, unless all of these conditions are satisfied, Central Excise Duty cannot be levied. Ownership of raw material is not relevant for duty liability - Hindustan General Industries v. CCE 2003 (155) ELT 65 (CEGAT)

Example 1: In the case of ***CCE v M M Khambhatwala*** **(1996) SC,** Mr. Khambhatwala was the owner of raw material. He supplied the raw material to the household ladies who were manufacturing the 'dhoop, agarbatti; etc. in their houses. There was no control or supervision over their work and payment to the ladies was on the basis of number of pieces manufactured. It was held that the household ladies, and not Mr. Khambhatwala, were the manufacturers.

2.4 DUTIES LEVIABLE

- **Basic Excise Duty** is levied u/s 3(1) of Central Excise Act. The section is termed as 'charging section'. General rate of duty of central excise on non-petroleum products has been increased from 10% to 12% w.e.f. 17-3-2012. (The duty rate was 14% during 1-3-2008 to 6-12-2008, which was reduced to 10% w.e.f. 7-12-2008 and to 8% w.e.f. 24-02-2009). This duty is applicable to majority of excisable goods. There is partial exemption to a few products.
- **Education Cess** @ 2% of excise duty under section 93 of Finance (No. 2) Act (w.e.f. 9-7-2004).
- **Secondary and Higher Education Cess** (S&H Education Cess) @ 1% of the total duties of excise vide section 136 read with section 138 of Finance Act, 2007 w.e.f. 1-3-2007.

Thus, total excise duty is 12.36%% in majority of the cases.

Example 2:

Basic Excise Duty	12%
Add: 2% Edu. Cess on 12%	0.24%
Add: 1% S & H Edu. Cess on 12%	0.12%
Total effective rate of duty	12.36%

National Calamity Contingent Duty – A 'National Calamity Contingent Duty' (NCCD) has been imposed vide section 136 of Finance Act, 2001 on some products. NCCD of 1% has been imposed on mobile phones w.e.f. 1-3-2008.

In addition, cesses and duties have been imposed on some specified products.

2.5 LEVY, COLLECTION & EXEMPTIONS FROM EXCISE DUTY

2.5.1 What is the Taxable Event?

The taxable event is of great significance in levy of any tax or duty. Excise duty is leviable on all excisable goods, which are produced or manufactured in India. Thus, 'manufacture or production in India' of an excisable goods is a 'taxable event' for Central Excise. It becomes immaterial that duty is collected at a later stage i.e. at the time of removal of goods. Therefore, removal from factory is not the 'taxable event'.

In UOI v Bombay Tyre International Ltd. (1983) 14 ELT 1896 (SC), the Supreme Court of India had held that while the levy of duty of excise is on manufacture or production of the goods, taxable event is with reference to manufacture.

Example 3: Product X is produced on 1st February 2013 by X Ltd. On that date X is an excisable commodity with a tariff rate of 12%. Subsequently on 31st March, 2013 Product X was removed from the factory. Hence, the taxable event is on 1st November 2012 and not on 31st December 2012.

2.5.2 Who is Liable to Pay Duty?

Rule 4(1) of the Central Excise Rules, 2002 provides that every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured or from a warehouse, unless otherwise provided.

It is provided that the goods falling under Chapter 61 or 62 of the First Schedule to the Tariff Act, produced or manufactured by a job worker may be removed without payment of duty leviable thereon and the duty of excise leviable on such goods shall be paid by the person referred to in sub-rule (3), as if such goods have been produced or manufactured by him, on the date of removal of such goods from his premises registered under rule 9.

Explanation – Where such person has authorized the job worker to pay the duty leviable on such goods under sub-rule (3), such duty shall be paid by the job worker on the date of removal of such goods from his registered premises.

Rule 4(2) provides that notwithstanding anything contained in sub-rule (1), where molasses are produced in a khandsari sugar factory, the person who procures such molasses, whether directly from such factory or otherwise, for use in the manufacture of any commodity, whether or not excisable, shall pay the duty leviable on such molasses, in the same manner as if such molasses have been produced by the procurer.

Rule 4(3) provides that notwithstanding anything contained in sub-rule (1), every person who gets the goods, falling under Chapter 61 or 62 of the First Schedule to the Tarrif Act, produced or manufactured on his account on job work, shall pay the duty leviable on such goods, at such time and in such manner as may be specified under these rules, whether the payment of such duty be secured by bond or otherwise, as if such goods have been manufactured by such person.

Provided that such person may authorize the job worker to pay the duty leviable on such goods on his behalf and the job worker so authorized, undertake to discharge all liabilities and comply with all the provisions of these rules.

From the above discussion it can be concluded that the following persons shall be liable to pay excise duty :

(I) A person, who produces or manufactures any excisable goods,

(II) A person, who stores excisable goods in a warehouse,

(III) In case of molasses, the person who procures such molasses,

(IV) In case goods are produced or manufactured on job work,

- (a) the person on whose account goods are produced or manufactured by the job work, or
- (b) the job worker, where such person authorizes the job worker to pay the duty leviable on such goods.

2.5.3 Liability to Excise Duty

Section 3(1) provides that there shall be levied and collected in such manner, as may be prescribed:

(a) a duty of excise to be called the Central Value Added Tax (CENVAT), on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985;

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods specified in the Second Schedule to the Central Excise Tariff Act, 1985, which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured:

(i) in a Free Trade Zone or a Special Economic Zone and brought to any other place in India (omitted w.e.f. 11-5-2007); or

(ii) by a hundred per cent Export Oriented Undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value.

2.5.4 Exemption on DTA Clearance by 100% EOU [Notification no. 23/2003-C.E., Dated 31.3.2003]

DTA clearances by 100% EOU are exempt from-

(a) 50% of the basic duties leviable thereon ;

(b) Additional duty of customs u/s 3(5) of customs tariff Act, 1975. Exemption from additional duty is available only if the goods so removed are not exempt from payment of sales tax/VAT in India.

2.5.5 Collection of Excise Duty

For collection of Central Excise Duty, the following two procedures are followed by the Central Excise Department:

(i) Physical Control Procedure: Applicable to cigarettes only. In this case, assessment is done by Central Excise Offices and thereafter goods are removed under his supervision under cover of an invoice counter signed by him.

(ii) Self-Removal Procedure: Applicable to all other goods produced or manufactured within the country. Under this system, the assesee himself determines the duty liability on the goods and clears the goods.

2.5.6 Exemptions from Levy of Excise Duty

Section 5A of the Central Excise Act, 1944 empowers the Central Government to grant Exemption from lavy of excise duty and lays down the provisions relating thereto:

(1) Power to Notify Exemptions in Public Interest

Section 5A(1) provides that the Central Government is empowered to exempt in the public interest, any excisable goods from the levy of whole or any part of excise duty. Such exemption may be granted either absolutely or subject to such conditions, as may be specified in the Notification.

Exceptions — However, unless specifically provided in such notification, no exemption shall apply to excisable goods, which are produced or manufactured :

(i) in a Free Trade Zone or Special Economic Zone and brought to any other place in India; or

(ii) by a hundred per cent Export Oriented Undertaking and brought to any place in India.

(2) Exemption in public interest

Section 5A(2) provides that if the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.

(3) Notification may provide for different method of levy of duty as well

Section 5A(3) provides that an exemption in respect of any excisable goods from any part of the duty of excise leviable thereon may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the duty statutorily payable.

Section 5A(2A) provides that the Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued or order issued, insert an Explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification or order, and every such Explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

2.6 GOODS

''Goods'' has not been defined in the central Excise Act, 1944.

As per Article 366(12) of the Constitution of India, ''Goods'' means all articles, materials and commodities.

Section 2(7) of Sale of Goods Act, 1930 defines 'Goods' to mean every kind of movable property other than actionable claims and money and includes stocks and shares, growing crops, grass and things attached to and forming part of the land, which are agreed to be served before sale or under the contract of sale.

These articles, materials and commodities must be movable and marketable. [Decision of the Supreme Court of India in the case of Union of India vs Delhi Cloth and General Mills Ltd (1977)].

Those movable and marketable goods must be excisable goods as per section 2(d) of the Central Excise Act, 1944. Those excisable goods must be manufactured in India as per section 2(f) of the Central Excise Act,1944 which includes any process incidental or ancillary to the completion of the manufactured product. [Decision of the Supreme Court in the case of Wallace Flour Mills Ltd Vs Commissioner of Central Excise (1989)].

Basic conditions for levy of Duty Under Section 3

It is obvious from section 3(1) that, to attract excise duty, the following conditions must be fulfilled:

- There should be movable goods;
- The goods must be excisable;
- The goods must be manufactured or produced; and
- The manufacture or production must be in India.

Goods manufactured or produced in SEZ are "excluded excisable goods". This means, that the goods manufactured or produced in SEZ are "excisable goods" but no duty is leviable, as charging section 3(1) excludes these goods. Thus, the goods manufactured in SEZ are not "exempted goods". They can be termed as "excluded excisable goods".

As per explanation to section 2(d), 'goods' includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable'.

Basic Ingredients

From the above definitions of 'goods', the two essential elements of goods are emanated:

(i) They should be movable, and

(ii) They should be marketable.

2.6.1 Goods must be Movable

In order to be movable, an article must fulfill two conditions:

(i) It should come into existence (as a result of manufacture); and

(ii) It should be capable of being moved to market to be bought and sold.

Thus, goods must exist. Where goods have not come into existence, they cannot be moved as well. So long as the goods have not come into existence, no question of levy of excise duty would arise. It has been observed that the word 'manufacture' or 'production' are associated with movables.

In *Municipal Corporation of Greater Mumbai v. Union of India,* a petrol pump of huge storage capacity which was not embedded to earth but which could not be removed without dismantling was held to be immovable in nature.

In *Sirpur Papers Mills Ltd. V. CCE* the machinery embedded to a concrete base to ensure its wobble free operation was held to be a movable property.

CBEC has clarified that whatever is attached to earth, unless it is like a tree/building/similar thing, shall not necessarily be regarded as immovable property if the whole purpose behind such attaching to the concrete base is to secure maximum operational efficiency and safety.

Thus, excise duty cannot be levied on immovable property.

Waste Water Treatment Plant is an immovable property

Example 4: A Ltd. was engaged in fabrication, assembly and erection of waste treatment plant. The plant could not function as such until it was wholly built including civil construction. A Ltd. purchased duty paid parts of water treatment plant in unassembled form and assembled to the ground with civil work. Hence, excise duty is not required to pay. Because, the product emerges as immovable in nature. Larsen & Toubro Limited v UOI 2009 (243) ELT 662 (Bom).

Example 5: M/s X Ltd., engaged in the manufacture of drums mix/hot mix plant by assembling and installing its parts and components. The machine is 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. Hence, the Supreme Court held that the plants in question were not immovable property. Consequently, duty would be levied on them *[CCE v Solid & Correct Engineering Works and Ors 2010 (252) ELT 48 1 (SC)].*

Drum Mix Plant

Hot Mix Plant

2.6.2 Goods must be Marketable

Marketability denotes the capability of a product, of being put into the market for sale. Where goods are not marketable, excise duty cannot be charged on them. Marketability is the decisive test for durability. The article must be capable of being sold to consumer without any additional thing.

The test of marketability will depend on the facts and circumstances of each case. It is a question of fact. The vendibility or marketability test includes the following three essential components: -

(a) the goods should be capable of being sold in the market,

(b) the goods should be capable of being sold ordinarily, and

(c) the goods should be capable of being sold as such.

The following points can be noted –

i. Marketability is to be decided on the basis of condition in which goods are manufactured or produced.

ii. Everything that is sold is not necessarily 'marketable'.

iii. Waste and Scrap can be 'goods' but dutiable only if 'manufactured' and are mentioned in Tariff.

iv. The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied. Thus, if machinery has to be dismantled before removal, it will not be goods - Triveni Engineering v. CCE AIR 2000 SC 2896 = 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC).

v. Branded Software is goods. However, service tax will be payable on tailor made software (w.e.f. Finance Act, 2008).

Shelf-life of 2 to 3 days sufficient for Marketability:

The Apex Court namely the Supreme Court ruled that short shelf-life could not be equated with no shelf-life. A shelf-life of 2 to 3 days was sufficiently long enough for a product to be commercially marketed. 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.

Hence, product with the shelf life of 2 to 3 days was marketable and hence, excisable *[Nicholas Piramal India Ltd v CCEx., Mumbai 2010* (260) ELT 338 (SC)].

Theoretical possibility of product being sold is not sufficient to establish the marketability of a product:

It means to say that a product known in the market with a nomenclature is not sufficient for marketability unless for the said product there is a buyer to buy it.

Example 6: M/s X Ltd. manufactured Double Textured Rubberized Fabric (i.e. upper lace of the shoe) and removed from the factory for job work, it has no marketability, because the said product known in the market with no buyer ***[Bata India Ltd.*** **v** *CCE* 2010 (252) ELT 492 (SC)].

Case Laws

(a) *In Cipla Ltd. V Union of India,* it was held by the Karnataka High Court that for dutiability, a product must pass the test of marketability, even if it is a transient item captively consumed in the manufacture of other finished goods and that the onus is on the Department to produce evidence of marketability.

(b) *In UOI v Indian Aluminium Co. Ltd. v CCE,* the Supreme Court held that marketability of a product must be for its dutiability. Mere manufacture or specification of an article in Tarrif is not enough.

(c) *In Bhor Industries Ltd. v CCE,* the Supreme Court held that the mere inclusion of a particular article

in the Tariff Schedule will not render it liable to excise duty. The marketability of that article is of primary importance. The decision given in this case was a turning point because prior to this decision, it was normal to treat all goods in the Tariff Schedule, as chargeable to duty regardless of the test of marketability.

(d) *In Union Carbide India Ltd. v UOI & Geep Industrial Syndicate Ltd. v Central Government,* the Supreme Court held that intermediate products, which were in a crude form, would not constitute goods. In this case, aluminium cans produced by the extrusion process were not to be goods, as they were neither capable of being sold nor were marketable.

Example 7: concept of immovability and marketability has been explained in the following lines:

Bags are movable and marketable Excise Duty can be levied on bags

Commercial buildings are immovable even though marketable Excise Duty cannot be levied on commercial buildings

2.6.3 Excisable Goods

Section 2(*d*) of Central Excise Act defines Excisable Goods as 'Goods specified in the Schedule to Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. As per explanation to section 2(d), 'goods' includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable'. Thus, unless the item is specified in the Central Excise Tariff Act as subject to duty, no duty is leviable.

In terms of the above definition of 'Excisable Goods, it may be held that all those goods, which are specified in the Tariff Schedule are 'Excisable Goods'. However, question arises as to whether those goods, which are exempted from duty by a notification, but find a place in the tariff schedule, are excisable goods. To answer this question we should know two terms namely dutiable goods and non-dutiable goods.

i. Dutiable goods mean excisable goods which has rate of duty greater than 2% per cent.

ii. Non-dutiable goods or exempted goods mean excisable goods which has rate of duty nil or 0% or 1% or 2%.

Therefore, both dutiable and non-dutiable goods are called as excisable goods.

Note**:** The rate of duty of 1% imposed on 130 items in the last Budget has been increased to 2%. The exceptions to this increase are:

i) Goods of heading no. 2701, i.e. coal;

ii) All goods of Chapter 31, other than those clearly not to be used as fertilizers;

iii) Articles of jewellery of heading 7113; and

iv) Mobile handsets and cellular phones of heading 8517.

Impact: Manufacturers paying excise duty @1% or 2% as the case may be are not eligible for claiming CENVAT Credit. Since, these goods are called as exempted goods.

By analyzing the definition, the following two important ingredients of excisable goods are found :

(a) Goods must be specified in the Schedule to the Central Excise Tariff Act, 1985;

(b) The goods so specified must be subject to duty.

(c) "Non-Excisable goods" are that goods which has not been very clearly mentioned in the Central Excise Tariff Act before they are manufactured.

2.6.4. The goods must be Manufactured or Produced in India

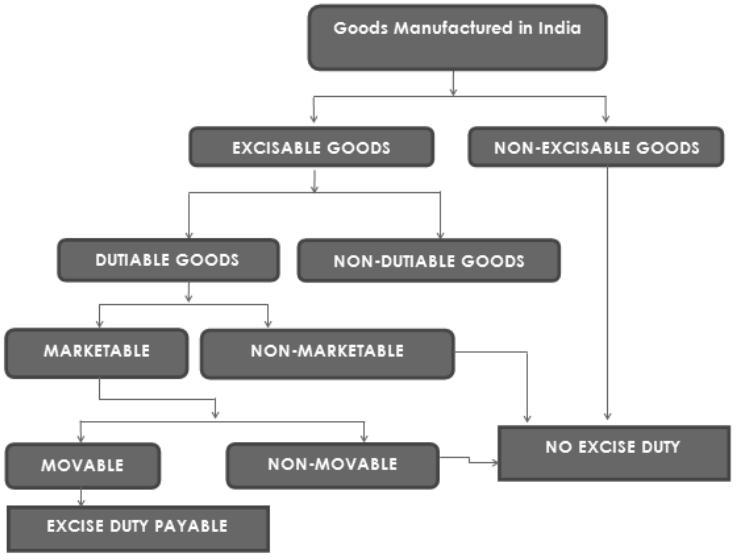
The term manufacture as understood under excise law refers to a process involving the conversion of an input into a completely different output. Goods manufactured in special economic zone are not exigible to excise duty as they are excluded from the scope of charging provisions of section 3 of Central Excise Act, 1944. However the goods manufactured by 100% EOU will be attracted if goods are cleared for domestic tariff area.

Excisable Goods manufactured in the state of Jammu and Kashmir attracts the excise duty since, the Central Excise Act, 1944 extended to the whole of India.

The Central Excise Act, 1944 has been extended to the designated areas in the Continental Shelf and Exclusive Economic Zone (EEZ) of India (vide Notification No. 166/87-CE, dated 11.6.1987).

Exclusive Economic Zone extends to 200 nautical miles from the base line of the coast. It means goods manufactured outside EEZ excise duty does not attract.

The entire concept of Goods Manufactured in India has been explained in the following diagram:



2.7 EXCISABILITY OF PLANT & MACHINERY, WASTE AND SCRAP

2.7.1 Excisability of Plant & Machinery

In view of Entry No. 84 of List-I Seventh Schedule to the Constitution of India, duty of excise could be levied only on goods and not on immovable property. The goods are classified and charged to duty according to the state and condition in which they are removed from the factory.

Assembly of Plant & Machinery at Site:

Mere bringing together of parts of a plant and machinery at site cannot be termed to be manufacture and hence, assembled plant cannot be treated to be goods.

Where assembly of parts and components brings out a different recognizable marketable product, before its installation or erection or attachment to the earth, it would be goods and hence chargeable to duty.

In *Sirpur Paper Mills Ltd. v CCE,* the Supreme Court held that machinery assembled and erected at site from bought out component was held to be goods and hence chargeable to duty, as it was attached to earth for operational efficiency and could be removed and sold.

However, in Triveni Engineering v CCE the Supreme Court overruled its decision given in Sirpur case and held that the marketability test, essentially, requires that goods should be in such condition, as could be brought as such to the market and sold, but if machinery requires dismantling before removal, it cannot be goods and hence, not chargeable to duty.

2.7.2 Excisability of Waste & Scrap

Section 3 imposes duty on manufacture of goods. Waste and scrap are not manufactured, but arise as a result of manufacture of the final product. Therefore, generally, there should not be levied any tax on the waste and scrap. Thus, waste and scrap can be 'goods' but dutiable only if 'manufactured' and are mentioned in Tariff.

In view of the amendment made by the Finance Act, 2008 in the definition of excisable goods under Section 2(d) of the Central Excise Act, 1944, which include 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 [Circular No. 904/24/09-CX, dated 28.10.2009].

Case Laws

In 1987 in the case of Modi Rubber Ltd., it was held that even though the waste was capable of fetching some amount of sale, it would not be chargeable to excise duty. Similar decision was given in the case of Captainganj Distilleries.

Later in 1989, the criteria for determining, whether waste generated would be excisable or not was laid down in the case of Asiatic Oxygen Limited v CCE. The Tribunal held that the question as to whether waste would be charged to duty or not would depend on:

(a) whether a process of manufacture has taken place,

(b) whether the waste generated is marketable, and

(c) whether the product named in the Tariff.

2.8 MANUFACTURE

Any taxable event for central excise duty is manufacture or production in India. The word 'produced' is broader than 'manufacture' and covers articles produced naturally, live products, waste, scrap etc. Manufacture means to make, to inset, to fabricate, or to produce an article by hand, by machinery or by other agency. To manufacture is to produce something new, out of existing materials.

i. 'Manufacture' means :

   (a) Manufacture as specified in various Court decisions i.e. new and identifiable product having a *distinctive name, character or use must emerge or*

   (b) Deemed Manufacture.

ii. Deemed Manufacture is of two types –

   (a) CETA specifies some processes as 'amounting to manufacture'. If any of these processes are carried out, goods will be said to be manufactured, even if as per Court decisions, the process may not amount to 'manufacture', [Section 2(f)(ii)].

(b) In respect of goods specified in Third Schedule to Central Excise Act, repacking, re-labelling, putting or altering retail sale price etc. will be 'manufacture'. The goods included in Third Schedule of Central Excise Act are same as those on which excise duty is payable u/s 4A on basis of MRP printed on the package. [Section 2(f)(iii) w.e.f. 14-5-2003].

2.8.1 Definition

Section 2(f) defines the term 'Manufacture' to include any process:

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985, as amounting to manufacture or,

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labeling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer. And the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

[Clauses (ii) and (iii) are called Deemed Manufacture]

And the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account".

Thus, according to the above definition, the manufacturer is a person:

(a) who manufactures or produces any excisable goods, or

(b) carries on any process incidental or ancillary to the completion of the manufactured products.

Case Laws

It was decided in the case of "Union of India v Delhi Cloth & General Mills Ltd" *that,* the manufacturer of vanaspati used to purchase oil from market and vanaspati was manufactured after subjecting the oil with various processes. The excise was paid on vanaspati. The Excise Department contended that during the process of manufacture of vanaspati, vegetable non-essential oil was produced, which is a separate dutiable product. The court decided that :

Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulations. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use."

Based on the above definition, the Court held that mere processing of basic oils did not amount to manufacture, because it is not marketable product. The refined oil requires deodorization before marketing.

In *South Bihar Sugar Mills Ltd. v UOI* the Supreme Court held that there must be such a transformation that a new and different article must emerge having a distinctive name.

In *Ujagar Prints v UOI,* the Supreme Court held that the generally accepted test to ascertain whether there was a manufacture, is whether the change or the series of changes brought about by the application of processes should take the commodity to the point, where commercially can no longer be regarded as the original commodity, but instead is recognized as a distinct and new article that has emerged out of and because of the result of processes.

Example 8: X Ltd is engaged in the activity of conversion of gray into embroidered dyed cloth. In the course of the various activities it gets the sizing done by S and dyeing by D. The cost of gray cloth is

₹ 50 per meter. S charges ₹ 10 per meter for sizing and D charges ₹ 30 per meter. The finished product is sold by A Ltd for ₹ 100 per meter. In the context of Central Excise Act, 1944, is there any manufacture involved? Who will be regarded as the manufacturer in this situation?

Answer:

As per the decided case law of the Supreme Court in Ujagar Paints v Union of India (1998), the end product should be one which is distinctive in name, usage and commercial character. In the given case, consequent to the value addition made to the grey cloth which is the input, the end product which emerges is commercially different with its own price structure, customs and commercial incidents. Hence, there is manufacture within the meaning of section 2(f) of the Central Excise Act, 1944.

It is not necessary that manufacturer should be the owner of the end product. Hence, in the given case, S and D will be regarded as manufacturers.

2.8.2 Assembly or Repair or Production- Whether the same is Manufacture

Assembly involves use of certain duty paid components to bring into existence an operational or functional product. As per the cardinal list laid down by the Supreme Court in Emperor Industries case, "any process would amount to manufacture if as a result of the said process the object has been transferred into a commercially known new and different product".

Thus, where assembly brings into existence of a new commercially known different product, however minor the consequent change, it would amount to manufacture.

Example 9: M/s Antony India Ltd. imported various components of TV (i.e T.V parts) in different consignments separately. They assembled these parts to bring into existence TV, it is a complicated procedure. Therefore, components cannot be considered as if they were finished goods. Hence, assembling of TV parts called as manufacture.

However, in Enfield India Ltd. case the tribunal held that an assembly, repair or reconditioning only improves the quality of performance of something which is not otherwise useful or fit to use, it would be manufacture.

Explanation as to what is not Manufacture

Any activity shall not be deemed to be manufacture, only because it has been so written in the licence granted. The following are not manufacture :

(a) Natural activity, even if carried otherwise, e.g. drying yarn in natural sun;

(b) Processing of duty paid goods;

(c) Purchasing various item and putting into a container and selling them;

(d) Obtaining of natural products;

(e) Testing/quality control of items manufactured by others;

(f) Cutting and polishing of diamond;

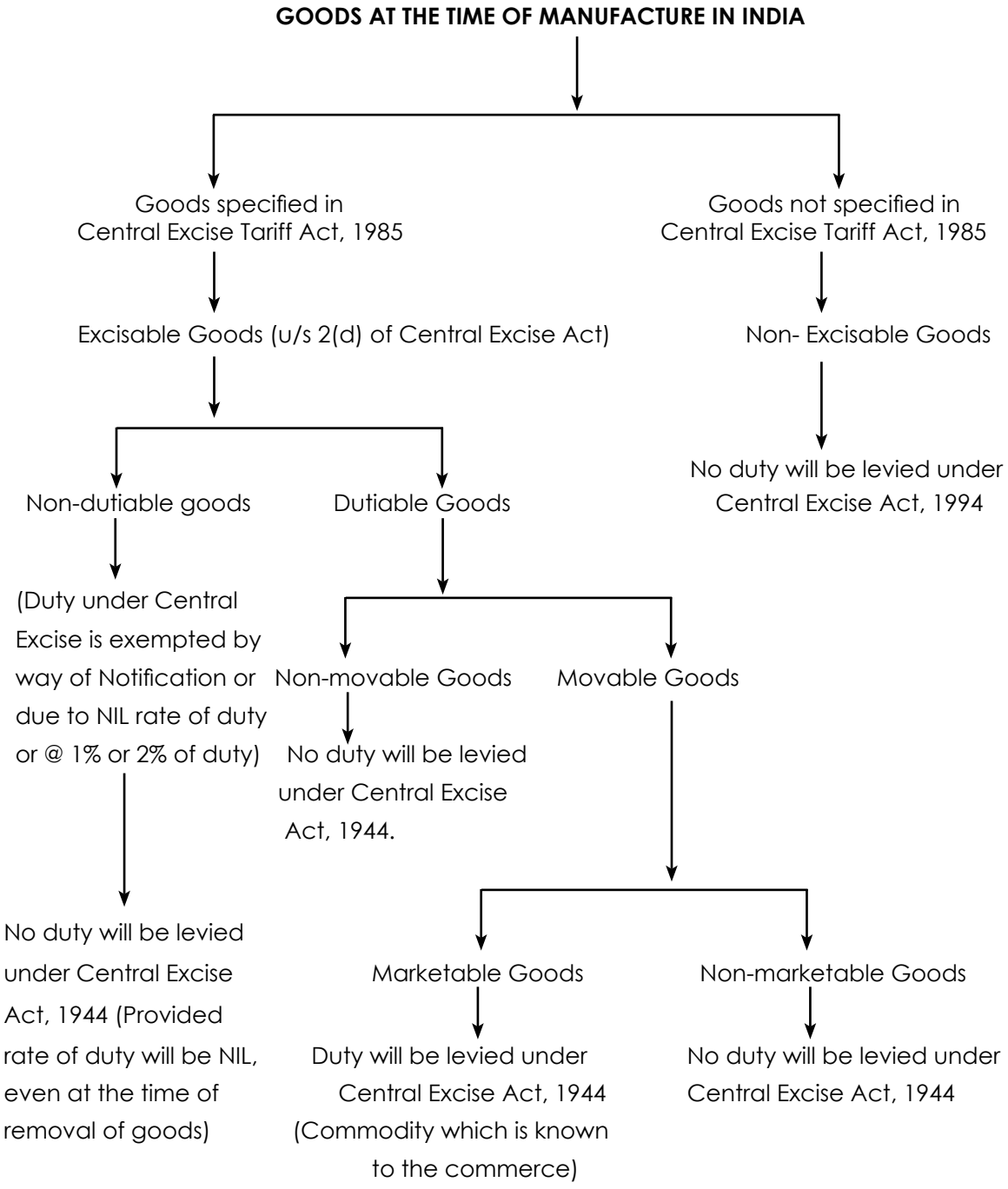
(g) Upgradation of computer system;

(h) Printing on glass bottles;

(i) Affixing brand name;

(j) Crushing of boulders into smaller stones.

Example 10: Cigarettes were wrapped in it with the help of roll of Aluminum Foil. It did not change the nature and substance of foil. The said process did not render any marketable value, only made it usable for packing. *CCE v. GTC Industries Ltd. 2011 (266) E.L.T. 160 (Bom.)].*



2.8.3 Explanation about Incidental & Ancillary Process

'Incidental' means anything that occurs incidentally. It refers to occasional or casual process.

'Ancillary' means auxiliary process, which unless pursued, shall not result into manufacture of the product. The definition of 'manufacture' under section 2(f), includes the processes which are 'incidental or ancillary to the completion of a manufactured product'. A process can be regarded as incidental or ancillary to the completion of the manufactured product, if it comes in relation to the finished product. It is immaterial whether the process is significant or inessential. On the other hand, where a process is not connected to the manufacture of the final product, it cannot be termed as incidental or ancillary.

Example 11: Mr. Ram use to purchase duty paid MS tubes from its manufacturers and cut the same into requisite length. Thereafter, put it in the swaging machine for undertaking swaging process whereby dies fitted in the machine imparted "folds" to the flat surface of the MS tube/pipe. The Department took the plea that swaging process amounted to manufacture and hence duty was payable on the goods manufactured by Mr. Ram.

Answer:

As per Section 2(f) of the Central Excise Act, 1944, Manufacture includes 'any process incidental or ancillary to the completion of a manufactured product'. However, input and output must be different with each other. Therefore, the process of swaging amounts to manufacture. Mr. Ram was liable to pay the duty. [*Prachi Industries v CCEx., Chandigarh* 2008 (225) ELT 16 (SC)]

Intermediate Products & Captive Consumption

The definition of manufacture under section 2(f) implies that manufacture would take place even at an intermediate stage, so long as the intermediate product is commercially and distinctly identifiable.

Intermediate products are such products, which are produced in a process naturally in the course of manufacture of a finished product, which involves more than one process. Thus, such products are output of one process and input for the subsequent process. Captive consumption means consumption of such output of one process in the subsequent process. Generally, the intermediate products do not have any marketable identity and can hardly be sold in the market.

In the case of JK Spinning &Weaving Mills v UOI the Supreme Court held that the captive consumption would amount to removal, hence chargeable to duty. However, in Union Carbide v UOI, the Supreme Court held that an intermediate product would be chargeable to excise duty, only if it is a complete product and can be sold in the market to a consumer. This decision was affirmed in Bhor Industries v UOI.

2.9 MANUFACTURER

Manufacturer is the person who actually brings new and identifiable product into existence.

(i) Duty liability is on manufacturer in most of the cases.

(ii) Mere supplier of raw material or brand name owner is not 'manufacturer'.

(iii) Loan licensee is not 'manufacturer'.

Loan licensee can be treated as manufacturer only if the manufacture is carried out by use of his own raw material under his own supervision by hiring the premises and equipment shift-wise or otherwise.

Exception:

Brand owners Liable to pay Excise Duty (w.e.f. 1-3-2011)

In case of ready-made garments and made-up articles of textiles manufactured on job-work basis, liability to pay excise duty and comply with the provisions of the Central Excise Rules, 2002 is on the merchant manufacturer (i.e. person on whose behalf the goods are manufactured by job workers, namely owner of raw materials), as per rule 4(1A) of the Central Excise Rules, 2002 (vide Notification No. 4/2011 C.E. dt. 1-3-2011).

Example 12: X Pvt. Ltd is job worker located at Tambaram South, Chennai, received raw material for manufacture of articles of apparels, clothing accessories, knitted or crocheted and worn clothing from Peter England a brand owner. Hence, the liability to pay excise duty is on brand owner namely Peter England.

Who is a Manufacturer as per Statute

The following are held to be manufacturer:

(a) Person manufacturing for own consumption,

(b) Person hiring labour or employees for manufacturing,

(c) A job-order worker,

(d) A contractor.

Who is not a Manufacturer

The following have been held as not to be a manufacturer :

(a) Where an activity is not a manufacture;

(b) Brand Owners, if their relation with the manufaturer is 'Principal to Principal' basis.

(c) Labour Contractors, who supply labor;

(d) Loan licensee.

(e) Raw material supplier is not manufacturer

Example 13: Assessee repairs his worn out machineries /parts with the help of welding electrodes, mild steel, cutting tools, M.S. Channel, M.S. Beam etc, in this process M.S. Scrap and Iron Scrap generated. Repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. The generation of metal scrap or waste during the repair of worn out machineries/parts of cement manufacturing plant does not amount to manufacture. *GRASIM INDUSTRIES LTD v UOI 2011 (273) E.L.T 10 (S.C.)*

Dutiability of Packing, Labelling and Repacking Activities

Section 2(*f*), defines 'Manufacture' to include any process, which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (CETA) as amounting to manufacture. Thus, the process may not amount to manufacture as per principles evolved by Courts, but the same may be liable to excise duty, if it is defined as amounting to manufacture under CETA.

This provision seemingly includes the process like packing, labeling, re-labelling, re-packing into manufacture, though otherwise these processes are not 'manufacture' as no new product emerges. In fact, these processes are adjunct to manufacture. The manufacture shall be complete only when the product is rendered marketable and movable and for this purpose packing is an inevitable process. Therefore, packing and associated with that the labeling is a part of the manufacturing process.

In *CCE v Prabhat Packging Ltd.,* the Tribunal has held that repacking of an already manufactured product would not amount to manufacture in excise law, since repacking does not result into a new commercially distinct product.

Labelling on packaged products is also not manufacture, since in the common market parlance a labeled and unlabelled product is treated as the same product and the distinction as such is made. The principle was affirmed in the case of *Pioneer Tools and Appliances Ltd. v UOI* by the Bombay High Court.

2.10 CLASSIFICATION OF GOODS

Central Excise Duty is chargeable on the goods, which are manufactured in India and are subject to excise duty. However, all goods cannot be charged with the same rate of duty. Therefore, the goods need to be grouped into separate categories and sub-categories, for which the rate of excise duty may be determined. This identification of goods through groups and sub-groups is called classification of goods.

The rate of duty is found out by classifying the product in its appropriate heading under Central Excise Tariff. The Central Excise Tariff Act, 1985 (CETA) classifies all the goods under 96 chapters and specific code is assigned to each item. CETA is based on International Convention of Harmonised System of Nomenclature (HSN), which is developed by World Customs Organisation (WCO) (That time called as Customs Cooperation Council). This is an International Nomenclature standard adopted by most of the Countries to ensure uniformity in classification in International Trade. HSN is a multi purpose 6 digit nomenclature classifying goods in various groups. Central Excise Tariff is divided in 20 broad sections. Section Notes are given at the beginning of each Section, which govern entries in that Section. Each of the sections is divided into various Chapters and each Chapter contains goods of one class. Chapter Notes are given at the beginning of each Chapter, which govern entries in that Chapter. There are 96 chapters in Central Excise Tariff. Each chapter and sub-chapter is further divided into various headings and sub-headings depending on different types of goods belonging to same class of products.

The Central Excise Tariff Act, 1985 (CETA) came into force w.e.f. 28th February, 1986.

The main features of the Excise Tariff are:

- The Central Excise Tariff has been made very detailed and comprehensive as all the technical and legal aspects in relation to goods have been incorporated in it.
- The Excise Tariff is based on the Harmonised System of Nomenclature, which is an internationally accepted product coding system formulated under the GATT.
- The goods of the same class have been grouped together to bring about parity in treatment and restrict the dispute in classification matter.
- The Central Excise Tariff provided detailed clarificatory notes under each section/chapter.
- The interpretation of the Tariff have been provided for at the beginning of the Schedule. All the section notes, chapter notes and rules for interpretation are legal notes and/therefore serve as statutory guidelines in classification of goods.
- The Tariff is designed to group all the goods relating to one industry under one chapter from one raw material in a progressive manner.

2.10.1 Harmonised System of Nomenclature (HSN)

Goods are classified under Central Excise Tariff Act based on the "Harmonized System of Nomenclature" having eight digit classifications. All goods are classified using 4 digit system. These are called 'headings'. Further 2 digits are added for sub-classification, which are termed as 'sub-headings'. Further 2 digits are added for sub-sub-classification, which is termed as 'tariff item'. Rate of duty is indicated against each 'tariff item' and not against heading or sub-heading.

Harmonised System of Nomenclature (HSN) is an internationally accepted product coding system, formulated to facilitate trade flow and analysis of trade statistics. The system was developed by World Customs Organisation (WCO), which was earlier known as Customs Cooperative Council. HSN was adopted by International Convention of Harmonised System of Nomenclature.

The CETA is also based on the HSN pattern, of course, with some deviation. HSN has got commercial as well as judicial recognition.

Example 14:

Chapter	XXXX
Sub Chapter	XXXX
Heading	- - -- - - (Four digits)
Sub-heading	---------- (Six digits)
Tariff Item	---------- (Eight digits)
Rate	%

2.10.2 Trade Parlance Theory/ Commercial Parlance

If a product is not defined in the Schedules and Section Notes and Chapter Notes of the Central Excise Tariff Act, 1985, then it should be classified according to its popular meaning attached to it by those dealing with it i.e., in its commercial sense.

2.10.3 Interpretative Rules of CETA

The Central Excise Tariff Act, 1985 incorporates SIX Rules of interpretation, which together provide necessary guidelines for classification of various products under the schedule. Rules for Interpretation of Schedule to Tariff are given in the Tariff itself. These are termed as 'General Interpretative Rules' (GIR). GIR (General Interpretative Rules) are to be applied for interpretation of Tariff, if classification is not possible on the basis of tariff entry and relevant chapter notes and section notes. Following are the steps of classification of a product.

(1) Refer the heading and sub-heading. Read corresponding Section Notes and Chapter Notes. If there is no ambiguity or confusion, the classification is final (Rule 1 of GIR). You do not have to look to classification rules or trade practice or dictionary meaning. If classification is not possible, then only to GIR. The rules are to be applied sequentially.

Example 15: Mr. A manufactured wooden table. There is no ambiguity or confusion while classifying the said product. Hence, the said product can be classified as wooden table.

(2) If meaning of word is not clear, refer to trade practice. If trade understanding of a product cannot be established, find technical or dictionary meaning of the term used in the tariff. You may also refer to BIS or other standards, but trade parlance is most important.

Example 16: Glass mirror cannot be classified as Glass and Glassware because glass loses its basic character after it is converted into mirror. It means that mirror has the reflective function [Atul Glass Industries Ltd v CCE (SC) (1986)]

Example 17: M/s. Baidyanath Ayurved Bhawan Limited manufacturing a product called "Dant Manjan Lal" (DML). The assessee contended that the product DML was a medicament under Chapter sub-heading 3003.31 of the Central Excise Tariff Act, 1985. However, the stand of the Department was that the said product was a cosmetic/toiletry preparation/tooth powder classifiable under Chapter heading 33.06, by considering common parlance test.

As long as product has popular meaning and understanding which is attached to such products by those using the product and not to the scientific and technical meaning of the terms and expressions used. Hence, it is important to note how the consumer looks at a product and his perception in respect of such product.

Moreover, merely because there is some change in the tariff entries, the product may not change its character. Therefore, it has to be classified as a tooth powder and falls under cosmetics.

Hence, the Department stand is correct. *CCEx., Nagpur v Shree Baidyanath Ayurved Bhawan Ltd. 2009 (237) ELT 225 (SC)*

(3) If goods are incomplete or un-finished, but classification of finished product is known, find if the un-finished item has essential characteristics of finished goods. If so, classify in same heading - Rule 2(a).

Example 18: Motor Car not fitted with wheels or tyres will be classified under the heading of Motor Vehicle.

(4) Mixture or Combinations of goods falls under different classifications –Rule 2(b):

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods

consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

Example 19: The Motor Car contains the stereo (music system), here two different products namely Motor Vehicle and Electronic System, hence we have to refer the Rule 3 for solution. It means to say that if Rule 2(b) is applied, or for any other reason, goods are prima facie classifiable with two or more headings then classification shall be under Rule 3.

(5) If ambiguity persists, find out which heading is specific and which heading is more general. Prefer specific heading:- Rule 3(a).

Example 20: Electrical lighting used for motor vehicles is more specifically classified as part of motor vehicle.

(6) If problem is not resolved by Rule 3(a), find which material or component is giving 'essential character' to the goods in question - Rule 3(b).

Example 21: Cell phone which consist a calculator will be called as Cell phone and not a Calculator. It means to say that the classification should be done according to its main function and additional function may be ignored.

(7) If both are equally specific, find which comes last in the Tariff and take it - Rule 3(c).

Example 22: If a product by virtue of its essential character comes under two headings namely 8512 and 8513 equally then the said product can be classified under the heading 8513 (i.e. Latter the better)

(8) If you are unable to find any entry which matches the goods in question, find goods which are most akin - Rule 4.

Example 23: Manufacturer manufacturing the following products can be understood as most akin products:

(a) Window mirror of the car

(b) Front mirror of the car

(9) Packing material is to be classified in the heading in which the goods packed are classified – Rule 5.

Example 24: packing material used as cases for camera classifiable as camera product.

(10) Goods compared at the same level of sub-headings- Rule 6: The classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

This means to say that if one heading contains 4-5 sub-headings, these sub-headings can be compared with each other. However, sub-heading under one heading should not be compared with the sub-heading of another heading.

As regards the Interpretative Rules, the classification is to be first tested in the light of Rule 1. Only when it is not possible to resolve the issue by applying this Rule, recourse is taken to rules 2,3 and 4 in seriatim.

2.10.4 Steps in Classification

The following steps are involved in classification:

(i) First reference is made to the heading and sub-heading, together with corresponding section notes and chapter notes. In case of no ambiguity, as per Rule 1, the classification would be final.

(ii) Where the product name is not clear, reference is made to the common trade practice, further

reference may be made to dictionary meaning or technical terminology, if the product name is not understood in common trade practice or, it is a new product.

(iii) In case of incomplete or un-finished goods, the essential characteristics of the product must be matched with the known finished product. In case of similarity, it should be classified, as per Rule 2, under the same heading.

(iv) In case of ambiguity Rule 3(a) should be applied and specific heading should be preferred over general heading.

(v) If Rule 3(a) does not apply, goods should be classified, as per rule 3(b) as if they consist of material or components which give them their essential character.

(vi) When goods cannot be classified with reference to rules 3(a) and 3(b), they should be classified, as per Rule 3(c) under the heading, which occurs last in numerical order.

(vii) In case of residuary items classification should be made as per Rule 4 under heading, which is most akin to the goods in question.

2.10.5 Tariff Commission and other Tariff Authorities

The Tariff Commission was established in September 1997. The Commission functions as an expert body to recommend appropriate tariff levels keeping in mind the larger economic interests of our country. Bureau of Industrial Costs & Prices was merged with the Commission in April 1999, to provide in-house support. The Commission also conducts studies on costing and price fixation referred to it by Central Ministries and Agencies. Matters concerning State Governments and their agencies have also been the subject of study by the Commission.

The Commission is headed by a Chairman in the rank of Secretary to the Government of India and assisted by a Member Secretary in the rank of Additional Secretary to the Government of India.

Tariff Commission is the only organization in the public domain having multi-disciplinary teams of :-

i. Engineers from the field of Science and Technology belonging to Tariff Commission

ii. Cost Accountants/Chartered Accountants from Indian Costs & Account Service (IC&AS)

iii. Economists from Indian Economic Service (IES); and

iv. Statisticians from Indian Statistical Service (ISS).

The Tariff Commission aims to be a premier knowledge based organisation, and a centre of excellence in the field of domestic and global market research and in tax, tariff, trade related matters, and realistic cost/price determination.

Mission of Tariff Commission is to advise the Government, Public Sector Undertakings (PSUs) and other client organisations, in a relevant, fair, and unbiased manner to enable and sharpen their decision making capabilities with practical recommendations.

2.10.6 Functions of Tariff Commission

A: On a reference from Government Tariff Commission undertakes:

i. Fixation of tariffs and all tariff related issues for goods and services.

ii. Examination of transition period for select industries for gradual phasing out of tariffs.

iii. Identification of tariffication process for select economic activities.

iv. To evolve an overall tariff structure and look into tariff rationalization issues.

v. To examine market access offers from trading partners within WTO framework (including antidumping and safeguards).

vi. To advise on classification of goods and applicable tariffs on such goods and products.

vii. Such other tasks as may be assigned by the Government from time to time.

B. On suo-moto basis

i. **To conduct**

Detailed impact analysis in select sectors like textiles, agriculture, automobiles, steel, information technology, chemicals and engineering goods.

Ii. **To maintain & monitor –**

Tariff changes of competing and trade partner countries and inventorize tariff rates.

iii. **To carry out studies –**

On cost of production of different goods and services and its competitiveness in relation to other countries.

iv. **To discharge –**

Core functions of the merged Bureau of Industrial Costs & Prices.

2.10.7 When two Exemption Notifications are available, assessee can select either

If applicant is entitled to claim benefit under two different notifications, he can claim more (i.e. better) benefit and it is the *duty* of authorities to grant such benefit to applicant – *Share Medical Care* v. *UOI* 2007 (209) ELT 321 (SC).

2.10.8 Benefit of Exemption can be claimed at any stage

Even if an applicant does not claim benefit under a particular exemption notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage - *Share Medical Care* v. *UOI* 2007 (209) ELT 321 (SC) – quoted and followed in *Cipla Ltd* . v. *CC* (2007) 218 ELT 547 (CESTAT), where it was held that benefit of exemption notification can be claimed at appellate stage also.

2.11 VALUATION OF GOODS

Excise duty is payable on any one of the following basis:

i. **Duty based on production capacity -** Some products (e.g. pan masala, rolled steel products) are perceived to be prone to duty evasion. In case of such products, Central Government, by notification, can issue notification specifying that duty on such notified products will be levied and collected on the basis of production capacity of the factory [section 3A(1) of Central Act inserted w.e.f. 10th May 2008]. When such notification is issued, annual capacity will be determined by Assistant Commissioner [section 3A(2)(a) of CEA]. Factors relevant to determine production capacity will be specified by rules issued by Central Government [section 3A(2)(b)(i)].

ii. **Specific Duty -** It is the duty payable on the basis of certain unit like weight, length, volume, thickness etc. For example, duty on Cigarette is payable on the basis of length of the Cigarette, duty on sugar is based on per Kg basis etc.

Example 25:

(a) Excise Duty payable on cigarette is based on the length of the Cigarette. If the length of cigarette is 5 mm the rate of duty is say ₹ 2 flat irrespective of the price at which it is sold.

(b) Excise duty payable on sugar is based on quintals of sugar. The excise duty is ₹ 100 per Kg of sugar product irrespective of the price at which it is sold.

iii. **Tariff value -** In some cases, tariff value is fixed by Government from time to time. This is a " Notional Value " for purpose of calculating the duty payable. Once 'tariff value' for a commodity is fixed, duty is payable as percentage of this 'tariff value' and not the Assessable Value fixed u/s 4.

Products covered under the tariff basis of valuation:

(a) Pan masala packed in retail packs of upto 10 gm per pack

(b) Readymade garments

Example 26: The price of readymade garment is ₹ 500 per unit. Suppose the government fixes a rate of 60% for computing tariff value. In this case, the tariff value is 60% of ₹ 500 i.e. ₹ 300. If the duty rate is 12.36%, the excise duty payable will be ₹ 300 x 12.36% = ₹ 37.08 per unit

iv. Duty based on basis of Maximum Retail Price printed on carton after allowing deductions - section 4A of CEA.

As per section 4A of the Central Excise Act 1944, MRP provisions will be covered only when the following two conditions are satisfied:

(a) Goods must be specified under Legal Metrology Act, 2009, w.e.f. 1-8-2011 (earlier Standards of Weights and Measures Act, 1976).

(b) Those Goods must be mentioned in the notification issued by the Government of India along with rate of abatement.

Example 27: The MRP of an Air-condition Machine is ₹ 40,000 and the abatement per cent is 40%. The Excise duty is the BED rate is 12% will be as under:

Maximum Retail Price	=	₹	40,000
Less: abatement (40%)	=	₹	16,000
Assessable Value	=	₹	24,000
Central Excise Duty (12%) = ₹ 24,000 x 12/100	=	₹	2,880
Educational Cess (2%) = ₹ 2,880 x 2/100	=	₹	57.60
Secondary and Higher Education Cess (1%) = ₹ 2,880 x 1/100	=	₹	28.80
Total Excise Duty Payable	=	₹	2,966.40

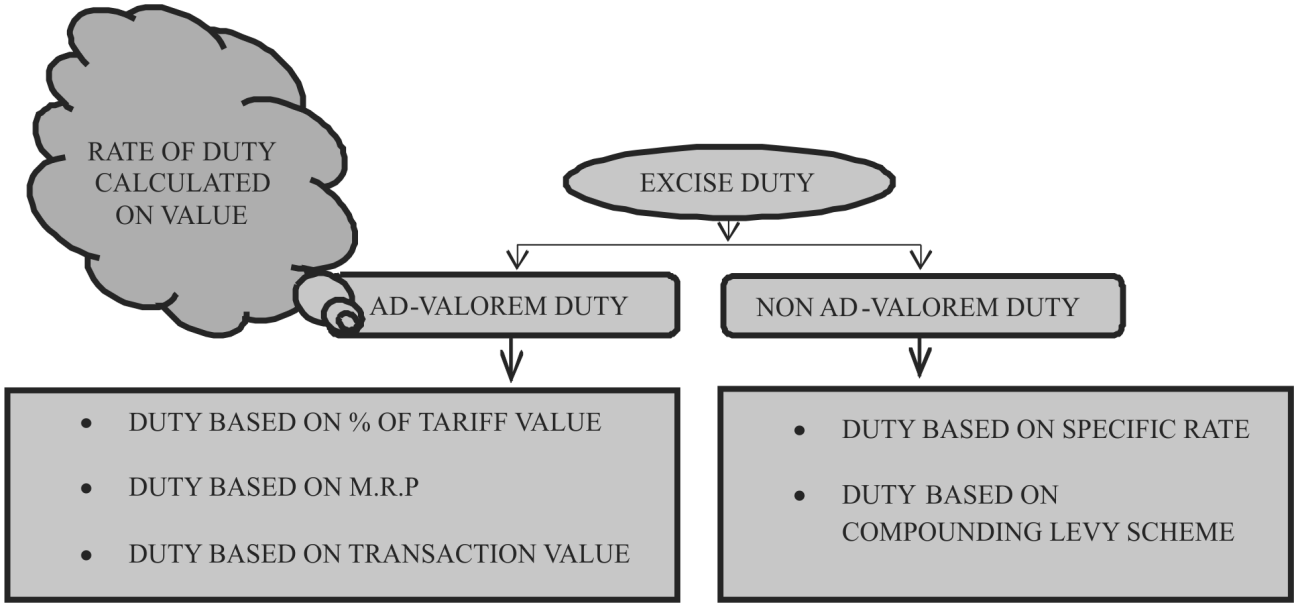
v. Compounded Levy Scheme - Normal excise procedures and controls are not practicable when there are numerous small manufacturers. Rule 15 of Central Excise Rules provides that Central Government may, by notification, specify the goods in respect of which an assessee shall have option to pay duty of excise on the basis of specified factors relevant to production of such goods and at specified rates. The scheme is presently applicable only to stainless steel pattas/pattis and aluminium circles. These articles are not eligible for SSI exemption.

Example 28: (i) The rate of compounded levy in case of cold rolled Stainless Steel patties/pattas, the manufacturer has to pay ₹ 40,000 per cold rolling machine per month plus cess as applicable.

(ii) The rate of compounded levy on aluminum circles is ₹ 12,000 per machine per month plus cess as applicable.

(iii) Duty as % based on Assessable Value (i.e. Transaction Value) fixed under section 4 (ad valorem duty) (If not covered in any of above)

It means, that payment of excise duties are depends upon value of goods (i.e. ad-valorem duty) or volume of goods (including production capacity) as the case may be. This concept explained hereunder:



2.11.1 Methods & Techniques of Valuation

Proper valuation of goods manufactured is an integral part towards levy of Excise Duty accurately. Accordingly, goods manufactured should be valued strictly in the manner as prescribed in the Central Excise Act, 1944 and rules framed there-under.

2.11.2 Value Under the Central Excise Act, 1944

Value of the excisable goods has to be necessarily determined when the rate of duty is on ad-valorem basis. Accordingly, under the Central Excise Act, 1944 the following values are relevant for assessment of duty. Transaction value is the most commonly adopted method.

(i) Transaction value under Section 4 of the Central Excise Act.

(ii) Value determined on basis of Maximum Retail Sale Price as per Section 4A of the Act, if applicable to a given commodity.

(iii) Tariff value under Section 3, if applicable.

Details of all the methods of valuation are discussed below :

1. Transaction Value

Section 4(3) (d) of the Central Excise Act, as substituted by section 94 of the Finance Act, 2000 (No. 10 of 2000), came into force from the 1st day of July, 2000. This section contains the provision for determining the Transaction Value of the goods for purpose of assessment of duty.

For applicability of transaction value in a given case, for assessment purposes, certain essential requirements should be satisfied. If anyone of the said requirements is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at under the valuation rules notified for the purpose. The essential conditions for application of a transaction value are :

(a) The excisable goods must be sold by the assessee.

(b) The transaction is between unrelated parties, i.e, the assessee and the buyer are not related parties

(c) The price is the sole consideration for the sale.

(d) The goods are sold by an assessee for delivery at the time of place of removal. The term "place of removal" has been defined basically to mean a factory or a warehouse, and will include a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearances from the factory.

Transaction value would include any amount which is paid or payable by the buyer to or on behalf of the assessee, on account of the factum of sale of goods. In other words, if, for example, an assessee recovers advertising charges or publicity charges from his buyers, either at the time of sale of goods or even subsequently, the assessee cannot claim that such charges are not to be included in the transaction value. The law recognizes such payment to be part of the transaction value, that is assessable value for those particular transactions.

(1) As per the new Sec.4, transaction value shall include the following receipts/recoveries or charges, incurred or provided for in connection with the manufacturing, marketing, selling of the excisable goods :

I. Advertising or publicity;

II. Marketing and selling organization expenses;

III. Storage;

IV. Outward handling;

V. Servicing, warranty;

VI. Commission or

VII. Any other matter.

The above list is not exhaustive and whatever elements which enrich the value of the goods before their marketing and were held by Hon'ble Supreme Court to be includible in "value" under the erstwhile section 4 would continue to form part of section 4 value even under new section 4 definition.

(2) Thus if in addition to the amount charged as price from the buyer, the assessee recovers any other amount by reason of sale or in connection with sale, then such amount shall also form part of the transaction value. Where the assessee includes all their costs incurred in relation to manufacture and marketing while fixing price payable for the goods and bills and collects an all inclusive price -as happens in most cases where sales are to independent customers on commercial consideration - the transaction price will generally be the assessable value.

However, where the amount charged by an assessee does not reflect the true intrinsic value of goods marketed and total value split up into various elements like special packing charges, warranty charges, service charges etc. it has to be ensured that duty is paid on correct value.

2.11.3 Inclusions in Assessable Value

(i) Packing Charges: Packing charges shall form part of the assessable value as it is a charge in connection with production and sale of the goods, recovered from the buyer. Under the erstwhile Sec. 4, inclusion of cost of packing in the value was related to the nature of packing such as preliminary or secondary ete. Such issues are not relevant in the new Sec. 4 and any charges recovered for packing, whether ordinary or special is includible in the transaction value if the same is not included in the price of the goods.

In the case of reusable containers (glass bottles, crates etc.), normally the cost is amortized and included in the cost of the product itself. Therefore, the same is not required to be included in the value or the product unless it is found that the cost of reusable container has not been amortised and included in the value of the product.

However, rental charges or cost of maintenance of reusable metal containers like gas cylinders etc. are to be included in the value since the amount has been charged by reason of, or in connection with the sale of goods.

Similarly, cost or containers supplied by the buyer will be included in the transaction value of the goods, as the price will not be the sole consideration of the sale and the valuation would be governed by Rule 6 of the Valuation Rules, 2000.

Durable and Returnable Packing : In case of durable/returnable containers, all that would be necessary, as per the Board's Circular No. 643/34/2002-CX dated 1-7-2002 [2002 (143) E.L.T. T39], is to include the amortised cost of the container in the price of the product itself; the returnable deposit taken from the buyer or deposit of the empty container by him would not then be treated as additional consideration.

(ii) **Design and Engineering Charges** being an essential process/activity for the purpose of manufacture shall be included in the Assessable value.

(iii) **Consultancy Charges** relating to manufacturing/production is included as such payment is 'by reason of sale".

(iv) **Loading and Handling** charges within the factory are included in Assessable Value.

(v) **Royalty Charged in Franchise Agreement** for permission to use the brand name is included in Assessable value as such payment is 'by reason of sale' or 'in connection with sale'.

(vi) **Advance Authorisation Surrendered** in favour of seller is additional consideration and includible. It is considered as an Additional consideration. It shall be included if it is paid by or on behalf of buyer to manufacturer-assessee and not when it is given by third party.

(vii) **Price Increase, Variation, Escalation** subsequent to removal of goods cleared from the factory is not relevant, provided the price is final at the time of removal.

(viii) **Free After Sales Service/Warranty** charges will form part of the transaction value irrespective of whether the warranty is optional or mandatory.

(ix) **Advertisement and Sales Promotion Expenses Incurred by the Buyer:** Manufacturer incurs advertisement expenditure. These are obviously built in the selling & distribution cost for determining the selling price. In addition, often dealers also advertise for the product at their own cost.

Definition of "Transaction Value" includes charges for "advertisement, publicity and marketing expenses". However, these are includible only if the buyer is liable to pay the amount to assessee or on behalf of the assessee.

Thus, advertisement and sales promotion expenses incurred by dealer/distributor, if done on his own, are not to be included, if transaction between buyer and seller is on principle to principle basis. This is because the buyer is not incurring these expenses "on behalf of the assessee".

(x) **After Sales Service and Pre Delivery Inspection (PDI) Charges:** After sales service and pre delivery inspection (PDI) are services provided free by the dealer on behalf of the assessee and the cost towards this is included in the dealer's margin (or reimbursed to him).

The value of goods which are consumed by the assessee or on his behalf in the manufacture of other articles will be on cost construction method only (Rule 8). The assessable value of captivity consumed goods will be taken at 110% (substituted by 60/2003 (NT.) 5-10-2003 - prior to that it was 115%) of the cost of manufacture of goods even if identical or comparable goods are manufactured and sold by the same assessee as there have been disputes in adopting values of comparable goods. The concept of deemed profit for notional purposes has also been done away with and a margin of 10% by way of profit etc. is prescribed in the rule itself for ease of assessment of goods used for captive consumption. The cost of production of captively consumed goods will be done strictly in accordance with CAS-4.

(xi) **"Transaction Value"** includes receipts/recoveries or charges incurred or expenses provided for in connection with the manufacturing, marketing, selling of the excisable goods to be part of the price payable for the goods sold. In other words, whatever elements which enrich the value of the goods before their marketing and were held by Hon'ble Supreme Court to be includible in "value" under the erstwhile Section 4 would continue to form part of Section 4 value even under new Section 4 definition. Where the assessee charges an amount as price for his goods, the amount so charged and paid or payable for the goods will form the assessable value. If however, in addition to the amount charged as price from the buyer, the assessee also recovers any other amount "by reason of sale" or "in connection with sale", then such amount shall also form part of the transaction value for valuation and assessment purposes. Thus if assessee splits up his pricing system and charges a price for the goods and separately charges for packaging, the packaging charges will also form part of assessable value as it is a charge in connection with production and sale of the goods recovered from the buyer.

(xii) **Dharmada Charges:** As per CBE&C Circular No. 763/79/2003-CX dt. 21-11-2003 has clarified that dharmada is includible in Assessable Value and the same view expressed by the Apex Court namely Supreme Court of India in the case of CCE v. Panchmukhi Engg. Works 2003 (158) E L T 550 (SC).

(xiii) **Dealers Margin:** Dealer's margin contained provision for rendering pre-delivery inspection and there after sale services, then amount collected by the dealers towards pre-delivery inspection or after sale services from the buyer of the goods during the warranty period it would form part of the assessable value of such goods. Therefore, pre-delivery inspection charges and after sale service recovered from the buyers of vehicles would be included in the assessable value of vehicles. The same view confirmed by the Tribunal in the case of Maruti Suzuki India Ltd. v. CCE (2010).

2.11.4 Exclusions from Transaction Value

(i) **Taxes and Duties:** The definition of transaction value mentions that whatever amount is actually paid or actually payable to the Government or the relevant statutory authority by way of excise, sales tax and other taxes, such amount shall be excluded from the transaction value. 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.

(ii) **Erection, Installation and Commissioning Charges:** If the final product is not excisable, the question of including these charges in the assessable value of the product does not arise. As for example, since a thermal power, as a whole, is an immovable property and therefore not excisable, no duty would be payable on the cost of erection, instigations and commissioning of the steel plant. Similarly, if a machine is cleared from a factory on payment of appropriate duty and later on taken to the premises of the buyer for installation/erection and commissioning into an immovable property, no further duty would be payable. On the other hand if parts/ components of a generator are brought to a site and the generator erected/installed and commissioned at the site then, the generator being an excisable commodity, the cost of erection, installation and commissioning charges would be included in its assessable value. In other words if the expenditure on erection, installation and commissioning has been incurred to bring into existence any excisable goods, these charges would be included in the Assessable Value of the goods. If these costs are incurred to bring into existence some immovable property, they will not be included in the assessable value of such resultant property.

However, 'time of removal' in case of excisable goods removed from the place of removal is deemed to be the time of clearance of such goods from the 'factory'. Therefore, the assessable value is with reference to delivery at the 'time and place of removal, transaction value will be the assessable value.

(iii) **Freight :** It follows from the Valuation Rules that in such categories of cases also if the price charged

is with reference to delivery at a place other than the depot, etc. then the actual or average cost of transportation (average freight being calculated according to Generally Accepted Principles of Costing - CAS - 5 beyond the depot/place of sale will not be taken to be a part of the transaction value and exclusion of such cost allowed on similar lines as discussed earlier, when sales are effected from factory gate/warehouse. There is no question of including the freight etc. right upto the buyer's premises even though delivery may be effected at that place. Delivery to the carrier at factory gate/depot is delivery to the buyer and element of freight and transit insurance are not includible in assessable value. Moreover, the ownership of the goods has no relevance so far as their transit insurance is concerned. - Escorts JCB Ltd. v. CCE., Delhi-II - 2002 (146) E.L.T. 31 (S.C) and Prabhat Zarda Factory Ltd. v. CCE. -2002 (146) E.L.T. 497 (S.C). Freight (actual or average) upto the point of depot etc. will, however, continue to be included.

(iv) Advertising/Publicity Expenditure by Brand Name/Copyright Owner: The expenditure incurred by brand name/copyright owner on advertisement and publicity charges, in respect of goods will not be added to assessable value, as such expenditure is not incurred on behalf of the manufacturer-assessee.

(v) Notional Interest on Security Deposit/Advances: The notional interest on advances may not be includible if relation between advance and selling price is only casual. There is 'relation' but 'no connection in relation to manufacture'.

(vi) Interest on Receivables: As regards interest for delayed payments it is the normal practice in industry to allow the buyers some credit period for which no interest is charged. That is to say, the assessee allows the buyers some time (normally 30 days, which could be less or even more depending upon industry) to make the payment for the goods supplied. Interest is charged by him from the buyer only if the payments are made beyond this period. A question has been raised whether such interest on receivables (for delayed payments) should form part of the transaction value or not. As per the earlier practice under Section 4 such amount of interest is not included in "value". Also, similar is the practice followed in this regard on the Customs side, where duties are collected on transaction value basis, and the importers are given certain "free" period for payment or to pay up interest for delayed payments. As the intention is not to disturb the existing trade practice in this regard, charges for interest under a financing arrangement entered between the assessee and the buyer relating to the purchase of excisable goods shall not be regarded as part of the assessable value provided that :

(a) the interest charges are clearly distinguished from the price actually paid or payable for the goods;

(b) the financing arrangement is made in writing; and

(c) where required, assessee demonstrates that such goods are actually sold at the price declared as the price actually paid or payable.

(vii) Discounts : As regards discounts, the definition of transaction value does not make any direct reference. In fact, it is not needed by virtue of the fact that the duty is chargeable on the net price paid or payable. Thus if in any transaction a discount is allowed on declared price of any goods and actually passed on to the buyer of goods as per common practice, the question of including the amount of discount in the transaction value does not arise. Discount of any type or description given on any normal price payable for any transaction will, therefore, not form part of the transaction value for the goods, e.g. quantity discount for goods purchased or cash discount for the prompt payment etc. will therefore not form part of the transaction value.

(i) cash discount for prompt payment and

(ii) interest or cost of finance for delayed payment, when not exorbitant, is to be granted abatement whether availed or not even under new Section 4 - 2006 (204) E.L.T. 570 (Tri - L.B.) - CCE v. Arvind Mills Ltd.

The differential discounts extended as per commercial considerations on different transactions to unrelated buyers if extended can't be objected to and different actual prices paid or payable for various transactions are to be accepted for working assessable value. Where the assessee claims that the discount of any description for a transaction is not readily known but would be known only subsequently - as for example, year end discount - the assessment for such transactions may be made on a provisional basis. However, the assessee has to disclose the intention of allowing such discount to the department and make a request for provisional assessment. Trade discount not paid to dealers at the time of invoice preparation but paid later on net sale value was held as deductable for valuation purpose by Hon'ble Supreme Court in the case of *Commissioner v. DCM Textiles* - 2006 (195) E.L.T. 129 (S.C). Liquidated damages (as for example price reduction for delay in delivery of goods) is acceptable - 2006 (204) E.L.T. 626 (Tri.) - *United Telecom Ltd. v. CCE.*

(viii) Deemed Export Incentives Earned on Goods Supplied: Duty drawback cannot be added to assessable value, especially if there is no evidence of drawback with depression of prices.

(ix) Subsidy/Rebate Obtained by Assessee: A general subsidy/rebate is not to be included as it has no connection with individual clearances of goods. In case of rebate/subsidy which is directly relatable to individual clerances, it should not be includible.

(x) Price of Accessories and Optional Bought-out items is not includible in Assessable Value.

2.11.5 Valuation Rules to Determine Assessable Value

As per Section 4(1)(b) of the Central Excise Act, if 'Assessable Value' cannot be determined u/s 4(1)(a), it shall be determined in such manner as may be prescribed by rules. Under these powers, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been made effective from 1-7-2000.

In Ispat Industries Ltd. v CCE 2006, it was observed that Excise Valuation Rules should be applied serially. The rules are as below :

(i) Value nearest to time of removal if goods not sold: If goods are not sold at the time of removal, then value will be based on the value of such goods sold by assessee at any other time nearest to the time of removal, subject to reasonable adjustments. **[Rule 4]**.

The rule applies when price at the time of removal is not available as the goods are not sold by the assessee at the time of removal. Thus, this rule should apply in case of removal of free samples or supply under warranty claims.

In case of new or improved products or new variety of products, price of similar goods may not be available. In such case, valuation should be on basis of cost of production plus 10%, in absence of any other mode available for valuation.

(ii) Goods sold at different place: Sometimes, goods may be sold at place other than the place of removal e.g. Buyer's place. In such cases, actual cost of transportation from place of removal upto place of delivery of the excisable goods will be allowable as deduction. Cost of transportation can be either on actual basis or on equalized basis. **[Rule 5]**

Explanation:

(1) "Cost of transportation" includes – (i) the actual cost of transportation; and (ii) in case where freight is averaged, the cost of transportation calculated in accordance with Generally Accepted Cost Accounting Principle.

(2) For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods.

(iii) Valuation when the price is not the sole consideration : Where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of —

(a) such transaction value, and

(b) the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. **[Rule 6]**

In case any of the goods and services *(listed below)* is provided by the buyer free of change or at reduced cost in connection with production and sale of such goods, then, the value of such goods and services, apportioned as appropriate, shall be deemed to be the money value of the additional consideration.

Only the value of the following goods and services are to be added in the transaction value:

(a) materials, components, parts and similar items relatable to such goods;

(b) tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;

(c) material consumed, including packaging materials, in the production of such goods;

(d) engineering, development, artwork, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

(iv) Sale at Depot/Consignment Agent: Section 4(3) (c) (iii) provides that in case of sale at depot/ consignment agent, the depot/place of consignment agent will be the 'place of removal'. As per section 4(3) (cc), in case of sale from depot/place of consignment agent, 'time of removal' shall be deemed to be the time at which the goods are cleared from factory.

In other words, in case of sale from depot/place of consignment agent, duty will be payable on the price prevailing at the depot as on date of removal from factory. Price at which such goods are subsequently sold from the depot is not relevant for purpose of excise valuation.

When goods are sold through depot, there is no 'sale' at the time of removal from factory. In such cases, price prevailing at depot (but at the time of removal from factory) shall be the basis of Assessable Value. The value should be 'normal transaction value' of such goods sold from the depot at the time of removal or at the nearest time of removal from factory. **[Rule 7 of Valuation Rules]**.

As per Valuation Rule 2(b), "normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold.

For example, if an assessee transfers a consignment of paper to his depot from Delhi to Agra on 5-7-2013, and that variety and quality of paper is normally being sold at the Agra depot on 5-7-2013 at transaction value of ₹ 15,000 per tonne to unrelated buyers, where price is the sole consideration for sale, the consignment cleared from the factory at Delhi on 5-7-2013 shall be assessed to duty on the basis of ₹ 15,000 per tonne as the assessable value. If assuming that on 5-7-2013 there were no sales of that variety from Agra depot but the sales were effected on 1-7-2013, then the normal transaction value on 1-7-2013 from the Agra depot to unrealated buyers, where price is the sole consideration shall be the basis of assessment.

(v) Captive Consumption (Rule 8): Since excise duty is on manufacture of goods, duty is payable as soon as goods are manufactured within the factory. Such goods are called 'intermediate products' and its use within the factory is termed as 'Captive Consumption'. Duty is payable even when goods are dispatched from one factory to another factory of the same manufacturer.

Duty payable on intermediated products: In A S Processors v. CCE 1999(112) ELT 706 (CEGAT), it was held that once a new marketable intermediate product comes into existence, it is to be charged to duty if not exempted by a notification – same view in CCE v. Citric India 2001(127) ELT 539 (CEGAT).

Captive consumption for dutiable final products: The intermediate product manufactured within the factory is exempt from duty, if it is consumed captively for manufacture of (a) Capital goods as defined in Cenvat Credit Rules i.e. those which are eligible for Cenvat credit or (b) Used for is or in relation to manufacture of final products eligible for Cenvat, made from inputs which are eligible for Cenvat. [Notification No. 67/1995 dated 16-3-1995].

Duty payable on captive consumption if intermediate product under Compounded Levy scheme: In Gaya Aluminium Industries v. CCE (2004) 170 ELT 98 (CESTAT), it was held that even if Aluminium Circles are captively consumed, duty will be payable under compounded levy scheme [However, assessee claimed that compounded levy scheme is optional and assessee can opt to pay normal duty. Hence, the matter was remanded to adjudicating authority for consideration].

In Gouri Shankar Industries v. CCE 2004 (173) ELT 247 (CESTAT) also, it was held that duty is payable if Aluminium circles are consumed captively.

Valuation in case of captive consumption: In case of captive consumption, valuation shall be done on basis of cost of production plus 10% [The percentage was 15% upto 5-8-2003]. (Rule 8 of Valuation Rules). Cost of production is required to be calculated as per CAS – 4.

Captive consumption means goods are not sold but consumed within the same factory or another factory of same manufacturer (i.e. inter-unit transfers).

The rule may also be helpful if goods are to be transferred to job worker for job work and then brought back for further processing. If job worker is utilizing some of his own material, it may be advisable to clear processed inputs on payment of duty to job worker. The job worker can avail Cenvat credit and then send back the goods manufactured by him on payment of duty.

Rule 8. Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten per cent of the cost of production or manufacture of such goods.

Captive consumption by related person: In case goods are supplied to a 'related person' but consumed by the related person and not sold, valuation will be done on the basis of cost of production plus 10% [Proviso to rule 9]. – CBE&C, vide its circular No. 643/34/2002-CX dated 1-7-2002, has clarified that this proviso applies when goods are transferred to a sister unit or another unit of the same factory for captive consumption in their factory.

Cost Sheet

Suggested cost sheet as per CAS-4 (issued by ICWAI) is as follows -

Statement of cost of production of .... manufactured/ to be manufactured during the period .....

Q1 Quantity Produced (Unit of Measure)

Q2 Quantity Dispatched (Unit of Measure)

Particulars	**Total Cost (₹)**	**Cost/ Unit (₹)**
Material Consumed		
Direct Wages and Salaries		
Direct Expenses		
Works Overheads		
Quality Control Cost		
Research and Development Cost		
Administrative Overheads (Relating to production capacity)		
Total (1 to 7)		
Add - Opening stock of Work-in-Progress		
Less - Closing stock of Work-in-Progress		

Particulars	Total Cost (₹)	Cost/ Unit (₹)
Total (8+9-10)		
Less: Credit for Recoveries/Scrap/By-Products/Misc Income		
Packing Cost		
Cost of Production (11-12+13)		
Add: Inputs received free of cost		
Add: Amortised cost of moulds, tools, dies and patterns etc. received free of cost		
Cost of Production for goods produced for captive consumption (1 4+15+16)		
Add: Opening stock of finished goods		
Less: Closing Stock of finished goods		
Cost of production of goods dispatched (17+18-19)		

[Note - The form is common both for future cost and historical cost. In case of future cost (say for future quarter or half year), some of the columns e.g. opening and closing stock of WIP and FG are not relevant].

Example 29: Raj & Co. furnish the following expenditure incurred by them and want you to find the assessable value for the purpose of paying excise duty on captive consumption. Determine the cost of production in terms of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and as per CAS-4 (cost accounting standard) (i) Direct material cost per unit inclusive of excise duty at 12.36% - ₹ 1,320, (ii) Direct wages - ₹ 250, (iii) Other direct expenses - ₹ 100, (iv) Indirect materials - ₹ 75, (v) Factory Overheads - ₹ 200, (vi) Administrative overhead (25% relating to production capacity) ₹ 100 (vii) Selling and distribution expenses - ₹ 150, (viii) Quality Control - ₹ 25, (ix) Sale of scrap realized - ₹ 20, (x) Actual profit margin - 15%.

Answer:

	Particulars	Amount (₹)
(i)	Direct Material (exclusive of Excise Duty) [1,320 × 100/112.36]	1174.80
(ii)	Direct Labour	250.00
(iii)	Direct Expenses	100.00
(iv)	Works Overhead [indirect material (75) plus Factory OHs (200)]	275.00
(v)	Quality Control Cost	25.00
(vi)	Research & Development Cost	Nil
(vii)	Administration Overheads (to the extent relates to production activity)	25.00
	Less: Realizable Value of scrap	(20.00)
	Cost of Production	1,829.80
	Add 10% as per Rule 8	183.00
	Assessable Value	2,012.80

Example 30: Determine the cost of production on manufacture of the under-mentioned product for purpose of captive consumption in terms of Rule 8 of the Central Excise Valuation (DPE) Rules, 2000 - Direct material - ₹ 11,600, Direct Wages & Salaries - ₹ 8,400, Works Overheads - ₹ 6,200, Quality

Control Costs - ₹ 3,500, Research and Development Costs - ₹ 2,400, Administrative Overheads - ₹ 4,100, Selling and Distribution Costs ₹ 1,600, Realisable Value of Scrap - ₹ 1,200. Administrative overheads are in relation to production activities. Material cost includes Excise duty ₹ 1,054.

Answer:

Cost of production is required to be computed as per CAS-4. Material cost is required to be exclusive of Cenvat credit available.

	Particulars	**Total Cost (₹)**
1	Material Consumed (Net of Excise duty) (11,600 – 1,054)	10,546
2	Direct Wages and Salaries	8,400
3	Direct Expenses	-
4	Works Overheads	6,200
5	Quality Control Cost	3,500
6	Research and Development Cost	2,400
7	Administrative Overheads	4,100
	Less: Sale of Scrap	(1,200)
	Cost of Production	33,946
	Add: 10% Profit margin on cost of production (i.e. 33,946 x 10%)	3,395
	Assessable Value as per Rule 8 of the valuation rules	37,341

Note - (1) Indirect labour and indirect expenses have been included in Works Overhead

(2) Actual profit margin earned is not relevant for excise valuation.

Example 31: Hero Electronics Ltd. is engaged in the manufacture of colour television sets having its factories at Kolkata and Gujarat. At Kolkata the company manufactures picture tubes which are stock transferred to Gujarat factory where it is consumed to produce television sets. Determine the Excise duty liability of captively consumed picture tubes from the following information: - Direct material cost (per unit) ₹ 800; Direct Labour ₹ 100; Indirect Labour ₹ 50; Direct Expenses ₹ 100; Indirect Expenses ₹ 50; Administrative Overheads ₹ 50; Selling and Distribution Overheads ₹ 100. Additional Information: - (1) Profit Margin as per the Annual Report of the company for 2012-13 was 12% before Income Tax. (2) Material Cost includes Excise Duty paid ₹ 73 (3) Excise Duty Rate applicable is 12%, plus education cess of 2% and SHEC @ 1%.

Answer:

Cost of production is required to be computed as per CAS-4. Material cost is required to be exclusive of Cenvat credit available.

	Particulars	**Total Cost (₹)**
1	Material Consumed (Net of Excise duty) (800 – 73)	727
2	Direct Wages and Salaries	100
3	Direct Expenses	100
4	Works Overheads	100
5	Quality Control Cost	-
6	Research and Development Cost	-
7	Administrative Overheads (Relating to production capacity)	50

	Particulars	Total Cost (₹)
8	Total (1 to 7)	1,077
9	Less - Credit for Recoveries/Scrap/By-Products/Misc Income	-
10	Cost of Production (8-9)	1,077
11	Add - 10% as per rule 8	108
12	Assessable Value	1,185
13	Excise duty @ 12% of ₹ 1,185	142.2
14	Education Cess @ 2% of ₹ 142.2	2.844
15	SHEC @ 1% on ₹ 142.2	1.422

∴ Total Duty Liability = ₹ (142.2 + 2.844 + 1.422) = ₹ 146.466

Note - (1) Indirect labour and indirect expenses have been included in Works Overhead (2) In absence of any information, it is presumed that administrative overheads pertain to production activity. (3) Actual profit margin earned is not relevant for excise valuation.

(vi) Sale to a Related Person: 'Transaction Value' can be accepted as 'Assessable Value' only when buyer is not related to seller. *In other words, price to an independent buyer has to be considered for excise valuation.*

As per section 4(3) (b) of Central Excise Act, persons shall be deemed to be 'related' if

(a) They are inter-connected undertakings

(b) They are relatives

(c) Amongst them, buyer is a relative and a distributor of assessee, or a sub-distributor of such distributor or

(d) They are so associated that they interest, directly or indirectly, in the business of each other.

Interconnected Undertakings: Buyer and seller are 'related' if they are inter-connected undertakings, as defined in section 2(g) of Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). – *Explanation* (i) to section 4(3) (b) of Central Excise Act.

The essence of the definition under MRTP is that the inter-connection could be through ownership, control or management. Just 25% of total controlling power in both undertakings is enough to establish inter-connection.

Since only 25% control is enough to make to buyer and assessee as inter connected undertakings, many assessees would come under the definition. This would have affected many assessees.

However, the provisions in respect of 'inter connected undertaking' have been made almost ineffective in valuation rules. Now, the 'inter connected undertakings' will be treated as 'related person' only if they are holding and subsidiary or they are 'related person' under any other clause. In other cases, they will not be treated as 'related person'. If they are not treated as related person, price charged by assessee to buyer will be accepted as 'transaction value' – confirmed in South Asia Tyres v. CCE (2003) 152 ELT 434 (CEGAT)

Interest in business of 'each other': As per section 4(3)(b)(iv), buyer and seller are 'related' if they are associated that they have interest, directly or indirectly, in the business of each other. It is not enough if only buyer has interest in seller or seller has interest in buyer. Both must have interest, directly or indirectly, in each other - Atic Industries Ltd. v. UOI (1984) 3 SCR 930 = 1984 (17) ELT 323 (SC) = AIR 1984 SC 1495 = (1984) 3 SCC 575.

The term 'relative and distributor' should be 'read down' and understood to means as '*distributor who is a Relative'* of assessee.

The word 'relative' is defined in section 6 of Companies Act, 1956 as follows : - A person shall be deemed to be a relative of another if, and only if, - (a) they are members of a Hindu undivided family; or (b) they are husband and wife; or (c) the one is related to the other in the manner indicated in Schedule I-A of the Companies Act. This Schedule contains following relatives : (1) Father (2) Mother (including step-mother) (3) Son (including step-son) (4) Son's wife (5) Daughter (including step-daughter) (6) Father's father (7) Father's mother (8) Mother's mother (9) Mother's father (10) Son's son (11) Son's son's wife (12) Son's daughter (13) Son's daughter's husband (14) Daughter's husband (15) Daughter's son (16) Daughter's son's wife (17) Daughter's daughter (18) Daughter's daughter's husband (19) Brother (including step-brother) (20) Brother's wife (21) Sister (including step-sister) (22) Sister's husband.

It is obvious that only a living i.e. natural person can be 'relative' of other. Thus, a company, partnership firm, body corporate, HUF, trust cannot be 'relative' of other.

Valuation when sale is through related person: If entire sale is made through 'related person', price relevant for valuation will be 'normal transaction value' at which the related buyer sales to unrelated buyer, as per rules 9 and 10 of Valuation Rules.

As per Valuation Rule 2(b), 'normal transaction value' means the transaction value at which the greatest aggregate quantities of goods are sold. The term '**Greatest Aggregate Quantity**' is used in Rule 7 of Customs Valuation Rules.

Provision when sale is only partly through related person : Rules 9 and 10 of Central Excise Valuation Rules make it clear that these rules apply only in cases where assessee sales goods exclusively to or through 'related person'.

Thus, there is no provision in rules when assessee partly sale to related person and partly to unrelated persons. As the wording stands, even if negligible quantity is sold to unrelated buyer, rules 9 and 10 become inapplicable. Valuation cannot be done on the basis of 'transaction value' of assesee to buyer as that is prohibited u/s 4(1)(a).

In such case, the only alternative seems to be residual method i.e. rule 11 of Valuation Rules, which states that if value cannot be determined under any of the foregoing rules, value shall be determined using reasonable means consistent with the principles and general provisions of section 4 and Valuation Rules.

(vii) Best Judgement Assessment : If assessment is not possible under any of the foregoing rules, assessment will be done by 'best judgement'. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of the Act. **[Rule 11]**

As the Valuation Rules stand today, there is no provision for calculating 'Value' in following cases- (a) If assessee makes sale partly to related person and partly to others. (b) Free samples. In these cases, valuation may be done under rule 11.

2.12 VALUATION IN CASE OF JOB WORK–RULE 10A

2.12.1 Meaning of Job Worker – As per *Explanation* to rule 10A, for the purposes of rule 10A, 'job worker' means a person engaged in manufacture or production of goods on behalf of a principal manufacturer, from any inputs or capital goods supplied by the said principal manufacturer or by any other person authorised by him.

Example 32: A Trader supplies raw material of ₹1,150 to processor. Processor processes the raw material and supplies finished product to the trader. The processor charges ₹ 450, which include ₹ 350 as

processing expenses and ₹ 100 as his (processor's) profit. Transport cost for sending the raw material to the factory of processor is ₹ 50. Transport charges for returning the finished product to the trader from the premises of the processor is ₹ 60. The finished product is sold by the trader at ₹ 2,100 from his premises. He charges Vat separately in his invoice at applicable rates. The rate of duty is 12% plus education cess as applicable. What is the AV, and what is total duty payable ?

Answer:

Assessable Value is to be calculated on basis of selling price of trader which is ₹ 2,100 (cum-duty). This price is to be treated as inclusive of excise duty. Hence, assessable value will be (2,100 x 100)/112.36 i.e. ₹ 1,868.99. Basic excise duty @ 12% will be ₹ 224.28. Education Cess (2%) is ₹ 4.49 and Secondary and Higher Education Cess is ₹ 2.24. Total duty payable will be ₹ 231.01.

2.12.2 Valuation in Case of Job Work

Excise duty will not be payable if raw material/semi-finished components are sent for job work under Cenvat provisions or under notification No. 214/86-CE. However, in other cases, if job work results in 'manufacture' of a product, duty will become payable by job worker. Rule 10A of Valuation Rules, as inserted w.e.f. 1-4-2007 provides that in such cases, excise duty will be payable on the basis of price at which the raw material supplier (termed as 'principal manufacturer' in valuation rules) sales the goods. Rule 1 0A has been inserted in the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 to provide that where goods are manufactured by a job-worker on behalf of a person (commonly known as principal manufacturer), the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods, as against the present provision where the value is taken as cost of raw material plus the job charges - *Para 32.1 of DO letter F. No. 334/1 /2007-TRU dated 28-2 -2007*.

(i) **When the Goods are Sold by the Principal Manufacturer from the Premises of Job Worker:** In a case where the goods are sold by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker, where the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the transaction value of the said goods sold by the principal manufacturer;

(ii) **When the Goods are Sold by the Principal Manufacturer from a Place Other than the Premises of Job Worker:** In a case where the goods are not sold by the principal manufacturer at the time of removal of goods from the factory of the job-worker, but are transferred to some other place from where the said goods are to be sold after their clearance from the factory of job-worker and where the principal manufacturer and buyer of the goods are not related and the price is the sole consideration for the sale, the value of the excisable goods shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of said goods from the factory of job-worker;

(iii) ***When Valuation as per Rule 10A(i) or 10A(ii) of Valuation Rules is not Possible –*** If valuation is not possible as per rule 10A(i) or 10A(2) of Valuation Rules, 'value' will be determined in accordance with the principles enunciated in the Valuation Rules on a case-to-case basis [rule 10A(iii) of Valuation Rules]. For example, if the excisable goods manufactured on job-work are sold by the principal manufacturer where the price is not the sole consideration for sale, the value of such goods shall be determined in terms of principles laid down in rule 6. If goods are captively consumed by Principal Manufacturer, valuation can be on basis of rule 8.

2.12.3 Manufacturer not Liable for Duty Liability of Scrap / Waste Generated at end of Job Worker

Earlier rule 57F provided that waste and scrap arising during job work is required to be returned to raw material supplier. New Cenvat Credit Rules make no such provision. Hence, in *Rocket Engineering Corporation* v. *CCE* 2006 (193) ELT 33 (CESTAT), it has been held that the scrap is not required to be returned to raw material supplier and the raw material supplier is not required to pay any duty on the scrap, since Cenvat Credit Rules after 1-4-2000 do not make any such provision – view confirmed in

CCE v. *Rocket Engineering Corporation* (2008) 223 ELT 347 (Bom HC DB) - followed in *Emco Ltd.* v. *CCE* (2008) 223 ELT 613 (CESTAT). In Preetam Enterprises v. CCE 2004 (173) ELT 26 (CESTAT), it was held that even in respect of inputs sent under Cenvat Credit Rules, job worker is manufacturer of scrap and he is liable to pay duty on scrap. Duty on scrap cannot be demanded from raw material supplier after 1-4-2000 – same view in Rocket Engineering v. CCE 2006 (193) ELT 33 (CESTAT) [Scrap is treated as a final product if mentioned in the Tariff. However, it is 'final product' of job worker and not of raw material supplier].

In Silicon Cortec v. CCE (2004) 166 ELT 473 (CESTAT SMB), it has been held that waste and scrap is final product of job worker and he can clear the same on payment of duty. In Timken India v. CCE (2007) 215 ELT 182 (CESTAT), it was held that duty liability on scrap is of the job worker. If he is under SSI exemption, no duty is payable by him. In GKN Sinter Metals v. CCE 2007 (210) ELT 222 (CESTAT), it was held that if waste and scarp is only in nature of floor sweeping, and if there is invisible loss, no duty is required to be paid on such scrap.

2.12.4 Service Tax on Job Work

Job work falls under 'Business Auxiliary Service', if the job work is not 'manufacture'. Service tax will be payable. Job work done under Cenvat provisions is exempt from service tax. If the job worker is not availing any Cenvat credit of any common input or input services, question does not arise. However, if the job worker is availing Cenvat credit on inputs or input services, he will be liable to pay 8% 'amount' on job charges under rule 6(3) of Cenvat Credit Rules, or he may have to go in for proportionate reversal of Cenvat Credit as per rule 6(3A) of Cenvat Credit Rules effective from 1-4-2008. If the job worker thinks that the rule 6(3A) is cumbersome, it may be advisable to pay service tax @ 12.36% on job charges, since the customer will be in a position to avail Cenvat credit. If job worker charges 8% 'amount', customer cannot avail Cenvat credit, but if job worker charges regular service tax, the customer will be eligible to avail Cenvat credit.

2.13 SOME CRITICAL ISSUES IN CENTRAL EXCISE

2.13.1 Software is 'Goods', But Unbranded Software is Service

In Tata Consultancy Services v. State of Andhra Pradesh (2005) 1 SCC 308 = 141 Taxman 132 = 271 ITR 401 = AIR 2005 SC 371 = 2004 AIR SCW 6583 = 137 STC 620 = 178 ELT 22 (SC 5 member Constitution bench), it has been held that canned software (i.e. computer software packages sold off the shelf) like Oracle, Lotus, Master-Key etc. are 'goods'. The copyright in the programme may remain with originator of programme, but the moment copies are made and marketed, they become 'goods'. It was held that test to determine whether a property is 'goods' for purpose of sales tax, is not whether the property is tangible or intangible or in-corporal. The test is whether the concerned item is capable of abstraction, consumption and use, and whether it can be transmitted, transferred, delivered, stored, possessed etc. Even intellectual property, once it is put on a media, whether it be in form of books or canvas (in case of painting) or computer discs or cassettes and marketed would become goods. In all such cases, intellectual property has been incorporated on a media for purpose of transfer. The buyer is purchasing the intellectual property and not the media, i.e. the paper or cassette or discs or CD. There is no distinction between 'branded' and 'unbranded' software. In both cases, the software is capable of being abstracted, consumed and used. In both the cases, the software can be transmitted, transferred, delivered, stores, possessed etc. Unbranded software when marketed/sold may be goods.

However, Supreme Court did not express any opinion because in case of unbranded software, other questions like situations of contract of sale and/or whether the contract is a service contract may arise. Hence, in case of unbranded software, the issue is not yet fully settled. [SC upheld decision of AP High Court reported in Tata Consultancy Services v. State of AP (1997) 105 STC 421 (AP HC DB)].

In *Bharat Sanchar Nigam Ltd* . v. UOI (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 (SC 3 member bench), following extract from decision in case of *Tata Consultancy Services* v. *State of Andhra Pradesh* was quoted with approval and adopted, 'A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold and (c) capable of being transferred, delivered, stored and possessed. If a software, whether customized or non-customized satisfies these attributes, the same would be goods'.

Earlier also, in *Associated Cement Companies Ltd.* v. CC 2001 (4) SCC 593 = 2001 AIR SCW 559 =128 ELT 21 = AIR 2001 SC 862 = 124 STC 59 (SC 3 member bench), it was held that computer software is 'goods' even if it is copyrightable as intellectual property.

In *State Bank of India* v. *Municipal Corporation* 1997(3) Mh LJ 718 = AIR 1997 Bom 220, it was held that 'computer software' is 'appliance' of computer. It was held that it is 'goods' and octroi can be levied on full value and not on only value of empty floppy. [In this case, it was held that octroi cannot be levied on license fee for duplicating the software for distribution outside the corporation limits].

Excise duty on software: All software, except canned software i.e. software that can be sold off the shelf, is 'exempt' under notification No. 6/2006-CE dated 1-3-2006.

Para 138 of Finance Minister's speech dated 28-2-2006 reads as follows, 'I propose to impose an 8 per cent excise duty on packaged software sold over the counter. Customized software and software packages downloaded from the internet will be exempt from this levy'.

Meaning of 'software': 'Information Technology Software' is defined in Supplementary Note of chapter 85 of Central Excise Tariff (and also Customs Tariff) as follows - 'For the purpose of heading 8523, 'Information Technology Software' means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine'.

In CCE v. Pentamedia Graphics (2006) 198 ELT 164 (SC), it was held that 'motion picture animation file' recorded in a machine readable format and capable of being manipulated by automatic data processing machine is software – referred in Padmini Polymers v. CCE (2007) 215 ELT 392 (CESTAT), where it was held that multimedia application software on CD ROM is exempt. In this case, Cook Books and games which were interactive were held as 'software'. Reference was made to CBE&C circular No. 7/98-Cus dated 10-2-1998 where it was clarified that encyclopedia, games, books will be 'software' if these satisfy the interactivity criterion.

The SC decision was also followed in Gayatri Impex v. CC (2007) 215 ELT 397 (CESTAT) and Adani Exports v. CCE (2007) 210 ELT 443 (CESTAT). However, from the decision, it is not clear what was exactly imported. There is no requirement that to qualify as software, it must work without any operating system preloaded on computer. Any programme which requires anther programme like operating system will also be treated as software – Contessa Commercial Co. P Ltd. v. CC (2007) 208 ELT 299 (CESTAT). In this case, the importer had imported educational programmes and games.

Classification of encyclopedia, books on CD: In case of encyclopedia and books, there is hardly any 'interactivity', except that search engine helps in locating particular information. Further, search engine, which can be termed as 'software' forms insignificant part of the whole goods.

Applying the criteria of 'essential character' in case of mixture of goods, in my view, these cannot be termed as 'software'. These have to be classified as books.

Chapter 49, Note no 2 reads as follows, 'For the purpose of Chapter 49, the term 'printed' also means reproduced by means of a duplicating machine, produced under the control of an automatic data processing machine, embossed, photographed, photocopies, thermo-copied or type-written. Hence, it can be argued that a book can be 'printed' on CD since it is produced under the control of an automatic data processing machine.

As per item Sr. No. 26 of Notification No. 6/2006-CE dated 1-3-2006, CD-ROMs containing books of an educational nature, journal, periodicals (magazines) or newspaper are fully exempt from excise duty. Thus, a book can be on CD has been recognized in law.

Unbranded software is service

Though Supreme Court has held that tailor made software is also goods, Finance Bill, 2008 has imposed service tax on tailor made i.e. unbranded software. "Information technology software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment [proposed section 65(53a) of Finance Bill, 2008]. Any service provided or to be provided to any person, by any other person in relation to information technology software for use in the course, or furtherance, of business or commerce, including:—

(i) development of information technology software,

(ii) study, analysis, design and programming of information technology software,

(iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,

(iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary information technology software

(v) acquiring the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products

(vi) acquiring the right to use information technology software supplied electronically, is a taxable service [proposed section 65(105)(zzzze) of Finance Bill, 2008].

Departmental clarification : CBE&C TRU letter F. No.334/1/2008-TRU dated 29-1-2008 clarifies as follows -

Software consists of carrier medium such as CD, Floppy and coded data. Softwares are categorized as "normal software" and "specific software". Normalised software is mass market product generally available in packaged form off the shelf in retail outlets. Specific software is tailored to the specific requirement of the customer and is known as customized software.

Packaged software sold off the shelf, being treated as goods, is leviable to excise duty. Number of IT services and IT enabled services (ITeS) are already leviable to service tax under various taxable services:

i. Consulting engineer's service - advice, consultancy or technical assistance in the discipline of hardware engineering.

ii. Management or business consultant's service - procurement and management of information technology resources.

iii. Management, maintenance or repair service - maintenance of software, both packaged and customized and hardware.

iv. Banking and other financial services - 'provision and transfer of information and data processing'.

v. Business support service - various outsourced IT and IT enabled services.

vi. Business auxiliary service - services provided on behalf of the client such as call centers.

IT software services provided for use in business or commerce are covered under the scope of the proposed service. Said services provided for use, other than in business or commerce, such as services

provided to individuals for personal use, continue to be outside the scope of service tax levy. Service tax paid shall be available as input credit under Cenvat credit Scheme.

Software and upgrades of software are also supplied electronically, known as digital delivery. Taxation is to be neutral and should not depend on forms of delivery. Such supply of IT software electronically shall be covered within the scope of the proposed service.

With the proposed levy on IT software services, information technology related services will get covered comprehensively.

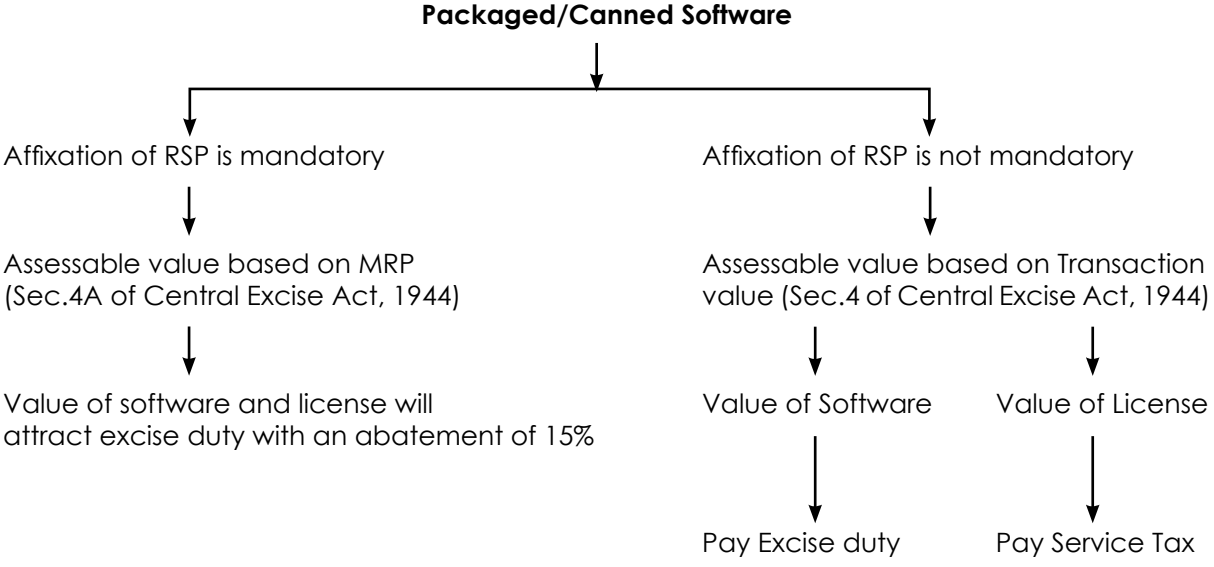
Duties on packaged/canned software [Notification No. 14/2011, dated 1-3-2011]:

Retail Sale Price (RSP) of packaged/canned software consist of two components namely

(i) Value of the software and

(ii) License (right to use)

The Central Board of Excise and Customs (CBE&C) issued Circular No. 15/2011 -Cus, dated 18.3.2011 to clarify the levy of Excise, Service Tax and Customs duties on packaged/canned software.



Note: if the packaged/canned software imported then the additional customs duty (CVD) under section 3(1) of the Customs Tariff Act, 1975 would be charged on value on the basis of MRP under section 4A of the Central Excise Act, 1944 provided affixation of RSP is mandatory. Otherwise additional customs duty (CVD) will be charged on the basis of Sec. 4 of the Central Excise Act, 1944.

2.13.2 Plant and Machinery Assembled at Site

Plant and Machinery assembled and erected at site cannot be treated as 'goods' for the purpose of Excise duty, if it is not marketable and movable. [It may be noted that even if goods are held as 'excisable', they will be exempt if manufactured within factory of production. [See case law '*Larsen & Toubro Ltd. v UOI* (2009 (243) ELT 662 (Mumbai)].

The word 'goods' applies to those which can be brought to market for being bought and sold, and it is implied that it applies to such goods as are movable. Goods erected and installed in the premises and embedded to earth cease to be goods and cannot be held to be excisable goods. - Quality Steel Tubes (P.) Ltd. v. CCE 75 ELT 17 (SC) = (1995) 2 SCC 372 = 6 RLT 131 = 1995 AIR SCW 11 - in this case, it was held that tube mill and welding head erected and installed in the premises and embedded in the earth for manufacture of steel tubes and pipes are not 'goods'. followed in Mittal Works v. CCE (1997) 1 SCC 203 = 1996 (88) ELT 622 (SC) = 106 STC 201 -quoted with approval in Thermax Ltd. v. CCE 1998(99)

ELT 481 (SC) - same view in Triveni Engineering v. CCE AIR 2000 SC 2896 = 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC) * CCE v. Damodar Ropeways 2003(151) ELT 3 = 54 RLT 125 (SC 3 member bench).

In Municipal Corporation of Greater Bombay v. Indian Oil Corporation AIR 1991 SC 686 = 1991 Supp (2) SCC 18, it was held that if the chattel is movable to another place in the same position (condition?), it is movable property. If it has to be dismantled and re-erected at later place, it is attached to earth and is immovable property.

Assembly at site is not manufacture, if immovable product emerges: In Mittal Engg Works v. CCE

1996 (88) ELT 622 = 17 RLT 612 = 106 STC 201 = (1997) 1 SCC 203, it was held that if an article has to be assembled, erected and attached to the earth at site and if it is not capable of being sold as it is, without anything more, it is not 'goods'. Erection and installation of a plant is not excisable - followed in CCE v. Hyderabad Race Club 1996 (88) ELT 633 (SC), where it was held that an article embedded in the earth was not 'goods' and hence excise duty is not leviable – followed in TTG Industries v. CCE 2004 AIR SCW 3329 = 167 ELT 501 (SC) – same view in case of storage cabinets, kitchen counters etc. erected at site in Craft Interiors P Ltd. v. CCE 2006 (203) ELT 529 (SC) – same view in respect of refrigeration plant, air conditioning plant and caustic soda plant in CCE v. Virdi Brothers 2007 (207) ELT 321 (SC).

Capital Goods manufactured within factory of production are exempt even if manufactured by third party - It may be noted that capital goods manufactured within the factory and used within the factory are exempt from excise duty vide notification No. 67/1995-CE dated 16.3.1995.

The exemption is available even when the capital goods are manufactured in the factory of production by third party. [refer case law under 'Captive Consumption'].

Assembly is manufacture only if machinery can be removed without dis-assembly: In Triveni Engineering v. CCE AIR 2000 SC 2896 = 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC), it was observed, 'The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'. [Thus, if machine has to be dis-assembled for removal, it is not 'goods' and duty cannot be levied].

If machine (generating set in this case) is only bolted on a frame and is capable of being shifted from that place, it is capable of being sold. It is goods and not immovable property – Mallur Siddeswara Spinning Mills v. CCE 2004 (166) ELT 154 (SC).

Present legal position in respect of machinery erected at site: The latest judgment on the issue is of Triveni Engineering judgment dated 8-8-2000, which has been practically accepted by Board vide its circular dated 15-1 -2002. Hence, the present legal provision is, as decided in Triveni Engineering , i.e. 'The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'. Thus, if machinery has to be dismantled before removal, it will not be goods. Following is also clear (a) Duty cannot be levied on immovable property (b) If plant is so embedded to earth that it is not possible to move it without dismantling, no duty can be levied (c) If machinery is superficially attached to earth for operational efficiency, and can be easily removed without dismantling, duty is leviable (d) Turnkey projects are not dutiable, but individual component/machinery will be dutiable, if marketable.

Article can be 'goods' if marketable before erection - An article will be liable to duty if its manufacture is complete before it is fastened to earth. Similarly, if 'machinery' is in marketable condition at the time of removal from factory of manufacture, duty will be leviable, even if subsequently, it is to be fastened to earth.

2.13.3 Dutiability of Steel and Concrete Structures

Following are covered in 'iron and steel structure' as defined in tariff heading 7308 – (i) big structures like bridges, transmission towers, and lattice masts, lock-gates, roofs etc. of iron and steel, (ii) parts of structures e.g. doors, windows and their frames, shutters, balustrades, pillars and columns etc. of iron and steel, (iii) Plates, rods, angles, shapes, sections, tubes and the like prepared for use in structures of iron and steel.

In Mahindra & Mahindra Ltd. v. CCE 2005 (190) ELT 301 (CESTAT 3 member LB), it has been held as follows –

(i) Immovable iron and steel structures are not goods.

(ii) Structures and parts mentioned in parenthesis of 7308 like bridges, lock-gates, towers, trusses, columns frames etc., in their movable state will be subject to excise duty, even if latter they get permanently fixed in the structures. (iii) Plates, rods, angles, sections, tubes and the like, prepared for use in the structures will also be excisable goods subject to duty *in their pre-assembled or disassembled state*.

Fabrication of steel structurals like columns, crane, grinders, trusses amounts to 'manufacture'- R S Avtar Singh v. CCE (2007) 213 ELT 105 (CESTAT).

Structure for pre-fabricated building is dutiable – Steel structure for prefabricated building is dutiable. – Mittal Pipe Mfg. Co . v. CCE 2002(146) ELT 624 (CEGAT).

Fabrication of steel structure at site is exempt : As per Sr. No. 64 of notification No. 3/2005-CE dated 24-2-2005, (earlier it was in tariff entry 7308.50), structures fabricated at site of work for use in construction at site are exempt from duty. In Delhi Tourism v. CCE 1999(114) ELT 421 (CEGAT), it was held that the term 'site' should be given wider meaning and not narrow meaning. Even if structure is cast at different place and brought to site of construction, it will be eligible for exemption.

2.13.4 Goods with Blank Duty Rate in Central Excise Tariff are 'Excisable Goods'

Some goods are mentioned in Central Excise Tariff but column of rate of duty is blank (e.g. live animals in Chapter 1, Electrical Energy in chapter 27, Newspaper and maps in Chapter 49).

As per additional note No. 1(c) to Central Excise Tariff, 'tariff item' means description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of duty or eight-digit number with blank in the columns of the rate of duty. Hence, goods where duty rate is blank is excisable goods – para 22 of *Geetanjali Woolens* v. CCE (2007) 218 ELT 152 (CESTAT) [Interestingly, in case of Customs Tariff, the note 1(c) does not make mention of 'blank' rate in the column of rate of duty].

However, in CCE v. *Solaris Chemtech* (2007) 9 STT 412 = 214 ELT 481 (SC), it is observed that electricity is not an excisable item. In excise tariff, rate is 'blank' in items like rice, wheat, soya bean, cotton seed etc. These are 'produced'. In excise tariff, rate is 'blank' in items like rice, wheat, soya bean, cotton seed etc. These are 'produced'.

Goods mentioned as 'free' in Customs Tariff - In Associated Cement Companies Ltd . v. CC 2001 AIR SCW 559 = AIR 2001 SC 862 = (2001) 4 SCC 593 = 128 ELT 18 = 124 STC 59 = (SC 3 member bench), it was held that if duty rate specified in Customs Tariff Act is 'FREE' (i.e. no duty is payable), no duty is payable on such goods and hence these are not 'dutiable goods'. [In Central Excise Tariff, the duty rate indicated is 'Nil'. Hence, these are 'excisable goods'].

2.13.5 Manufacture –Other Aspects

Cutting of jumbo rolls of typewriter to make ribbon of standard length and winding on spool and blister packed - In Kores India v. CCE (2003) 152 ELT 395 (CEGAT), it was held that conversion of jumbo reels of ribbons into spool form to suit particular model and make of typewriting/telex machine is 'manufacture' as new and distinct product emerges – view upheld in Kores India v. CCE (2005) 1 SCC 385 = 174 ELT 7 (SC) – followed in CCE v. Sohum Industries Ltd .2006 (203) ELT 493 (CESTAT).

This decision was discussed in Anil Dang v. CCE (2007) 213 ELT 29 (CESTAT 3 member bench). It was held that this was no mere cutting and slitting but the roll was spooled on metal spools, plaster packed and sealed with aluminium foils. Hence, this decision will not apply where only slitting and cutting is involved.

Betel Nut to supari powder is not manufacture : Crushing betel nuts into smaller pieces and sweetening them does not result in a distinct product, as 'betel nut remains a betel nut' – Crane Betel Nut Powder Works v. CCE 2007 (210) ELT 171 = 6 VST 532 (SC) – decision of Tribunal in CCE v. Crane Betel Nut Powder Works 2005 (187) ELT 106 (CESTAT) is now not valid.

Upgradation of computer system is not manufacture : Upgradation of computer system by increasing its storage / processing capacity by increasing hard disk capacity, RAM or changing processor chip is not manufacture as new goods with different name, character and use do not come into existence. - CBE&C circular No. 454/20/99-CX dated 12-4-1999 – view confirmed in Maxim In formation Tech v. CCE 2005 (184) ELT 78 (CESTAT) * CCS Infotech v. CCE (2007) 216 ELT 107 (CESTAT).

2.13.6 Classification of Goods

Classification of parachute coconut oil : In Amardeo Plastics Industries v. CCE (2007) 210 ELT 360 (CESTAT 2 v. 1 order), on the basis of chapter notes, it was held that parachute coconut oil is 'vegetable oil' under chapter 15 and not 'preparation for use on the hair', since the marking on package did not say that it is for 'such specialized use', though advertisements did indicate so.

However, in Shalimar Chemical Works v. CST (2008) 12 VST 485 (WBTT), it has been held that except in a few Southern States, coconut oil is not treated as edible oil for use of daily cooking. In West Bengal, considering consumption pattern, coconut oil cannot be treated as 'edible oil'. It has to be treated as 'hair oil'.

Plastic name plate : Plastic name plate for motor vehicle is to be classified as 'accessory of motor vehicle' in chapter 87 and not 'other articles of plastic' in chapter 39, since 'name plate' is not specified in any heading in chapter 39 – Pragati Silicons P Ltd. v. CCE (2007) 8 VST 705 = 211 ELT 534 (SC).

Meaning of 'set of articles' : Distinction between laptop and desktop – 'Set of article' should consist of more than one item, each complementing the work of another and retaining their individual identity all the time – CC v. Acer India P Ltd. (2007) 218 ELT 17 (SC). In this case, it was held that a desktop computer is a combination of CPU with monitor, mouse and keyboard as a set. A desktop computer does not lose individual identities of CPU, monitor, mouse and keyboard. Not only they are marketable as separate items but are also used separately. On the other hand, a laptop (notebook computer) comes in an integrated and inseparable form. It is a combination of CPU, monitor, mouse and keyboard. A laptop cannot be said to be set of CPU with monitor mouse and keyboard – confirming Tribunal decision in CC v. Acer India P Ltd . (2007) 208 ELT 132 (CESTAT).

Software/records/tapes supplied along with equipment – Software imports are exempt from customs duty. Earlier, Customs and Central Excise Tariff had a note No. 6 which stated that software when presented with the apparatus for which it was intended will be classifiable as software. This note has been deleted w.e.f. 1-1-2007. Hence, software embedded or pre-loaded in machine is to be classified along with the machine. This will also be case when software is brought separately, but as a 'set'. If tangible software e.g. operating software or application software loaded on disk, floppy, CD-ROM etc. is imported, it will be classifiable as software under heading 8523 – CC (Import), Mumbai PN 39/2007 dated 3-12-2007. In CC v. Hewlett Packard India (Sales) P Ltd. (2007) 215 ELT 484 (SC), it was held that pre-loaded software in laptop forms integral part of the laptop. Without operating system like windows, the laptop cannot work. Hence, the laptop along with software has to be classified as laptop and values as one unit. Software pre-loaded cannot be classified separately as software (In this case, the importer wanted to classify hard disk along with software as 'software' and refused to give value of software even when called upon to do so. Hence, the decision has to be seen from peculiar facts of the case).

Principles of classification irrelevant for valuation : Classification decides the applicable rate. It is followed by valuation i.e. value at which rate is to be applied. The concept of 'classification' is therefore different from the concept of valuation. Section and chapter notes in Tariff and interpretative rules do not provide guidelines for valuation - CCE v. Frick India Ltd . (2007) 216 ELT 497 (SC).

2.14 ASSESSABLE VALUE UNDER SECTION 4

2.14.1 Factory can be Place of Removal even if Insurance taken by Assessee as Service to Customers
In Blue Star Ltd. v. *CCE* (2008) 224 ELT 258 (CESTAT), transport was arranged by assessee since individual customer cannot arrange for transportation. Insurance was taken for safe transport of goods, as a

service to customers. It was held that insurance cover cannot be taken as criteria for determining ownership of goods. It was held that there was sale at factory gate and freight is not includible in assessable value.

2.14.2 Minimum Charges if Assured Quantity not Purchased, are not Part of Excise Assessable Value

In Jindal Praxair Oxygen v. CCE (2007) 208 ELT 181 (CESTAT), MTOP charges were payable to assessee if buyer fails to purchase minimum quantity assured, as in such cases, assessee is not in position to operate his plant at optimum capacity. It was held that these are not includible in assessable value - followed in CCE v. Praxair India (2008) 223 ELT 596 (CESTAT).

2.14.3 Place of Removal in Case of Exports

In case of exports, the place of removal is port where export documents are presented to customs office – Kuntal Granites v. CCE (2007) 215 ELT 515 = 2007 TIOL 930 (CESTAT) – quoted and followed in Rajasthan Spinning & Weaving Mills v. CCE (2007) 8 STR 575 (CESTAT).

2.14.4 Cash Discount Admissible Whether Availed or Not

In *CCE* v. *Arvind Mills Ltd.* (2006) 204 ELT 570 (CESTAT 3 member bench), it has been very clearly held that cash discount and finance cost are admissible under new section 4 of CEA also. Differential price represents interest for delayed payment. Cost of finance and cash discount whether availed or not are to be granted as abatement even after 1-7-2000.

2.14.5 Self Insurance Charges Addible

In *Gujarat Borosil* v. *CCE* (2007) 217 ELT 367 (CESTAT), assessee was collecting 7% amount was 'insurance charges'. Actual insurance premium paid was much less. The charge was to cover breakage of goods in transit. It was held that this cannot be permitted as deduction since assessee was not an insurance company.

2.14.6 Valuation of Free Samples

CBE&C, *vide* circular No. 813/10/2005-CX dated 25-4-2005 has clarified that in case of samples distributed free, valuation should be done on basis of rule 4 i.e. value of similar goods. The revised circular dated 25-4-2005 stating that valuation of samples should be on basis of rule 4, has been upheld as valid in *Indian Drugs Manufacturers' Assn* v. *UOI* (2008) 222 ELT 22 (Bom HC DB).

2.14.7 Valuation in Case of Stock Transfer

In case of stock transfer, value to be adopted is the price prevailing in depot at the time of clearance from factory. Once goods are cleared from factory to depot on payment of duty (on basis of price prevailing at the time of removal from factory), it is not necessary to chase the goods and see at what price the goods were subsequently sold -*CCE* v. *Carborandum Universal Ltd.* (2008) 224 ELT 290 (CESTAT).

2.14.8 Sale to Parent Company both as Spares as well as for Maintenance

In *CCE* v. *Aquamall Water Solutions* (2008) 223 ELT 385 (CESTAT), assessee sold its water purifying equipment to its parent company (Eureka Forbes Ltd.). Assessee also supplied parts of the water purifying equipment to its parent company, both for sale as spares and also for maintenance purposes. In case of spares for sale, duty was paid on the basis of selling price of spares of parent company. In case of parts supplied for use in maintenance, duty was paid on the basis of cost of production plus 10%. Department contended that in case of parts supplied for maintenance also, duty should be paid on basis of selling price of parent company. However, Tribunal held that when parts are not sold by parent company, duty should be paid under rule 8 on basis of cost of production plus 10% since no other specific rule to cover this (The decision is based on a Board circular which has since been withdrawn).

Part sale and part consumption – in *Ispat Industries Ltd.* v. *CCE* 2006 (201) ELT 65 (CESTAT), it was held that if goods are partially sold to unrelated buyers and partially supplied to sister concern, valuation

should be under rule 4 i.e. on the basis of price at which goods are sold to other independent buyers – relying on *Aquamall Water Solutions* v. *CCE* 2003 (153) ELT 428 (CEGAT).- view upheld in *Ispat Industries* v. *CCE* 2007 (209) ELT 185 (CESTAT 3 member bench).

2.15 VALUE BASED ON RETAIL SALE PRICE

Section 4A of CEA empowers Central Government to specify goods on which duty will be payable based on 'retail sale price'.

The provisions for valuation on MRP basis are as follows :

(a) The goods should be covered under provisions of Legal Metrology Act, 2009, w.e.f. 1-8-2011 (earlier Standards of Weights and Measures Act, 1976) **[section 4A(1)]**.

(b) Central Government has to issue a notification in Official Gazette specifying the commodities to which the provision is applicable and the abatements permissible. Central Government can permit reasonable abatement (deductions) from the 'retail sale price'**[section 4A(2)]**.

(c) While allowing such abatement, Central Government shall take into account excise duty, sales tax and other taxes payable on the goods **[section 4A(3)]**.

(d) The 'retail sale price' should be the maximum price at which excisable goods in packaged forms are sold to ultimate consumer. It includes all taxes, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding charges etc. If under certain law, MRP is required to be without taxes and duties, that price can be the 'retail sale price' **[Explanation 1 section 4A]**.

(e) If more than one 'retail sale price' is printed on the same packing, the maximum of such retail price will be considered [Explanation 2(a) to section 4A]. If different MRP are printed on different packages for different areas, each such price will be 'retail sale price' for purpose of valuation **[Explanation 2(c) to section 4A]**.

(f) Removing excisable goods without MRP or wrong MRP or tampering, altering or removing MRP declared on a package is an offence and goods are liable to confiscation [section 4A(4)] If price is altered, such increased price will be the 'retail sale price' for purpose of valuation **[Explanation 2(b) to section 4A]**.

For example, Government had issued a notification to the effect that excise duty on 'cosmetics and toilet preparations' will be payable on the basis of MRP printed on retail carton after allowing abatement of 40%. In such case, if MRP printed on carton is ₹ 200 and if the duty on 'cosmetics & toilet preparations' is 12% plus education cess of 2% plus SAH education cess of 1%, the duty @ 12% will be payable on ₹ 120 (i.e. after allowing 40% abatement on MRP of ₹ 200). Thus duty payable per pack will be ₹ 14.40, plus Education Cess ₹ 0.288 plus SAH education cess of ₹ 0.144.

MRP provisions are overriding provisions– Section 4A(2) of Central Excise Act uses the words 'notwithstanding section 4A. Hence, when section 4A is applicable, provisions of section 4 for determination of assessable value are not applicable.

Provision of MRP based valuation are applicable only when product is statutorily covered both under Weights and Measures Act and notification issued under CEA - reiterated in Swan Sweets v. CCE 2006 (198) ELT 565 (CESTAT).

Same product sold in wholesale and under MRP - CBE&C has clarified in circular No. 737/53/2003-CX dated 19-8-2003 that when goods covered u/s 4A are supplied in bulk to large buyer (and not in retail), valuation is required to be done u/s 4. Provisions of section 4A apply only where manufacturer is legally obliged to print MRP on the packages of goods. Thus, there can be instances where the same

commodity would be partly assessed on basis of section 4A and partly on basis of transaction value u/s 4.

Products covered under the MRP valuation scheme - So far, 96 articles have been covered under this scheme [Notification No. 2/2006-CE(NT) dated 1-3-2006.

Non-applicability of provisions of MRP - If an article is not covered under provisions in respect of marking MRP, provisions of duty payable on basis of MRP do not apply and in those cases, duty will be payable on *ad valorem* basis as per section 4. As per rules 2A and 34 of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (as amended w.e.f. 14-1-2007), the provisions of marking MRP are not applicable to following commodities – Packages above 25Kg (50 Kg in case of cement) * Packaged commodities for industrial or institutional consumers * Small packages of 10gm/10 ml or less * Fast food items * Scheduled drugs and formulations * Agricultural farm produce * Bidis for retail sale * Domestic LPG gas.

Deemed Manufacture of products covered under MRP - In respect of goods specified in third schedule to Central Excise Act, any process which involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on the container or adoption of any other treatment on the goods to render the product marketable to consumer will be 'manufacture'. [section 2(f)(iii) effective from 14-5-2003].

2.16 MRP BASED VALUATION

2.16.1 Same Product partly sold in retail and partly in Wholesale

CBE&C has further clarified in circular No. 737/53/2003-CX dated 19-8-2003 that when goods covered u/s 4A are supplied in bulk to large buyer (and not in retail), valuation is required to be done u/s 4. Provisions of section 4A apply only where manufacturer is legally obliged to print MRP on the packages of goods. Thus, there can be instances where the same commodity would be partly assessed on basis of section 4A and partly on basis of transaction value u/s 4 – view noted and approved in Jayanti Food Processing v. CCE (2007) 10 STT 375 = 215 ELT 327 (SC).

2.16.2 Valuation on MRP basis even if package is not really intended for Retail Sale

In Jayanti Food Processing v. CCE (2007) 10 STT 375 = 215 ELT 327 (SC), it was observed that nature if sale is not the relevant factor for application of section 4A but application would depend on five factors i.e. (i) goods should be excisable goods (ii) They should be such as are sold in the package (iii) There should be requirement of SWM Act or rules or any other law to declare price of such goods relating to their retail price on package (iv) The Central Government must have specified such goods by notification of Official gazette and (v) Valuation of such goods would be as per the declared retail price on the package less the amount of abatement.

In ITEL Industries P Ltd. v. CCE 2004 (163) ELT 219 (CESTAT 2 v. 1 decision), telephone instruments were supplied to DOT/MTNL in bulk with MRP duly marked. DOT/MTNL lent these to subscribers retaining their ownership. It was held that since goods were packed, the valuation is required to be done u/s 4A on basis of MRP, even if goods were not sold to customers – followed in BPL Telecom v. CCE (2004) 168 ELT 251 = 60 RLT 664 (CESTAT), where it was held that there is no requirement under Packaged Commodities Rules that goods covered by those provisions must be actually sold in retail – view confirmed in Jayanti Food Processing v. CCE (2007) 10 STT 375 = 215 ELT 327 (SC).

This was followed in CCE v. Liberty Shoes (2007) 216 ELT 692 (CESTAT), where it was held that MRP provisions apply even when sale is in bulk to institutional buyers.

2.16.3 Provision does not apply to Ice Cream sold in bulk

In Monsanto Manufacturers v. CCE 2006 (193) ELT 495 (CESTAT), it was held that if ice cream is sold in

bulk to hotels and not intended for retail sale, valuation will be as per section 4 and not on MRP basis – view confirmed in Jayanti Food Processing v. CCE (2007) 10 STT 375 = 215 ELT 327 (SC).

2.16.4 Two Items in Combi-Pack with One Item Free

In Icon Household Products v. CCE (2007) 216 ELT 579 (CESTAT), assessee was selling Mosquito Repellant Liquid (MRL) and Liquid Vapourising Device (LVD) as combi-pack. MRP was contained only on plastic container of MRL and not on LVD. It was held that this MRP will be taken for valuation of multipack. LVD supplied free in the multipack is not liable to assessment separately – relying on Himalaya Drug Company v. CCE (2006) 195 ELT 109 (CESTAT) - same view in CCE v. J L Morison (2008) 223 ELT 655 (CESTAT SMB).

2.16.5 No MRP on Free Gifts/Samples, Hence Valuation as Per Section 4

In Jayanti Food Processing v. CCE (2007) 10 STT 375 = 215 ELT 327 (SC), assessee as selling Kitkat chocolates to Pepsi. These were distributed as free gift along with Pepsi bottle as a marketing strategy. It was held that even if product (chocolate) is covered under MRP provisions, since the product was not to be sold in retail, MRP is not required. Hence, valuation should be on basis of section 4.

2.16.6 Provision when more than One Retail Price Declared

MRP printed on package is required to be inclusive of taxes. Rate of taxes vary from State to State. Hence, in some cases, a manufacturer may print different prices for different States. In some cases, manufacturer earmarks different packages for different areas and marks different prices for different areas.

If a package bears more than one retail sale price, maximum out of these will be deemed to be retail price for purpose of section 4A [Explanation 2(a) to section 4A(4)]. If retail price declared on the package at the time of removal is subsequently altered to increase the price, such increased retail price will be retail price for purpose of section 4A [Explanation 2(b) to section 4A(4)]. Where different retail sale prices are declared on different packages, each such retail price shall be the 'retail sale price' for purposes of

valuation of excisable goods intended to be sold in area to which the retail price relates. [Explanation 2(c) to section 4A(4)]. Thus, if different prices are printed on different packages, each such price will be 'retail price'.

There is no stipulation in the Act that all packages should bear same MRP. Different MRPs for different buyers can be fixed. Even if MRP is different for each packet, such MRP is required to be adopted for assessable value– CCE v. Bell Granito Ceramics (209) 235 ELT 171 (CESTAT).

2.16.7 Provisions and Requirements of the Standards of Weights and Measures (Packaged Commodity) Rules, 1977 (''SWM Rules'')

The relevant provisions and requirements of the SWM Rules, are as follows

(1) **Only Packages Intended for Retail Sale Covered:** The requirement to declare retail sale price of the packages is applicable only in respect of packages intended for retail sale.

(2) **Goods on which RSP need not be Declared:** There is no requirement to declare RSP on-

(a) Packages of commodities containing quantity of more than 25 Kg or 25 Liters (excluding cement and fertilizer sold in bags up to 50 Kg.);

(b) Packaged commodities meant for industrial consumers or institutional consumers;

''Industrial consumer'' means those consumers who buy packaged commodities directly from the manufactures/packers for using the product in their industry for production etc.;

''Institutional consumers'' means those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like transportation including airways, railways, hotel or any other similar service industry;

(c) Any domestic LPG cylinders of which the price is covered under the Administered Price Machanism of the Government;

(d) goods meant for export;

(e) goods supplied free as marketing strategy (e.g. physicians sample);

(f) any package containing fast food item packed by restaurant/ hotel and the like;

(g) any package containing a commodity if it contains schedule formulation and non-schedule formulations covered under the Drugs (price Control) order, 1995;

(h) Wholesale packages;

(i) agriculture farm produces in packages of above 50Kg.

(3) Certain Definitions:

(a) retail packages means the packages intended for retail sale to the ultimate consumer for consumption of the commodity contained therein and includes the imported packages. The expression 'ultimate consumer' doesn't include industrial or institutional consumers.

(b) retail sale means the sale, distribution or delivery of a commodity through retail sale agencies or other instrumentalities for consumption by an individual or a group of individual or any other consumer.

(c) wholesale package means a package containing-

(i) A number of retail packages, where wholesale package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer; or

(ii) A commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or delivery such commodity to the consumer in smaller quantities; or

(iii) Packages containing ten or more than ten retail packages provided that the retail packages are labeled as required under the rules.

Example 33: 1,500 pieces of a product 'A' were manufactured during the financial year. Its list price (i.e. retail price) is ₹250 per piece, exclusive of taxes. The manufacturer offers 20% discount to wholesalers on the list price. During the year, 840 pieces were sold in wholesale, 510 pieces were sold in retail, 35 pieces were distributed as free samples. Balance quantity of 115 pieces was in stock at the end of the year. The rate of duty is 12% plus education cess and SAH education cesses as applicable. What is the total duty paid during the financial year?

Assume that the manufacture is not eligible for SSI concession.

Answer:

The total selling price is as follows –

Qty	Price	Total (₹)
510	250	1,27,500
840	200	1,68,000
35	200	7,000
Total		3,02,500

Duty payable is 12% of ₹ 3,02,500 i.e. ₹ 36,300, plus education cess @ 2% i.e. ₹ 726 plus SAH education cess @ 1% is ₹ 363, therefore total excise duty is ₹ 37,389

Note – (a) Since 115 pieces were in stock at year end, no duty will be payable. Duty will be payable only when goods are cleared from factory. (b) In case of samples, as per rule 4 of Valuation Rules, value nearest to the time of removal, subject to reasonable adjustments is required to be taken. However, since prices are varying, value nearest to the time of removal may not be ascertainable and will not be acceptable for valuation as the prices are changing. In such case, recourse will be taken to rule 11 of Valuation Rules, i.e. best judgment assessment. We can take recourse to rule 7 and 9 where principle of 'normal transaction value' is accepted, when prices are varying.

As per rule 2(b) of Valuation Rules, 'normal transaction value' means the transaction value at which the greatest aggregate quantity of goods is sold. Since greatest quantity of 840 pieces are sold at ₹ 200, that will be 'normal transaction value', which can be taken for valuation of free samples.

Example 34: A manufacturer has appointed brokers for obtaining orders from wholesalers. The brokers procure orders for which they get brokerage of 5% on selling price. Manufacturer sells goods to buyers at ₹ 250 per piece. The price is inclusive of State Vat and Central excise duty. State Vat rate is 4% and excise duty rate is 12% plus education cess and SAH education cess as applicable. What is the AV, and what is duty payable per piece?

Answer:

Assume that Assessable Value = x. No deduction is available in respect of brokerage paid to third parties from Assessable Value.

Since Excise duty is 12%, education cess is 2%, SAH education cess is 1% and State Vat rate is 4%, price including excise will be 1.1 236x.

State Vat @ 4% of 1 .1236x is 0.0449x. Hence, price inclusive of sales tax and excise duty will be 1.1 685x.

Now,	1.1685x = ₹ 250.00
Hence,	X = ₹ 213.95
Check the answer as follows –	
Assessable Value	= ₹ 213.95
Add duty @ 12.36% of ₹ 213.95	= ₹ 26.44
Add State Vat @ 4% on ₹ 240.39 (213.95+26.44)	= ₹ 9.62
Total Price (Including duty and tax)	
(213.95+26.44+9.62)	= ₹ 250.00

Example 35: Find Assessable Value and duty payable. The product is not covered under section 4A. Maximum Retail Trade Price : ₹ 1,100 per unit, State Vat, Octroi and other Local Taxes: 10% of net price, Cash Discount : 2%, Trade Discount: 10%, Primary and Secondary packing cost included in the above MRP: ₹ 100, Excise duty rate: 12% ad valorem plus education cesses as applicable.

Answer:

Cash discount ₹ 22 (2% of ₹ 1,100) and trade discount ₹ 88 [8% of ₹ 1,100] are available as deduction. Packing cost is not allowable as deduction. Hence, price of excise purposes is ₹ 990. [₹1,100– 22 – 88]. — Now, if X is the assessable value, excise duty is 1.1236x. State Vat and local taxes @ 10 % of 1.1236x will be 0.1236x and price including Excise duty is inclusive of excise duty and sales tax will be 1.2360x.

Now,	1 .2360 x	=	₹ 990.00
Hence,	x	=	₹ 800.97
Excise Duty @ 12.36% of ₹ 800.97		=	₹ 99.00
Check the answer as follows Assessable Value		=	₹ 800.97
Add duty @ 12.36% of ₹ 800.97		=	₹ 99.00
Add State Vat @ 10% on ₹ 899.97		=	₹ 90.00
(800.97+99)			
Total Price (After allowable deductions)		=	₹ 989.97 or ₹ 990

Example 36: A manufacturer has to supply a machinery on following terms and conditions : (a) Price of machinery : ₹ 3,40,000 (net of taxes and duties), (b) Machinery erection expenses : ₹ 26,000, (c) Packing (normally done by him for all machinery) : ₹ 4,000, (d) Design and drawing charges relating to manufacture of machinery : 30,000 or (Net of taxes and duties), (e) Central Sales Tax @ 4%, (f) Central Excise Duty @ 12% plus education cess of 2% plus SAH education cess of 1%, (g) Cash discount of ₹ 5,000 will be offered if full payment is received before dispatch of goods, (h) The buyer made all

payment before delivery, (i) The manufacturer incurred cost of ₹ 1,200 in loading the machinery in the truck in his factory. These are not charged separately to buyer. Find the 'Assessable Value'and the duty payable.

Answer:

Erection expenses are not includible in AV. Cash discount is allowable as deduction. Duty is not payable on optional bought out accessories supplied along with the machinery. The cost of ₹ 1,200 is already included in the selling price of machinery (as it is not charged separately) and hence is not to be added again. Hence, AV is ₹ 3,69,000 [₹ 3,40,000 + ₹4,000 + ₹30,000 – ₹5,000]. Duty @ 12% will be ₹ 44,280, plus education cess @ 2% i.e. ₹ 885.60 and SAH education cess @ 1% i.e. ₹ 442.80.

Example 37: M/s. XYZ Ltd., sold machinery to Mr. Kapoor at a price of ₹ 5 lakhs on 15th June, 2013 and the same was removed from the factory at Kolkata. The rate of excise duty applicable is 12.36% on the date of removal. Mr. Kapoor refused to take delivery of the machine when it reached his destination. In the meantime, M/x. XYZ Ltd. increased the prices of the similar type of machinery to ₹ 6 lakhs with effect from 16th June, 2013. The machinery as refused by Mr. Kapoor has been sold on 20th June 2013 to Mr. Lal at the revised price of ₹ 6 lakhs. The excise duty including Education Cess is 12.36% applicable with effect from 10th June, 2013.

Explain the following with reasons:

(i) What is the value to be taken as assessable value?

(ii) What is the rate of excise duty applicable and duty payable on above transaction?

(iii) The Central Excise Officer is demanding duty on the price of ₹ 6 lakhs at the time of sale to Mr. L. Is he right in his approach?

(iv) Does cost of production have any bearing on the assessable value?

Answer:

(i) The price prevailing at the time of removal from factory (i.e. ₹ 5 lacs on 15th June 2013 is the assessable value.

(ii) The applicable rate of duty is @1 2.36% and duty amount is ₹ 61,800 (i.e. ₹ 5 lacs x 12.36/100).

(iii) The Central Excise Officer is not right in his approach.

(iv) Cost of production has no bearing with assessable value in present case. Central Excise valuation can be below manufacturing cost. If price is the sole consideration and dealing between seller and buyer are arm's length, assessable value will be decided on the basis of selling price, even if it is below manufacturing cost. So cost of manufacturing will not change the assessable value.

Example 38: ABC Ltd of Kanpur agreed to sell an electronic motor to DEF Ltd of New Delhi for ₹ 15,000.00 on ex-factory basis. Other particulars are:

(i) Transportation and transit insurance were arranged by ABC Ltd. This was at the request of DEF Ltd and amounted to for ₹ 1,250 and ₹ 1,500 respectively which were charged separately. Actual transportation charges amounted to ₹ 1,000 only.

(ii) A discount of ₹ 1,000 was given to DEF Ltd. on the agreed price on payment of an advance of ₹ 3,500 with the order. (Ignore notional interest on advance).

(iii) Interest of ₹ 800 was charged from DEF Ltd. as it failed to make the payment within 30 days.

(iv) Packing charges of the motor amount to ₹ 1300.

(v) The expenditure incurred by ABC Ltd. towards 'free after sale service' during warranty period comes out to be ₹ 500 per motor.

(vi) Dharmada charges of ₹ 200 were recovered from DEF Ltd.

(vii) ABC Ltd. sold a lubricant worth ₹ 250 along with the motor to the interested customers. Lubricant

which was purchased from the market by ABC Ltd. at ₹ 200 ensured durability and high efficiency of the motor. DEF Ltd. opted for the said lubricant.

Compute the Assessable Value.

Answer:

Calculation of Assessable Value

Offered Price to DEF	=	14,000
ADD: Discount	=	1,000
ADD: Packing charges	=	1,300
ADD: Free after sale service	=	500
ADD: Dharmada charges	=	200
Assessable Value	=	17,000

Example 39: How will the assessable value under the subject transaction be determined under section 4 of the Central Excise Act, 1944? Give reasons with suitable assumptions where necessary.

Contracted sale price for delivery at buyer's premises ₹ 10,00,000. The contracted sale price includes the following elements of cost:

(I)	Cost of drawings and designs	₹ 3,000
(II)	Cost of primary packing	₹ 3,500
(III)	Cost of packing at buyer's request for safety during transport	₹ 7,500
(IV)	Excise duty	₹ 2,11,200
(V)	VAT (Sales tax)	₹ 37,000
(VI)	Octroi	₹ 9,500
(VII)	Freight and insurance charges paid from factory to 'place of removal	₹ 20,000
(VIII)	Actual freight and insurance from 'place of removal' to buyer's premises	₹ 42,300

Answer:

Sale price		₹ 10,00,000
Less: Excise Duty		₹ 2,11,200
VAT		₹ 37,000
Octroi		₹ 9,500
Freight and insurance from Place of removal to buyers		₹ 42,300
		3,00,000
Assessable Value	₹	7,00,0000

Example 40: Determine the assessable value for purpose of excise duty under the Central Excise Act, 1944 in the following cases:

(i) An assessee sells his excisable goods for ₹ 1,12,360 per unit and does not charge any duty of excise in his invoice. Subsequently it was found that the goods were not exempted from excise duty but were liable at 12.36%.

(ii) Certain excisable goods were sold for ₹ 1,12,360 per unit and @12.36% is the rate of excise duty. Subsequently it was found that the price cum duty was in fact ₹ 1,40,000 per unit as the assessee had collected ₹ 40,000 per unit separately.

(iii) The cum duty price per unit was ₹ 1,10,300 and the assessee had paid duty at 10.30%. subsequently it was found that the rate of duty was 15.45% and the assesee had not collected anything over and baove ₹ 1,10,300 per unit.

Answer:

Statement showing Assessable Value for the Purpose of Excise Duty in each case: (As per CBE&C DO letter No. 334/1/2003- TRU dated 28.2.2003)

Sl. No.	Particulars	Value (₹)	Workings
(i)	Assessable value	1,00,000	₹ 1,12,360 x 100/112.36 = ₹ 1,00,000
(ii)	Assessable value	1,24,600	Cum-duty price ₹ 1,12,360 (12.36% duty inclusive). Hence, assessable value is ₹1,00,000. Additional consideration received subsequently of ₹ 40,000. Hence, Cum-duty price is ₹ 1,40,000. 1,40,000 x 100/112.36 = ₹ 1,24,600
(iii)	Assessable value	95,539	Cum-duty price ₹ 1,10,300 (excise duty included @10.30%). However, correct rate of duty is 15.45%. If no additional consideration has been received, then ₹ 1,10,300 is it self considered as inclusive of excise duty @15.45%. 1,10,300 x 100/115.45= ₹ 95,539.

Maximum Retail Price (MRP)

Example 41: B Ltd manufactures two products namely, Eye Ointment and Skin Ointment. Skin Ointment is a specified product under section 4A of the Central Excise Act, 1944. The sale prices of the two products are ₹ 43 per unit and ₹ 33 per unit respectively. The sale price of both the products included 14% excise duty as BED, education cess of 2% and SAH of 1%. It also includes CST of 4%. Additional information is as follows:

Units cleared: Eye Ointment - 1,00,000 units, Skin Ointment – 1, 50,000 units. Deduction permissible under section 4A: 40%

Calculate the total excise duty liability of B Ltd for both the products.

Answer:

Eye Ointment:

Let us assume X as the assessable value

Assessable Value	=	x
Add: BED @14%	=	0.14X
Add: Education Cess @2%	=	0.0028X
Add: SAH @1%	=	0.001 4X
	=	1.1 442X
Add: CST @ 4%	=	0.045768X
Selling price	=	1.1 89968X

Assessable value per unit		₹ 43 x 1/1.189968	
	=	₹ 36.1354 per unit	
Total Assessable Value	=	₹ 36, 13,540	(i.e. ₹ 36.1354 x 1,00,000 units)
Excise duty @14% on 1,00,000 units	=	₹ 5, 05,896	
Education Cess @2%	=	₹ 10,118	
SAH Cess @1%	=	₹ 5,059	
Total Excise Duty	=	₹ 5, 21,073	
Skin Ointment			
Maximum Retail Price	=	₹ 33	
Less: Abatement @40%	=	₹ (13)	
Assessable Value (per unit)	=	₹ 20	
Total Assessable Value	=	₹ 30,00,000	(i.e. ₹ 20 x 1,50,000 units)
Excise Duty @14%	=	₹ 4,20,000	
Education Cess @2%	=	₹ 8,400	
SAH Cess @ 1%	=	₹ 4,200	
Total Excise Duty	=	₹ 4,32,600	
B Ltd liable to pay total excise duty	=	₹ **9,53,673**	

Transaction Value with Valuation Rules

Example 42: Cost of production of a product X calculated as per Cost Accounting Standard is ₹ 350 per piece.

550 pieces of a product were manufactured. 120 pieces were sold at ₹ 700 per piece to Industrial Consumers. 70 pieces were sold to a Central Government department @ ₹ 690 per piece. 210 pieces were sold to wholesalers at ₹ 720 per piece. 70 pieces were sold in retail @ ₹ 800 per piece. 20 pieces were given out as free samples. Out of the 70 pieces sold to Government department, 25 pieces were rejected, which were subsequently sold to other customers @ ₹ 300 per piece, without bringing them in the factory. Balance pieces were in stock, out of which 25 pieces were so damaged that they became unsaleable.

Note that all the prices are exclusive of excise and sales tax. The rate of duty on the product is 12% plus education cess as applicable.

(a) What is the total duty payable?

(b) Advise Management about steps to be taken in respect of 25 pieces which were damaged in storage.

Answer:

(a) Calculation of duty payable on product X

Name of the buyer	**Number of pieces**	**Rate per piece (₹)**	**Total (₹)**
Industrial Consumers	120	700	84,000
Central Government department	70	690	48,300
Wholesalers	210	720	1,51,200
Retailers	70	800	56,000
others (Free samples) (Rule 4)	20	720	14,400
Assessable Value			3,53,900

Basic excise duty @12% (3,53,900×12%)	₹ 42,468
Education Cess @2%	₹ 849
SAH Cess @ 1%	₹ 425
Total Excise Duty	₹ 43,742

(b) As per Rule 21 of the Central Excise Rules, 2002, obtain the remission certificate from the central excise department for the damaged units of 25 pieces.

Valuation Rules:

Example 43: Compute the assessable value and excise duty under the Central Excise Act, 1944 in the following case:

Production	:	2,000 units on 1.1.2013
Quantity sold	:	450 units @ ₹ 200 per unit
	:	650 units @ ₹ 190 per unit
Samples clearances	:	50 units
Balance in stock	:	850 units
		(at the end of factory day for 1-1-2013)

Assume that the rate per unit is exclusive of Central Excise duty. Basic Excise Duty @12%, education cess as applicable.

Answer:

(Rule 4 read with 2(c)) Assessable value

Units	Rate per unit (₹)	Total (₹)	Remarks
450	200	90,000	
650	190	1,23,500	
50	190	9,500	Samples are valued as per rule 4 read with rule 2(c) of C.Ex. Valuation Rules, 2000
Assessable Value		2,23,000	

Total excise duty =₹ 27,562.80 (i.e.₹ 2,23,000 x 12.36%)

Example 44: A manufacturer having a factory at Mumbai has uniform price of ₹ 2,000 per unit (exclusive of taxes and duties) for sale anywhere in India. During the financial year 2013-14, he made the following sales:

Particulars	Quantity sold in units	Cost of transportation (₹)
Goods sold at factory in Mumbai	1,000	Nil
Goods sold from New Delhi	500	12,000
Goods sold from Chennai	600	48,000
Goods sold from Kolkata	900	30,000

Find assessable value per unit and total excise duty payable by the manufacturer. Excise duty @12% plus 2% education cess and 1% Secondary and Higher Education cess.

Answer:

(Rule 5 of valuation rule)

Selling price per unit	=	₹ 2,000	
Less: cost of equalized freight	=	₹ 30	
Assessable value per unit	=	₹ 1,970	
Total excise duty payable	=	₹ 7,30,476	(3,000 units x ₹ 1 ,970 per unit × 12.36%)

Working note: (1)

Particulars	Quantity sold in units	Cost of transportation (₹)
Goods sold at factory in Mumbai	1,000	Nil
Goods sold from New Delhi	500	12,000
Goods sold from Chennai	600	48,000
Goods sold from Kolkata	900	30,000
Total	3,000	90,000

(2) Cost of equalized freight = ₹ 30 (₹ 90,000/3,000 units)

(3) The aforesaid equalized freight has to be certified by the Cost Accountant/Chartered Accountant/ Company Secretary in practice.

Example 45: Compute the assessable value and amount of excise duty payable under the Central Excise Act, 1944 and rules made there-under from the following information:

Particulars	No. of units	Price at Factory Per unit	Price at Depot Per unit	Rate of Duty Advalorem
(i) Goods transferred from factory to depot on 8th February	1,000	₹ 200	₹ 220	12%
(ii) Goods actually sold at depot on 18th February	950	₹ 320	₹ 350	8%

Answer:

(Rule 7 of valuation rules)

	Amount (₹)	
Assessable Value	2,20,000	[i.e. 1,000 units × ₹ 220]
Basic Excise Duty	26,400	[i.e. ₹ 2,20,000 × 12/100]
2% Education Cess	528	[i.e. ₹ 26,400 × 2/100]
1% SAH Edu. Cess	264	[i.e. ₹ 26,400 × 1/100]
Total Excise Duty	27,192	[i.e. ₹ 26,400 + ₹528 + ₹264]

Example 46: Name the Cost Accounting Standard which is to be used while calculating cost of production for valuation for captive consumption under Central Excise. Is the standard mandatory? AS per that standard, which of the following costs are includible/not includible in 'Cost of Production'?

(i) Research and Development Cost

(ii) Interest on capital borrowed,

(iii) Lay-off wages to workmen

(iv) Packing cost.

Answer:

(Rule 8 of valuation rules)

The Cost Accounting Standard 4 is required to be used while calculating cost of production for valuation for captive consumption under Central Excise. As per circular issued by CBEC, cost of production is required to be calculated as per CAS-4 issued by the Central Council Members of The Institute of Cost Accountants of India (ICAI). Hence, the standard is mandatory.

Cost includible	Cost not includible
(i) Research and Development	(i) Interest on capital borrowed
(ii) Packing cost	(ii) Lay off wages to workmen

Example 47: X Ltd. manufacturer manufactured components within factory for own use. Cost of raw materials purchased for ₹ 50,000 to manufacture said components. Cost of overheads as certified by a Cost Accountant, as per Cost Accounting Standard (CAS) – 4 is ₹ 20,000. Profit margin on inter departmental transfer @20%. These components are subject to Excise Duty @12.36% and State VAT rate @12.50%.

You are required to answer (a) Assessable Value of these Components, (b) Total Excise Duty and (c) Value Added Tax (VAT).

Answer:

(Rule 8 of valuation rules)		₹
Cost of Material	=	50,000
Overhead Cost	=	20,000
Cost of Production	=	70,000
ADD: 10% profit margin (as per Rule 8 of Valuation Rules)	=	7,000
(a) Assessable Value	=	77,000
(b) Excise Duty	=	₹ 77,000 x 12.36/100 = ₹ 9,517

(c) VAT payable is nil, since these components are consumed internally. VAT will attract only when there is a sale.

Example 48: R & Co. furnish the following expenditure incurred by them and want you to find the assessable value for the purpose of paying excise duty on captive consumption. Determine the cost of production in terms of rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 and as per CAS – 4 (Cost Accounting Standard):

(i)	Direct material cost per unit inclusive of excise duty at 12.36%	₹ 880
(ii)	Direct wages	₹ 250
(iii)	Other direct expenses	₹ 100
(iv)	Indirect materials	₹ 75
(v)	Factory overheads	₹ 200
(vi)	Administrative overhead (25% relating to production capacity)	₹ 100
(vii)	Selling and distribution expense	₹ 150
(viii)	Quality control	₹ 25
(ix)	Sale of scrap realised	₹ 20
(x)	Actual profit margin	15%

Answer:

Cost of production is required to be computed as per CAS-4. Material cost is required to be exclusive of Cenvat credit available.

	Particular	**Total Cost (₹)**
1.	Material Consumed (Net of Excise duty) [₹ (880-108.77)]	771.23
2.	Direct Wages	250.00
3.	Other Direct Expenses	100.00
4.	Works Overhead [indirect material (₹ 75) plus factory overhead (₹ 200)	275.00
5.	Quality control cost	25.00
6.	Administrative Overhead (25% relates to production activity)	25.00
	Less : Sale of Scrap	(20.00)
	Cost of Production	1,426.23
	Add : 10% profit margin on cost of production (₹) 426.23 x 10%)	142.62
	Assessable value as per Rule 8 of the valuation rules	1,568.85

Note : Actual profit margin is not relevant for excise valuation.

Tax Planning

Example 49: A company manufacturing a dutiable product in the factory at Cochin, was making sales through its depot in Mumbai. The sale price at Mumbai depot at ₹ 30,000 per piece inclusive of transport charges from Cochin to Mumbai of ₹ 3,000. The depot price includes excise duty @ 12% plus cess @ 3% but excludes Maharashtra VAT. Annually 2,000 pieces are sold by the depot. The company decides to make direct sale from Cochin to its customers which would attract CST at 2% to be borne by the company. The company wants to close down the depot at Mumbai bringing cost saving of ₹ 5,00,000 per annum. The sale price will continue to be as earlier.

Evaluate the implications of the decision.

Answer:

Depot continues:

Presently, goods are sold from depot. If the sale is from depot, excise duty is payable on the depot price of ₹ 30,000. No deduction of transport cost from Cochin to Mumbai depot is allowed.

Since, the price is inclusive of excise duty @ 12.36% (12% plus 2% education cess plus 1% SAH education cess), the duty payable is ₹ 3,300 (i.e. ₹ 30,000 x 12.36 /112.36) and Assessable Value is ₹ 26,700 (i.e. ₹ 30,000 x 100/112.36).

	Value per piece
Depot sale price	₹ 30,000
Less: Transport charges	₹ 3,000
Less: Excise duty	₹ 3,300
Net revenue if depot continues	₹ 23,700

Depot closes down:

If goods are sold directly from Cochin, CST @ 2% will be payable. The price chargeable to dealers is required to remain unchanged at ₹ 30,000 per piece.

Net price of Product	X
Add- Excise Duty @ 12.36%	0.1236X
Taxable turnover	1.1236 X
Add- CST @ 2% on 1.1236 X	0.0225X
Total price	1.1461X
Add- Transport charges	₹ 3,000
Total Invoice Value	1.1461X + 3,000

Note.—Excise duty and CST are not payable on transport charges, if charged separately in invoice, because sale is from factory.

Now, 1.1461X + 3,000 = ₹ 30,000

Net price of the product = ₹ 23,558 [(i.e. ₹ 30,000 – 3,000)/1.1461]

Net realizable value is ₹ 22,725 per piece if the depot closes down.

If depot continues the revenue	₹ 23,700	per piece
Less: If depot closes down the revenue	₹ 23,558	per piece
Net revenue loss if depot closes down	₹ 142	per piece
Total revenue loss for 2,000 pieces annually if depot closes down (i.e. 2,000 pieces x ₹ 30 per piece)	₹ 2,84,000	
Less: Savings on account of closes down the depot	= ₹ 5,00,000	
Net savings on account of close down the depot	= ₹ 2,16,000	

If depot is closed, there will be net savings of ₹ 2,16,000 per annum.

Hence, it is economical to close down the depot.

2.17 ASSESSMENT UNDER CENTRAL EXCISE LAW

2.17.1 Assessment

The expression 'assessment' has been defined in the Central Excise Rules, 2002.

As per Rule 2(b), includes self-assessment of duty made by the assessee and provisional assessment under Rule 7 of the said Rules.

2.17.2 Assessee

The expression 'assessee' has been defined in the Central Excise Rules, 2002.

As per Rule 2(c), means any person, who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored and includes an authorized agent of such person.

2.17.3 Liability to Assessment and Payment of Duty

Rule 4 of the Central Excise Rules, 2002 provides that every person, who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law. No excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided.

2.17.4 Incidence of Duty I.e. Removal

For the purposes of the Rule 4, excisable goods manufactured in a factory and utilized, as such or after subjecting to any process, for the manufacture of any other commodity, in such factory, shall be deemed to have been removed from such factory immediately before such utilization.

2.17.5 Major Ingredients of Assessment

Before each removal, whether outside the factory of manufacture or production or for captive consumption, duty has to be assessed on the excisable goods.

2.17.6 Classification and Rate of Duty

For determining the rate of duty, classification is a prerequisite.

Classification means the appropriate classification code, which is applicable to the excisable goods in question under the First Schedule to Central Excise Tariff Act, 1985. There are Section Notes and Chapter Notes, in the Tariff which are helpful in determining the appropriate classification. In case of difficulties, there are "Interpretative Rules" in the said Act.

2.17.7 Valuation

Where rate of duty is dependent on the value of goods *(ad valorem duty),* value has to be determined, in accordance with the provisions of Central Excise Act, 1944, as follows :

(i) Value under section 4 based on transaction value or determined in terms of valuation Rule,

(ii) Value based on retail sale price under section 4A,

(iii) Tariff value fixed under section 3.

2.17.8 Self Assessment

As per Rule 6 of the Central Excise Rules, 2002 a Central Excise assessee is himself (self-assessment) required to determine duty liability at the time of removal of excisable goods and discharge the same. In other words, the assessee should apply correct classification and value *(where duty is ad valorem)* on the quantities being removed by him and indicate the same in the invoice. However, in case assessee manufacturing cigarettes, the Superintendent or Inspector of Central Excise has to assess the duty payable before removal by the assessee.

2.17.9 Provisional Assessment

Provisional Assessment is resorted to, in the event the duty cannot be determined at the point of clearance of the goods.

2.17.10 Guidelines and Procedure for Provisional Assessment

Rule 7 of the Central Excise Rules lays down that where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, they may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, indicating:

i. Specific grounds and reasons and the documents or information's, for want of which final assessment cannot be made.
ii. Period for which Provisional Assessment is required.
iii. The rate of duty or the value or both, as the case may be, proposed to be applied by the assessee, for Provisional Assessment.
iv. That he undertakes to appear before the Assistant Commissioner or Deputy Commissioner of Central Excise within 7 days or such date fixed by him, and furnish all relevant information and documents within the time specified by the Assistant or Deputy Commissioner of Central Excise in his order, so as to enable the proper officer to finalize the provisional assessment.

Rule 7 further provides that the payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

Ac or Dc of central excise, as the case may be,, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1);

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reason to be recorded in writing, be extended by the commissioner of central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deemed fit.

2.17.11 Payment of Duty Under Protest

Sometimes it happens that the classification of goods done by excise authorities, Assessable Value determined by the excise authorities in adjudication proceedings, etc. are not agreeable or acceptable to the assessee. In such cases, the assessee can file an appeal and in the meanwhile he can pay duty under protest (If no stay is obtained from Appellate Authorities).

2.17.12 Duty Liability of Pre-Budget Stock

Some goods in stock on the budget day are cleared subsequent to presentation of budget. If there is change in duty at budget, it was felt that these goods should be cleared at the rate applicable before the budget. The thinking was that duty liability is fastened as soon as goods are manufactured as 'manufacture in India' is taxable event in Central Excise. Since goods were already manufactured before budget, rate as applicable at the time of manufacture should be applied.

2.18 PROCEDURAL ASPECTS UNDER CENTRAL EXCISE DUTY

2.18.1 Registration Under Central Excise Law

A manufacturer has to compulsorily get registered under the central excise law if he manufactures dutiable goods.

The following persons are also required to get registered under central excise law:

i. First Stage Dealer,
ii. Second Stage Dealer,
iii. Importer
iv. Person who stores dutiable goods in the specified area or in a warehouse before exports.
v. Manufacturers liable to pay excise duty @1% or 2% as the case may be

First Stage Dealer: Rule 2(ij) of CENVAT Credit Rules defines first stage dealer to mean a person who purchases directly from manufacturer or depot of the said manufacturer or consignment agent of the said manufacturer or any other place from where goods are sold by or on behalf of the said manufacturer under cover of excise invoice and includes purchases from importer or consignment agent of the importer or depot of the said importer under an invoice.

The concept of dealer has been introduced under Central Excise merely to enable a buyer to avail the CENVAT credit when the goods are bought from a person other than the manufacturer. Here the dealer can pass on the CENVAT credit of the excise duty paid on the goods by the manufacturer, to his buyer. If a person is registered as dealer then he shall pass on credit which is equal to the amount of duty per unit of the goods in question, paid by the manufacturer at the time of clearance. The dealer does not pay any duty from his pocket as there is no processing or value addition at his end and he only enjoys a margin on his cost. However his margin on sales can be arrived at by calculating backwards.

Second Stage Dealer means a dealer who purchases goods from a first stage dealer. Dealer of any subsequent stage after second stage cannot issue Cenvatable Invoice.

i. The following manufacturers are exempt from registration and consequently payment of excise duty:
ii. Manufacturer of dutiable goods who claims exemption under SSI notification Manufacturer in a unit of 100% Export Oriented Units (EOUs) and Software Technology Park are exempted from the registration provided they do not procure and sell the goods in the Domestic Tariff Area (DTA).
iii. Dealers

2.18.2 Exemption from Registration

- Persons who manufacture the excisable goods, which are chargeable to nil rate of excise duty or are fully exempt from duty by a notification;
- Small scale units availing the exemption based on value of clearances under a notification. However, such units will be required to give a declaration once the value of their clearances crosses ₹ 90 lakhs for a financial year;
- Persons manufacturing excisable goods by following the warehousing procedure under the Customs Act, 1962 subject to certain conditions;
- The person who carries on wholesale trade or deals in excisable goods (except first and second stage dealer, as defined in Cenvat Credit Rules, 2004);
- Persons who use excisable goods for any purpose other than for processing or manufacture of goods availing benefit of concessional duty exemption notification. (Notification 36/2001-C.E. (N.T.), dated 26-6-2001)

2.18.3 Procedure for Obtaining Central Excise Registration

i. Fill up Form A-1 in full and have it duly signed. If the applicant is a manufacturer/producer/ dealer/ warehouse incharge/importer.
ii. Submit copy of PAN card issued by the Income Tax Department.
iii. The Inspector in the office of Assistant Commissioner/Deputy Commissioner will scrutinize the A-1 form and if found in order it shall be fed into computer through System for Allotment of Central Excise Registration (SACER).

iv. A 15 digit PAN based registration number (ECC) will be allotted to the assessee on the spot; otherwise the same will be delivered to him within the next working day.

v. Registration under Central Excise can be granted in the name of minor, provided a legal guardian undertakes to conduct the business.

vi. Normally separate registrations are required if factories are located in different locations. Similarly if the warehouse is at a significant distance from the factory these must be registered separately. A single registration can be allowed by the Commissioner of Central Excise for factories located in adjoining premises, or premises separated by road; railway, etc can if the facts and circumstance facilitates to do so.

Example 50: A manufacturer has place of business in the Factory in one location and in the warehouse at another location. If these locations are bifurcated by road, railway etc then with the permission of Commissioner of Central Excise the assessee can avail a single registration for these two locations. Otherwise each location has to be registered separately. In that case each factory of the manufacturer is considered a separate registration.

Centralized registration: Every mine engaged in the production/manufacture of specified goods is exempt from obtaining registration where the producer/manufacturer of such goods has a centralized billing/accounting system in respect of such goods produced by different mines and opts for registering only the premises or office from where such centralized billing or accounting is done (Notification No. 10/2011-CE dt. 24-3-2011).

vii. If the assessee ceases to carry on operations for which he is registered his registration certificate can be cancelled. This is called de-registration.

Sometimes registration certificate can also be revoked by registering authority. Registration certificate can be revoked in the following cases.

(a) If the manufacturer manufactures prevented goods. (like arms, explosive devise without license).

(b) Manufacturer carries higher risk (evasion of duty continuously, repeatedly producing the malafide evidences etc).

2.18.4 Provisions Relating to Non Registration

As per Rule 25 of the Central Excise Rules, 2002, where registration under Central Excise is required for a manufacturer but not registered then, all such goods shall be liable to confiscation. Such manufacturer is supposed to face the punishment and penalty.

Punishment: (Section 9 of the Central Excise Act, 1944)

i. if the duty leviable on the excisable goods exceeds ₹ 50,00,000 (w.e.f. 28-5-2012)

(a) imprisonment upto seven years and fine without any upper limit.

(b) 6 months minimum imprisonment unless there are special and adequate reasons for granting lesser punishment.

ii. if the duty leviable on the excisable goods is less than or equal to ₹ 50,00,000 (w.e.f 28-5-2012)

(a) Imprisonment upto three years or fine or both can be imposed

(b) 6 months minimum imprisonment unless there are special and adequate reasons for granting lesser punishment

Penalty for Non-Registration:

The penalty for non-registration is amount of duty of contravening goods or ₹ 2,000 whichever is higher. [Rule 25(1)(c) of the Central Excise Rules]

2.18.5 Daily Stock Account (DSA)

Every assessee registered under Central Excise should maintain the Daily Stock Account (DSA) [Rule 10(1) of Central Excise Rules, 2002]

There is no specific format for Daily Stock Account. The following information should be captured in the DSA

i. Description of goods manufactured
ii. Opening balance of goods manufactured
iii. Quantity manufactured
iv, Inventory of goods (closing stock)
v. Goods removed from the place of removal (quantity)
vi. Assessable value of goods removed
vii. Amount of duty payable to the department
viii. Particulars with regard to the amount of duty actually paid.

The first page and the last page of the DSA shall be duly authenticated by the manufacturer or his authorized person. The DSA shall be preserved for five years.

Penalty upto the amount of duty payable can be imposed and the offending goods can be confiscated if DSA is not maintained by the manufacturer. [Rule 25(1)(b) of Central Excise Rules]

2.19 REFUND & OTHER IMPORTANT PROVISIONS

Other important provisions are summarized below.

2.19.1 Refund of Excise Duty

i. Assessee can claim refund of duty within one year from relevant date u/s 11 B, in form R.
ii. Refund is subject to doctrine of unjust enrichment, i.e. refund will be available only if the amount was not recovered from buyer. These are overriding provisions.
iii. Doctrine of unjust enrichment applies to captive consumption, provisional assessment and also when duty was paid under protest.
iv. If refund is delayed beyond three months, interest is payable @ 6% p.a.

2.19.2 Exemption from Duty

Goods exported under bond are not 'Exempted Goods'

Rule 19(1) of Central Excise Ruloes states that any material may be exported wiothout payment of duty from factory of producer or manufacturer by removing under bond. Thus, the goods are cleared 'without payment of duty'. They are not 'exempt' goods. Ministry of Law Advice dated 29.10.1974 – confirmed and circulated vide CBE&C circular No. 278/112/96-CX dated 11.12.1996, states as follows, 'Under Central Excise, 'exemption' means exemption by notification under section 5A of CEA [earlier rule 8]. Thus, goods exported under bond are not 'exempt' from duty. These goods also cannot be termed as 'chargeable to Nil rate of duty', as in fact, the goods are dutiable.

i. Section 5A(1) of Central Excise Act and section 25(1) of Customs Act empower Central government to exempt any excisable goods from duty, by issuing notification in Official Gazette.
ii. Such exemption may be partial or full, conditional or unconditional.
iii. Absolute i.e. unconditional exemption is compulsory, while conditional notification is at option of assessee.
iv. Central Government can also grant exemptions in exceptional cases u/s 5A(2).
v. An exemption notification should be strictly construed, but purposeful construction is permissible.
vi. Principle of promissory estoppel can apply to an exemption notification.

2.19.3 Remission of Duty for Goods Lost, Destroyed or unfit for Consumption or Marketing

i. Rule 21 provides for remission of duty if the assessee can prove to the satisfaction of the Commissioner of Central Excise that the goods have been lost or destroyed by natural cause or by unavoidable accident or the manufacturer claims them as unfit for consumption or for marketing, before their clearance. In such cases Commissioner can remit the duty on such goods subject to such conditions as may be imposed by him or ordered in writing. Power of remission given to various officers have been increased in 2007. The assessee should apply for destruction and remission in duplicate. Credit taken for inputs of the goods so lost or destroyed need not be reversed as such loss cannot be equated to exemption to goods - 2007 (208) E.L.T. 336 (Tri.-LB) - *Grasim Industries* v. *CCE.* But as per new sub-rule (5C) of Rule 3 of Cenvat Credit Rules, 2004, such credit on input requires reversal. No remission is allowable if goods are lost due to theft or dacoity - 2008 (232) E.L.T. 796 (Tri.-LB) - *Gupta Metal Sheets* v. *CCE.*

ii. But no remission of duty is grantable for any loss or destruction or deterioration of any goods taking place after the goods have been cleared for home consumption on payment of duty or in cases of theft.

iii. For duty upto ₹ 10,000, Superintendent of Central Excise has been empowered to grant remission. Deputy /Assistant Commissioner can grant remission of duty exceeding ₹ 10,000 and upto ₹ 1 lakh. Additional/Joint Commissioner will have the power to remit duty exceeding ₹ 1 lakh and upto ₹ 5 lakhs. No limit has been prescribed for Commissioner in this regard.

iv. Remissions have to be claimed by the assessee and the burden to furnish adequate evidence of loss is on the assessee. Remission when granted is subject to conditions as may reasonably be imposed by the officer, such as irretrievable destruction under official supervision of goods claimed to be unfit for consumption or for marketing.

2.19.4 Compounded Levy Schemes

i. As per Rule 15, the Central Government may by notification specify the goods in respect of which the assessee shall have the option to pay excise duty on the basis of such factors as may be relevant to production of such goods and at such rate as may be notified in this respect. The Central Government has, therefore, notified the *Compounded Levy Scheme for Stainless Steel pattis/pattas, aluminium circles, subject to the process of cold rolling. - Notification No. 17/2007-C.E., dated 1-3 -2007.* These units have to pay Education Cess and SHE Cess also over and above the compounded levy rates as per C.B.E. & c. Letter F. No. 27/16/2008-CX.1, dated 25-8-2008 [2008 (230) E.L.T. T19].

ii. Section 3A has been inserted by Finance Act, 2008, empowering the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods and to notify the procedure for the same. Accordingly, pan masala and pan masala containing tobacco commonly known as gutkha manufactured with the aid of packing machine and packed in pouches have been notified for this purpose with effect from 1-7-2008. Pan masala with betel nut content not exceeding 15% is not covered. Detailed procedures and other matters like filing of specified declaration/intimation, payment of duty at notified rates, abatement in case of non-production, requirement of declaration of retail sale price on packages, bar on Cenvat credit availment, addition or removal of packing machines, penalty and confiscation for contravention and the like are provided in Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008.

New procedure for End-Use Exemption (erstwhile Chapter X procedure) - A new procedure for End-Use Exemption has been notified in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001.

The new Rules contemplate that procurement of goods for end-use under concessional (including fully exemted) rate of duty.

iii. Goods received duty free can be removed to another eligible manufacturer under the new end-use exemption procedure. Commissioner can also allow sending goods outside the factory for test, repair, reconditioning etc. and return thereof under their supplemental instruction power under Central Excise Rule 31.

2.19.5 Removal of Goods from FTZ, EOU and SEZ to Domestic Tariff Area

i. As per Rule 17, removal of goods from FTZ and EOU to the domestic tariff area shall be made under an invoice and on payment of appropriate duty by 5th of the following month except March, like other units in DTA. Such unit shall maintain proper account relating to production, description of goods, quantity removed, duty paid and each removal made on an invoice. Unit shall also submit a monthly Return to the Superintendent, Central Excise within ten days from the close of the month to which the return relates. The Return shall be submitted in form ER-2

ii. For the period prior to 11-5-2001 when Section 3 of the Act was amended to substitute the words "allowed to be sold" with the words "brought to any other place", clearances from EODs if not allowed to be sold into India shall continue to be chargeable to duty under main Section 3(1) of Central Excise Act, 1944 as such units are also situated in India.

iii. SEZ having been given the status of foreign territory, imports there from to DTA will be governed by the provisions of the Special Economic Zones Act, 2005. Removal of semi-finished goods or finished goods for further processing, or testing has been permitted under Rules 1 6B and 1 6C, broadly on the pattern of old Rule 56B.

2.19.6 Return of Duty paid Goods for Repairs etc. – Credit of Duty

i. As per Rule 16 of the Central Excise Rules, 1944 where any duty paid goods (whether originally manufactured in the same or another factory) are subsequently returned to the factory for being remade, refined, reconditioned or for any other reason, the assessee shall record the particulars of such returned goods in his record and take Cenvat Credit of the duty paid on such goods as if they are inputs and shall utilize this credit according to the Cenvat Credit Rules, 2002. But the goods received must be eventually returned.

ii. When the process to which the returned goods are subjected, does not amount to manufacture, the assessee shall pay the amount equal to Cenvat credit taken in respect to such returned goods. In other cases the returned goods after processing shall be removed on payment of duty according to the value and rate of duty applicable as on the date of removal.

iii. As per sub-rule (3) of Rule 16, where it is difficult to follow the provisions of sub-rule (1) and sub-rule (2) of Rule 16, the assessee can receive the goods subject to such conditions as may be specified by the Commissioner of Central Excise. Thus, in case where it is not possible to know the amount of the duty paid on returned goods as they may have been removed originally long back and the original invoice may not be available, in such or similar cases the return of goods shall be subject to the general or specific orders of the Commissioner of Central Excise and there will be no credit and no payment of duty.

iv. According to one school of thought, under the Rules there are now no restrictions on return, re-entry, retention and re-issue of duty paid goods if no credit is desired and taken. But presence of the retuned goods in the factory may cause accounting and surprise stock checking problems unless the returned goods are clearly identifiable as such and are stored and accounted for (in private accounts) separately It has been held that restrictions for re-entry apply only to identical or similar to those manufactured in the factory and not to other goods - 2004 (168) E.L.T. 53 (Tri.) - *Varsha Engineering* v. *C.C.E.*

2.19.7 Removal of Excisable Goods on Payment of Duty

i. As per Rule 4, no excisable goods on which duty is payable shall be removed without payment of duty from any place where they have been produced, manufactured or warehoused, unless otherwise provided. Duty, however is payable as specified in Rule 8.

ii. As per Rule 4(2), where molasses are produced in a khandsari sugar fatory, the person who procures such molasses, whether directly from such factory or otherwise, for use in the manufacture of any commodity (whether or not excisable) shall pay the duty payable on such molasses as if it is produced by him.

iii. By virtue of Rule 12AA excise duty can be paid either by the principle jewellery manufacturer or by his job worker.

iv. Full amount collected from the customer by way of duty should be shown distinctly in the invoice and paid to the credit of the Govemment.

2.19.8 Storage of Non-Duty paid goods outside the Factory

As per Rule 4(4) of the Central Excise Rules, 2002, the storage of non-duty paid goods outside the factory can be permitted by the Commissioner of Central Excise subject to such safeguards as he may specify. Such storage outside the factory premises is permissible in exceptional circumstances having regard to the nature of the goods and shortage of storage space in the factory. No merchant overtime charges would be recovered for supervision over such storage.

2.19.9 Manner of Payment of Duty Monthly

(i) Rule 8 provides the manner of payment of duty. 'Duty' for this purpose includes the 'amount' payable in terms of the Cenvat Credit Rules, 2004. This rule allows payment of duty on monthly basis by 5th day of the succeeding month (6th day of the following month in case of e-payment through internet banking) except for the month of March when duty is to be paid by 31st March.

(ii) The buyers of the goods cleared by manufacturers would be allowed to avail credit in respect of the duty payable on such goods immediately on receipt of the goods by them.

(iii) The duty liability shall be deemed to have been discharged only if the cheque received by the nominated bank is honored. Where the cheque is duly honoured, even if a few days later, the date of presentation of the cheque to the nominated bank is the date of payment of duty/ deposit. For P.L.A. format (Annexure 8 in Part 7) and the proced ure of its maintenance in triplicate.

(iv) Electronic payment (e-payment) of excise duty using Internet banking facility has been made mandatory w.e.f. 1-4-2007 for assessees who have paid excise duty of rupees 50 lakhs or more in cash (i.e. from P.L.A.) during the preceding financial year. It is optional for others. For features of the department's Electronic Accounting System in Excise and Service Tax (EASIEST) and the list of banks authorised for Intemet banking, see 2007 (211) E.L.T. T25-30; 2007 (213) E.L.T. *A62* and 2009 (235) E.L.T. T19-T22. Cut off time for e-payment on a particular day is 8 PM. E-payment received after 8 PM will be treated as received on the next day.

(v) GAR-7 Challans for paying amounts in banks must contain the 15-digit PAN/TAN based assessee code as well as Commissionerate code besides other particulars. A separate GAR -7 Challan should be used for each major head of account.

2.19.10 Action in Case of Default

As per Rules 8(3) and *8(3A),* when the assessee fails to pay the duty by the due date he shall be liable to pay the outstanding amount along with interest at the rate notified under Section 11AB from the first day of default to the date of actual payment of the outstanding amount. If the default in payment continues beyond 30 days from the due date, then without the need for any order from the A.C/D.C, duty requires to be paid for each consignment at the time of removal till outstanding amount with interest thereon is paid. Cenvat credit is not utilisable for such payment. In the event of any failure, it

shall be deemed that such goods have been cleared clandestinely with consequential penal action. Tribunal, however, holds: "It is well settled that Cenvat account is the same as PLA in regard to debit of Central Excise duty - 2006 (202) E.L.T. 814 (Tri.) - *SCT Ltd.* v. *CCE.*

2.20 OTHER PROCEDURES IN CENTRAL EXCISE

Some procedures are basic, which every assessee is required to follow. Besides, some procedures are required to be followed as and when required.

Basic Procedures

(i) Every person who produces or manufactures excisable goods, is required to get registered, unless exempted. [Rule 9 of Central Excise Rules]. If there is any change in information supplied in Form A-1, the same should be supplied in Form A-1.

(ii) Manufacturer is required to maintain Daily Stock Account (DSA) of goods manufactured, cleared and in stock. [Rule 10 of Central Excise Rules]

(iii) Goods must be cleared under invoice of assessee , duly authenticated by the owner or his authorised agent. In case of cigarettes, invoice should be countersigned by Excise officer. [Rule 11 of Central Excise Rules]

(iv) Duty is payable on monthly basis through GAR-7 challan / Cenvat credit by 5th/6th of following month, except in March. . Assessee paying duty through PLA more than ₹ 10 lakhs per annum is required to make e-payment only [Rule 8].

Excise Duty Due Date w.e.f. 1.4.2010 by SSI units: (Notification No. 05/2010-CE (N.T.) dated 27.02.2010)

Frequency –Quarterly (other than e-pay)

April – December	5th of the following month from the end of the relevant quarter
January – March	31st March itself.

Frequency –Quarterly (e-pay)

April – December	6th of the following month from the end of the relevant quarter
January – March	31st March itself.

(v) Monthly return in form ER-1 should be filed by 10th of following month. SSI units have to file quarterly return in form ER-3. [Rule 12 of Central Excise Rules] — EOU/STP units to file monthly return in form ER-2 – see rule 1 7(3) of CE Rules.

(vi) Assessees paying duty of ₹ 1 crore or more per annum through PLA are required to submit Annual Financial Information Statement for each financial year by 30th November of succeeding year in prescribed form ER-4 [rule 12(2) of Central Excise Rules].

(vii) Specified assessees are required to submit Information relating to Principal Inputs every year before 30th April in form ER-5, to Superintendent of Central Excise. Return for 2004-05 was required to be submitted by 31-12-2004 [rule 9A(1) to Cenvat Credit rules inserted w.e.f. 25-11-2004]. Any alteration in principal inputs is also required to be submitted to Superintendent of Central Excise in form ER-5 within 15 days [rule 9A(2) to Cenvat Credit Rules inserted w.e.f. 25-11-2004]. Only assessees manufacturing goods under specified tariff heading are required to submit the return. The specified tariff headings are – 22, 28 to 30, 32, 34, 38 to 40, 48, 72 to 74, 76, 84, 85, 87, 90 and 94; 54.02, 54.03, 55.01, 55.02, 55.03, 55.04. Even in case of assessees manufacturing those products, only assessees paying duty of ₹1 crore or more through PLA (current account) are required to submit the return.

(viii) Assessee who is required to submit ER-5 is also required to submit monthly return of receipt and consumption of each of Principal Inputs in form ER-6 to Superintendent of Central Excise by tenth of following month [rule 9A(3) to Cenvat Credit rules inserted w.e.f. 25-11-2004]. *Only those assessees who are required to submit ER-5 return are required to submit ER-6 return.*

(ix) Every assessee is required to submit a list in duplicate of records maintained in respect of transactions of receipt, purchase, sales or delivery of goods including inputs and capital goods, input services and financial records and statements including trial balance [Rule 22(2)].

(x) Inform change in boundary of premises, address, name of authorised person, change in name of partners, directors or Managing Director in form A-1.

These are core procedures which each assessee has to follow.

2.20.1 Periodic Returns under Central Excise

Mandatory e-filing of Central Excise Returns in ACES w.e.f. 1-10-2011 (vide CBEC Circular No.955/16/2011 - CX dt. 15-9-2011). It means all assesses are required to file returns mandatorily through e-filing, irrespective of the payment of excise duty. Penalty for delayed submission of return can extend upto ₹ 5,000 and with confiscation of the goods in respect of which the offence is committed. [Rule 27 of Central Excise Rules]

Form of return	Description	Assessee	Time Limit
ER-1	Monthly	Manufacturer	10th of the following month from the end of the relevant month.
ER-2	Monthly	EOU	10th of the following month from the end of the relevant month.
ER-3	Quarterly	SSI	10th of the following month from the end of relevant quarter w.e.f. 1.4.2010
Annexure 13B	Quarterly	First Stage Dealer (or) Second Stage Dealer	15th of the following month from the end of the relevant quarter.
ER-4	Annual Financial Information Statement (A F I)	Duty paid including CENVAT Credit ₹ 100 lakhs in the previous year.	Annually by 30th November of next year.
ER-5	Information relating to principal inputs statement	Duty paid including CENVAT Credit ₹ 100 lakhs in the previous year.	Annually by 30th April for the current year.
ER-6	monthly input and output	ER-5	10th of the following month from the end of the relevant month.
ER-7	Annual Installed Capacity Statement	by every assessee*	30th April of the succeeding Financial Year
ER-8	Quarterly	An assessee is availing the exemption under N.T. 1/2011 dt. 1-3-2011 namely paying duty @1% or 2% as the case may be and does not manufacture any other products.	10th of the following month from the end of relevant quarter. For the year end quarter 31st March.

Exempted from filing Annual Installed Capacity Statement (i.e. ER-7)

The following manufacturers are exempted from filing Annual Installed Capacity Statement, vide Notification No. 26/2009-CE-(NT), dated 18.11.2009, namely:

- biris manufactured without the aid of machines falling under tariff item 2403 10 31.
- matches manufactured without the aid of power falling under heading 3605.
- reinforced cement concrete pipes falling under heading 6810.

The Following Assessees are Exempted From E-Filing (Nt 21 & 22/2011 W.E.F. 1.10.2011:

(a) Exempted goods are cleared from the state of Uttaranchal or Himachal Pradesh
(b) Units located in the Industrial Growth Centre or
(c) Industrial development centre
(d) Industrial Infrastructure Development centre
(e) Export promotion industrial park

2.20.2 Automation of Central Excise and Service Tax (ACES)

The Central Board of Excise & Customs (CBE & C) has developed a new software application called ***Automation of Central Excise and Service Tax (ACES),*** which aims at improving tax-payer services, transparency, accountability and efficiency in indirect tax administration.

It is a centralized, web based software application which automates various processes of Central Excise and Service Tax for Assessees and Department, and gives complete end to end solution. Any Assessee can register with Department using ACES application, can file tax return, claims & intimations, track its status and get online messages.

Benefits to the Assessees

i. Reduce Physical Interface with the Department
ii. Save Time
iii. Reduce Paper Work
iv. Online Registration and Amendment of Registration Details
v. Electronic filing of all documents such as applications for registration, returns [On-line and off-line downloadable versions of ER 1, 2, 3, 4, 5, 6, Dealer Return, and ST3], claims, permissions and intimations; provisional assessment request, export-related documents, refund request
vi. System-generated e-acknowledgement
vii. Online tracking of the status of selected documents
viii. Online view facility to see selected documents
ix. Internal messaging system on business-related matters

Salient features of ACES homepage

i. ACES homepage is an interface for users/Assesses to access the Central Excise and Service Tax applications.
ii. The website also enables users to make online payment through e-payment option, download the Returns offline utilities through Download option.
iii. The website also keeps track on latest updates of the ACES application and gives links to various other sites under CBEC.

Certified Facilitation Centre (CFC)

CFC stand for Certified Facilitation Centre under ACES project of CBEC and is an e-facility, which may be set-up and operated by a Cost Accountant/Chartered Accountant/Company Secretary or a proprietary concern/firm of Cost Accountants or Chartered Accountants or Company Secretaries in

practice to whom a certificate is issued under the ACES project, where the assessees of Central Excise and Service Tax can avail this facility to file their returns and other documents electronically along with associated facilitation on payment of specified fees.

2.20.3 There are other Procedures Which are not Routine

Non-core procedures - The non-core procedures are as follows: -

(a) Export without payment of duty or under claim of rebate [Rules 18 and 19 of Central Excise Rules].

(b) Receipt of goods for repairs / reconditioning [Rule 16 of Central Excise Rules].

(c) Receipt of Goods at concessional rate of duty for manufacture of Excisable Goods.

(d) Payment of duty under Compounded Levy Scheme.

(e) Provisional Assessment [Rule 7 of Central Excise Rules].

(f) Warehousing of goods.

(g) Appeals and settlement.

2.20.4 Invoice for Removal of Final Products

Rule 11(1) of Central Excise Rules provides that excisable goods can be removed from factory or warehouse only under an 'Invoice' signed by owner or his authorised agent. In case of cigarettes, invoice shall be counter-signed by Inspector. Invoice should bear serial number and should be in triplicate. As per Rule 11(2) of Central Excise Rules, Invoice shall contain –

(a) Registration Number,

(b) Address of jurisdictional Central Excise Division,

(c) Name of consignee,

(d) Description and classification of goods,

(e) Time and date of removal,

(f) Mode of transport and vehicle registration number,

(g) Rate of duty,

(h) Quantity and Value of goods,

(i) Duty payable on the goods.

2.20.5 Export Procedures

Exports are free from taxes and duties.

i. Goods can be exported without payment of excise duty under bond under rule 19 or under claim of rebate of duty under rule 18.

ii. Excisable Goods should be exported under cover of Invoice and ARE-1 form.

iii. Merchant exporter has to execute a bond and issue CT-1 so that goods can be cleared without payment of duty. Manufacturer has to issue Letter of Undertaking.

iv. Export to Nepal/Bhutan are required to be made on payment of excise duty.

v. EOU has to issue CT-3 certificate for obtaining inputs without payment of excise duty.

Bringing goods for repairs, re-making etc.

i. Duty paid goods can be brought in factory for being re-made, refined, reconditioned or for any other reason under rule 16.

ii. The goods need not have been manufactured by assessee himself.

iii. Cenvat credit of duty paid on such goods can be taken, on basis of duty paying documents of such goods.

iv. After processing/repairs, if the process amounts to 'manufacture', excise duty based on assessable value is payable.

v. If process does not amount to manufacture, an 'amount' equal to Cenvat credit availed should be paid [rule 16(2)].

vi. If some self manufactured components are used, duty will have to be paid on such components

vii. Buyer/recipient of such goods can avail Cenvat credit of such amount/duty.

viii. If the above procedure cannot be followed, permission of Commissioner is required [rule 16(3)].

2.20.6 Receipt of Goods at Concessional Rate of Duty

Some users of excisable goods can obtain goods at nil or lower rate of duty, subject to certain conditions. In other words, the exemption is based on end use. If the buyer is entitled to obtain excisable goods at nil or concessional rate of duty, he is required to follow prescribed procedure. The provisions are contained in Central Excise (Removal of Goods at Concessional Rate for Manufacture of Excisable Goods) Rules, 2001.

Payment of Duty through Personal Ledger Account (PLA)

The Personal Ledger Account (PLA) is a running account through which the manufacturer can avail the credit the excise duty credit, pay the shortfall, if any, or carry forward the surplus if any.

In order to open a new Personal Ledger Account, the manufacturer, quoting his registration number, shall obtain the New Excise control Code Number (New ECC Number), which is a Permanent Acccount Number (PAN). Once the department adopts 'common number' for registration and accounts, separate ECC number shall not be required.

The manufacturer working under the procedure shall maintain an account current (Personal Ledger Account) in the Form specified in Annexure-8.

Each credit and debit entry should be made on separate lines and assigned a running serial number for the financial year. The PLA is credited when duty is deposited in the bank by GAR- 7 challan. The PLA is debited with the duty required to be paid on manufacture of goods on monthly basis. PLA and CENVAT credit should be used only for payment of excise duty and not other payments like fines, penalties etc.

The PLA must be prepared in triplicate by writing with indelible pencil and using double-sided carbon-original. Duplicate copies of the PLA should be detached by the manufacturers and sent to the central Excise Officer in charge along with the monthly/ quarterly periodical return in form E.R 1 or E.R 3.

2.21 EXCISE AUDIT

Goods are removed by the assessee under a system of self-removal. Returns are filed by the assessee without verification by the Excise department. Hence there is a need for audit by the Excise department to protect the interests of the government i.e. to check that there are no revenue leakages. A series of audits under the Central Excise Law is contemplated.

2.21.1 Types of Audits

Three types of audit are contemplated under Central Excise Law.

(1) Central Excise Revenue Audit (known as CERA Audit) conducted by the office of the Comptroller and Auditor General of India. (C & AG)

(2) Internal audit conducted by the Excise Department (known as Excise Audit 2000)

(3) Special audit conducted by Cost Accountant/Chartered Accountant.

(1) Central Excise Revenue Audit

The key points relating to this audit are as under:

(i) Conducted by the Comptroller and Auditor General of India (C & A G) it is called Central Excise Revenue Audit (CERA).

(ii) This is an audit of the Central Excise Department's functioning and is carried out at the office of the Central Excise Department.

(iii) This is not an audit of the assessee.

(iv) The audit focuses on ascertaining revenue leakage and is assessed on the basis of the periodical returns filed by the assessee, the execution of various bonds, and other relevant information such as cost audit reports, and income-tax audit reports of the assessee.

(v) The CERA auditor has the right to visit the office of the assessee though the audit is not of the assessee.

(vi) There is no defined frequency for the carrying out of this audit.

(vii) C & A G submits the report to the President of India, who causes these to be laid before each House of Parliament.

(2) Central Excise Audit 2000

However, effective from 1st January 2002, the Central Board of Excise and Customs (CBEC) has instructed that all audits would be conducted only under the Central Excise Audit 2000 system. This is an audit of the assessee and is conducted by the Central Excise Department officials.

Salient Features of Excise Audit 2000

(i) Selection of Assessee: The choice of the unit for audit is based on risk factors. This means that such of the assessee who have a bad track record (i.e. have duty evasion cases and major audit objections against them, past duty dues etc.) are taken up for audit as opposed to those who enjoy a clean track record.

(ii) Frequency of Audit: The frequency of audit is based on annual excise duty payment

Excise duty	Frequency	Duration of audit
< 50 lakhs	10% of units	5 days
>50 $\leq$ 100 lakhs	Once in 5 years	5 days
>100 $\leq$ 300 lakhs	Once in 2 years	7 days
> 300 lakhs	Yearly	10 days

About 25% of EOUs will be audited every year.

(iii) Preliminary or Desk Review: Desk Review is carried out by a practicing cost accountant/ chartered accountant. The following points need to be borne in mind:

(a) The entire process can be done by the Cost Accountants/Chartered Accountants without interacting with the assessee; hence it is called Desk Review.

(b) The review is carried out at the office of the Excise Department.

(c) The desk review is a part of the internal audit procedure and the services of the professionals are taken to help the department.

(d) The normal scope of work for the professional is to ascertain:

- Evasion of duty
- Under Valuation of excisable goods

- CENVAT Credit misuse
- Execution of Bonds and its misuse
- Evasion of interest, penalty, if any
- Facts produced by the assessee is in order or not and so on.

(e) This will help the Central Excise department to assess the risk of the assessee and prepare a suitable audit plan.

(f) The audit team would collect data/records required for preliminary review such as:

- all information available about the unit or assessee,
- its operations,
- reasons for selection for audit
- possible issues that can be identified at this stage
- assessee profile
- annual report, Cost audit report, Tax audit report and other Excise records.

(g) The audit should be completed in 5-7 working days.

(iv) Gathering and Documenting Assessee Information: With the help of desk review the central excise auditors would identify certain areas, which warrant closer examination. For this the Department may write to the assessee or send him a questionnaire to obtain the necessary information.

(v) Touring of the Premises: The auditor visits the factory of the assessee and to gather information about

- the production process,
- the marketing process
- the system of accounting,
- the inventory management system, and to verify
- duty payment details
- existence of physical stock
- correctness of stock records.

(vi) Evaluation of Internal Control System: Internal controls form a basis for reliability of the company's accounting records. The evaluation of internal controls is necessary for determination of the scope and extent of audit checks required for the assessee. One of the ways of evaluating internal control is to do a 'walk through' of a transaction from beginning to end. For example, to assess the reliability of internal control in respect of procurement system all the related documents and accounting records starting from indent to posting in the posting in the stores ledger of a particular item of purchase is studied carefully.

(vii) Preparation of Audit Plan: The audit plan should be documented in the working papers. It should be consistent with complexity of the unit, materiality, problems and risk factors identified up to this point and reasons for selection of the unit for audit in the first place. The draft Audit Plan should be submitted for approval of Additional or Joint Commissioner (Audit) and the audit should be undertaken only after such approval. Once the Audit Plan is approved, the auditor should stick to the audit plan in the conduct of audit.

(viii) Preparation of Audit Report: This step involves putting together all of the audit findings in one place to be placed in the audit file. Where necessary, important objections and findings must

be reviewed with the immediate supervisor before discussing them with the assessee. It is expected that the auditor should inform the assessee of all the objections before preparing a draft audit report. The assessee must have the opportunity to know the objections and to offer clarifications with supporting documents. This process will resolve potential disputes early and avoid unnecessary disputes.

(ix) Audit Follow up: After the submission of the Audit Report along with the working papers, the Superintendent in charge of the audit team should discuss the major audit points with Assistant/ Deputy Commissioner of audit.

The Audit Report should be submitted for evaluation to the Audit Monitoring Cell. This Cell, headed by the Commissioner, during its monthly meetings should review the Audit Reports for final acceptance (or non-acceptance) of the audit points. Thereafter the draft Audit Report would be finalized. The Audit cell should update the Assessee Master file based on the information available in the Audit Report.

(x) Notice: A minimum of 15 days' notice should be given to the assessee before commencing the audit.

(3) Special Audit by Cost Accountant or Chartered Accountant Special audit consists of

- Valuation Audit (Section 14A of Central Excise Act.)
- CENVAT Credit Audit (section 1 4AA of Central Excise Act.)

Duty payment is correct only when the valuation is correct. Hence valuation is critical. Valuation Audit can be ordered only with the prior approval of Chief Commissioner of Central Excise.

CENVAT credit is allowed to the manufacturers to avoid cascading effect of tax. Hence, the department would like to ensure that only the correct amount has been taken credit of. In this connection the Commissioner of Central Excise may order the CENVAT Credit Audit, if he believes that the CENVAT credit utilized is not within the normal limits.

Valuation Audit (Section 14A of Central Excise Act)

(i) Deputy Commissioner of Central Excise or Assistant Commissioner with prior approval of Chief Commissioner can order the Valuation of Assessable Value.

(ii) Audit has to be done by a qualified Cost Accountant or Chartered Accountant.

(iii) The Cost Accountant has to be nominated by the Chief Commissioner.

(iv) The maximum time limit for submission of such cost audit report is 180 days from the date of receipt of cost audit order by the manufacturer.

(v) The expenses and audit fees shall be paid by excise department to the cost auditor.

(vi) The auditor is required to find:

(a) Whether the assessable value of goods manufactured by the assessee is correct Whether classification of goods has been done correctly

(b) Wherever certification is required and whether such certification has been obtained

(c) Whether the cost of production shown in the cost sheet is in accordance with the Cost Accounting Standard 4 issued by the Institute of Cost and Works Accountants of India

Whether raw material shown in the purchase book matches with the purchase invoice

CENVAT *Credit Audit (Section 14AA of Central Excise Act)*

(i) The authority for ordering the CENVAT Credit Audit is the Commissioner of Central Excise.

(ii) Only a practicing Cost Accountant or Chartered Accountant can carry out the audit.

(iii) The Cost Accountant or Chartered Accountant has to be nominated by the Commissioner of Central Excise.

(iv) The Cost Accountant or Chartered Accountant has to submit his audit report within the time specified by the Commissioner of Central Excise.

(v) The expenses and fees for conducting the audit shall be paid by the Excise department to the Cost auditor.

Note: Finance Act 2009, amendment of Section 1 4A and 1 4AA, for the words "cost accountant,", the words "cost accountant or chartered accountant" shall be substituted.

Departmental Verification

(a) The assessee has to submit periodic returns to Superintendent of Central Excise and date stamped acknowledgement for the same should be obtained.

(b) In general the Superintendent and Inspectors of Central Excise may visit factories of the assessee to verify the records, stock taking and so on. Stock taking can be done for finished goods and CENVAT goods.

(c) Sometimes road checks are carried out by the department authorities to check whether all goods moving are accompanied by duty paying documents or not.

(d) Moreover, each Commissionerate has a preventive section to have surprise checks and raids when evasion is suspected. Directorate of Central Excise Intelligence under Central Board of Excise and Customs gathers information from various sources about the duty evasion and initiate suitable action against them.

In short, in addition to the audit, the Central Excise Department is empowered to carry out verification at ANY point in time.

Submission of Records and Books (vide NT 22/2012 C.Ex. dt. 30-3-201 2)

As per Rule 22 (3) of the Central Excise Rules, 2002, every assesse, and first stage and second stage dealer shall, on demand make available to the officer empowered by the Commissioner or the audit party deputed by the commissioner or Comptroller and Auditor General of India, or a Cost Accountant or Chartered Accountant nominated under section 1 4A or section 1 4AA of the Act,

(i) the records maintained or prepared by the assesse.

(ii) the cost audit reports, if any under section 233B of the Companies Act, 1956.

(iii) the income-tax audit report, if any under section 44AB of the Income-tax Act, 1961.

for the scrutiny of the officer or the audit party or the Cost Accountant or Chartered Accountant, as the case may be.

2.22 WAREHOUSING

2.22.1 Warehousing

Facility of warehousing of excisable goods without payment of duty has been provided in respect of the specified commodities by Notification No. 47/2002-CE(NT), dated 26th June, 2001. The Central Board of Excise and Customs has also specified detailed procedure including the conditions, limitations and safeguards for removal of excisable goods under Rule 20(2) of the Central Excise Rules, 2002 and in the Central Excise Manual, 2001.

2.22.2 Place of Registration of Warehouse

Commissioner of Central Excise will specify the places under his jurisdiction where warehouse can be registered, by issuing Trade Notice. Any person desiring to have warehouse will get himself registered under the provisions of Rule 9 of the Said Rules.

2.22.3 Failure to Receive a Warehousing Certificate

(a) The consignor should receive the duplicate copy of the warehousing certificate, duly endorsed by the consignee, within ninety days of the removal of the goods. If the warehousing certificate is not received within ninety days of the removal or such extended period as the Commissioner may allow, the consignor shall pay appropriate duty leviable on such goods.

(b) If the Superintended-in-charge of the consignor of the excisable goods does not receive the original warehousing certificate, duly endorsed by the consignee and countersigned by the Superintendent-in-charge of the consignee, within ninety days of the removal of the goods, weekly reminders must be issued by him to the Superintendent-in-charge of the consignee.

2.22.4 Warehouse to Store Goods Belonging to the Registered Person

(a) A warehouse shall be used solely for storing excisable goods belonging to the registered person of the warehouse alone. He shall not admit or retain in the warehouse any excisable goods on which duty has been paid.

(b) The Commissioner of Central Excise having jurisdiction over the warehouse may permit storage of excisable goods along with the excisable goods belonging to another manufacturer.

(c) The Commissioner of Central Excise having jurisdiction over the warehouse may permit the registered person of the warehouse to store duty paid excisable goods or duty paid imported goods along with non-duty paid excisable goods in the warehouse.

2.22.5 Export Warehousing

In pursuance of Rule 20(1) of the Central Excise Rules, the Board had issued Notification No. 46/2001-Central Excise (N.T.), dated 26th June, 2001 which has come into form on 1st July, 2001, whereby the warehousing provisions have been extended to all excisable goods specified in the First Schedule to the Central Excise Tariff Act, 1985 intended for storage in a warehouse registered at such places as may be specified by the Board and export there from.

In pursuance of the above-mentioned notification the Board has also specified by Circular N. 581/18/2001 -CX, dated 29th June, 2001 the places and class of persons to whom the provisions of the Notification No. 46/2001-Central Excise (N.T.), dated 26th June, 2001 shall apply. In the same Circular, the Board has specified the conditions (including interest), limitations, safeguards and procedures.

2.23 EXPORT BENEFITS AND PROCEDURES

2.23.1 Export Benefits and Incentives

In order to boost exports from India various incentives and benefits have been allowed *inter alia* under the Excise and Customs Law. A brief account of the same is given below:

(i) Rebate of duty on "export goods" and "material" used in manufacture of such goods : Rule 18 of the Central Excise Rules, 2002 provides for grant of rebate of duty paid on goods exported or duty paid on the material used in the manufacture of export goods, subject to such conditions, limitations and procedures as specified in the Notifications Nos. 40/2001 -CE(NT) and 41/2001-CE(NT), both dated 26-6-2001.

(ii) Export of goods without payment of excise duty under Bond: As per Rule 19, any excusable goods can be exported or inputs for manufacture of such goods can be removed without payment

of duty from the factory or warehouse or any other premises as may be approved by the Commissioner under Bond subject to the conditions safeguards and procedures notified by CBEC *vide* the Notifications Nos. 42/2001-CE(NT) to 45/2001-CE(NT), all dated 26-6-2001.

Further, to facilitate export under Bond , export warehouses have been allowed to be setup, from where goods can also be exported directly. Goods can also be cleared directly from the job workers' premises to export warehouses of even merchant exporters for export.

(iii) Cenvat credit of input excise duty provided drawback for the same is not taken : Where goods are exported under bond, the input credit taken on account of export can be utilized for paying duty on similar products cleared for home consumption. Assessee may also obtain cash refund. However, cash refund of input credit is not admissible for 'deemed exports to FTZ units and 100% EOU's.

***(iv)* Setting up of units in FTZ/EPZ/ETP and Jewellery Complexes and 100% EOU/SEZ :** All required inputs and capital goods, whether indigenous or imported, are made available to these units free of customs and excise duties under bond. For getting indigenous/imported inputs, CT-3 book-lets/ Procurement Certificate is issued to them by the Range Officer. These are customs bonded units set up under section 65 of the Customs Act, 1962 but with a much relaxed control and in accordance with the EXIM Policy for manufacture of articles for export out of India or for production or packaging or job work for export of goods or services out of India.

Inter-unit transfers for valid reasons are freely allowed among EPZ/EOU/SEZ units themselves. The warehousing licence for that would be valid for 5 years.

100% EOUs have been given the facility of sending the Customs bonded goods to such contractors in DTA for job work and EOUs/EPZ units have also been allowed to carry out job work for DTA units. Capital goods can be sent to DTA for repairs and return under the Range Superintendent's permission. All EOUs and units having an investment of ₹ 5 crores or above, in plant and machinery, have to show positive value addition only.

(v) Drawback of Customs and Central Excise Duties in respect of Inputs, both Indigenous and Imported: An All Industry Rate Schedule is laid down and published for this purpose within 3 months of presentation of each Budget. If an exporter's goods do not figure therein or if he finds the all Industry rate too low (less than four-fifths of the input duties paid by him), he can apply for fixation of brand rate(s) for his goods. Anti-dumping duty, if actually paid on inputs, can only be claimed by way of brand rate. It is a Simplified Brand Rate Fixation Scheme under which all applicant exporters can be allowed a provisional brand rate within 15 days without pre-verification of data submitted by them. Exporters should send the data duly verified by them and accompanied by original duty paying documents (bills of entry and invoices) direct to the Ministry of Finance (Revenue Department), Joint Secretary (Drawback), Jeevan Deep Building 10, Parliament Street, New Delhi – 110 001.

DTA exporters are also eligible for grant of drawback at *brand* rate only in respect of duties suffered on their inputs which are processed by EOU/EPZ units. Sanctions for brand rate are normally valid for one year but for brand rates having all Industry Rate linkage, validity is up to notification of the next AIR Schedule.

Drawback for inputs is permissible not only in case of manufacture but also for processing or other operations for export of goods.

(vi) Drawback of 98% customs duty (including anti-dumping duty): If imported goods are re-exported as such, drawback of 98% customs duty is permitted. Re-export can be through any port and to any party (not necessarily the original supplier of the goods).

(vii) Duty free Replenishment Scheme: The scheme allows duty free replenishment on post-export basis for import of inputs on the basis of input-output norms where such norms exist and on condition of uniform value addition of 33%. The duty exemption is only for basic customs duty, surcharge and

SAD. There would be no exemption for anti-dumping duty or safeguard duty or CVD. But Cenvat credit of CVD can be taken.

(viii) DEEC Scheme: For imported inputs against Advance Licence (Quantity Based only) Duty Entitlement Export Certificate has to be taken subject to bond executed with customs authorities undertaking to export stipulated quantity/value of specified finished goods. These licences are not transferable. However, imports against these licenses have been exempted from payment of all kinds of duties like basic, additional Customs duty, special customs duty, anti-dumping/ safeguard duty.

(ix) DEPB Scheme: Duty entitlement pass book scheme patterned on the credit-debit system of Central Excise CENVAT scheme was scheduled to phase out by March 31, 2002 but is being continued till VAT comes into force.

Under the scheme, exporters are granted duty credits, on the basis of pre-notified entitlement rates, which will allow them to import inputs duty free. The exporter can export any product under the DEPB Scheme provided the same is covered by the Standard Input-Output Norms. The importer has the option to forego exemption from C.V.D. and pay the C.V.D. in cash so that he or the customer can claim Cenvat credit. Goods in the Negative List of EXIM Policy cannot be exported.

Pass Book credit can also be used for paying duty on (1) SIL imports, and (2) imports under other schemes like EPCG Scheme or Project Imports, thereby availing the exemption from Special Additional Duty. In case the imported goods are eligible for another partial exemption from payment of duty, such exemption would also be applicable to goods imported against a DEPB scrip. In the case of composite items, the lowest rates applicable to their constituents would be allowable.

Verification of present market value of the export product is assigned to SIIB Branch of Customs house to be completed in 30 days.

(x) Imports for repair, jobbing, etc. free of duties (both basic and additional) : Such imports are made subject to bond for their re-export with 10% value addition. No CCP is required now. Jobbing operations would be carried out in accordance with the Customs (Import of Capital Goods at Concessional Rate for Manufacture of Excisable Goods) Rules, 1996 and not in Customs Bond under section 65. Such export should be completed within 6 months.

(xi) Import of capital goods at 5% concessional rate under EPCG Scheme: Such imports are subject to export obligation and are applicable to all sectors and to all capital goods without any threshold limit. No payment of additional Customs duty (e.v.d.) and special additional duty (SAD) applies. The scheme has also been extended to identified service sectors. The export obligation is to be completed in eight years. However, for the following categories, export obligation period will be 12 years :

1. EPCG licenses of ₹ 100 crores or more;
2. Units in agri-export zones; and
3. Companies under the revival plan of the BIFR.

Further, supplies under deemed exports are eligible to counting for discharge of export obligation.

(xii) Duty Free Entitlement Credit Certificate to Status holders: Who show incremental growth of more than 25% in exports, such certificate would be equal to 10% of the incremental growth achieved during 2002-2003 subject to a maximum turnover of ₹ 25 crores. Imports under it would be exempt from basic customs duty, CVD and SAD. Actual user condition would apply to certificate and the goods imported thereunder [Notificatio No. 53/2003-Cus]

(xiii) Duty Free Entitlement Credit Certificate to Service Providers: It would be equal to 10% (5% in the case of hotels) of average forex earnings of the preceding three years subject to a maximum

earning of ₹ 10 lakhs. Extent of exemption and all conditions shall be same as in case of status holders. Service providers should register themselves with FIEO. [Notification No. 54/2003-Cus]

(xiv) Special Economic Zones: By new notifications 22, 23,24, 25/2003-CE & 51 -52/2003-Cus. Special incentives have been provided for the special economic zones set up on Chinese model at Mumbai, Kandla, Cochin and other locations by converting the existing EPZs into SEZ, which would be treated as under outside territory of India.

2.23.2 Export Without Payment of Duty

The Rule 19 of the Central excise Rules, 2002, which corresponds to Rule 13 of the Central excise Rules. 1944 provides that:

i. Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

ii. Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

iii. The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

Categories of Exports

There are two categories of export without payment of duty –

(i) Export of finished goods without payment of duty under bond or undertaking.

(ii) Export of manufactured/processed goods after procuring raw material without payment of duty under bond.

Simplified Export Procedure For Exempted Units

Units, which are fully exempted from payment of duty by a notification granting exemption based on value of clearances for home consumption, may be exempted from filing ARE. 1 and Bond till they remain within the full exemption limit. The following simplified export procedure, as detailed out in the Central Excise Manual, 2001, shall be followed in this regard by such units:

Filing of Declaration

Manufacturers exempted for payment of duty will not be required to take Central Excise Registration. They shall however, file a declaration in terms of Para 2 of Notification No. 36/2001-CE(NT), dated 26-6-2001, and obtain declarant code number [notwithstanding they are exempted from declaration], but for this procedure.

Documentation

The clearance document will be as follows:

(i) Such manufacturers are permitted to use invoices or other similar documents bearing printed Serial Numbers beginning from 1st day of a financial year for the purpose of clearances for home consumption as well as for exports. (The printing of Serial Numbers can be done by use of franking machine). The invoices meant for use during a month shall be pre-authenticated by the owner or partner or Director/ Managing Director of a Company or other authorized person.

(ii) The declarant's Code Number should be mentioned on all clearance documents.

(iii) Such declarant's document should contain particulars of the description of goods, name and address of the buyer, destination, value, [progressive total of total value of excisable goods cleared for home consumption since beginning of the financial year], vehicle number, date and time of the removal of the goods.

(iv) The clearance document will be signed by the manufacturer or his authorized agent at the time of clearance.

(v) In case of export through merchant exporters, the manufacturer will also mention on the top "EXPORT THROUGH MERCHANT EXPORTERS" and will mention the Export-Import Code No. of such merchant exporters.

(vi) In case of direct export by the manufacturer-exporters, he will mention on the top "FOR EXPORT" and his own Export-Import Code No., if any.

2.24 EXCISE ON SMALL SCALE INDUSTRIES

2.24.1 Small Scale Industries

The contribution of Small Scale Sector in the industrial growth of the Indian economy and to the Gross Domestic Product is significant, besides the potential for employment generation. Keeping this into consideration, special provisions of Central Excise are applicable to small-scale units.

2.24.2 Exemption to SSI

- SSI are eligible for exemption from duty under Notification No. 8/2003-CE dated 1-3- 2003. The SSI unit need not be registered with any authority.
- Broadly, items generally manufactured by SSI (except in tobacco, matches and textile sector) are eligible for SSI exemption. Some items like pan masala, matches, watches, tobacco products, Power driven pumps for water not confirming to BIS, products covered under compounded levy scheme etc. are specifically excluded, even when these can be manufactured by SSI. Some items like automobiles, primary iron and steel etc. are not eligible for SSI exemption, but anyway, these are beyond capacity of SSI unit to manufacture.
- Unit whose turnover was less than or equal to ₹ 4 crores in previous year are entitled to full exemption upto ₹ 150 lakhs in current financial year.
- SSI units manufacturing goods with brand name of others are not eligible for exemption, unless the goods are manufactured in rural area.
- Turnover of all units belonging to a manufacturer will be clubbed for calculating SSI exemption limit.
- Clubbing is also possible if two units are sham or bogus or if there is unity of interest and practically they are one. While calculating limit of ₹ 400/150 lakhs -
- Turnover of Exports, deemed exports, turnover of non-excisable goods, goods manufactured with other's brand name and cleared on full payment of duty, job work done under notification No. 214/86-CE, 83/94-CE and 84/94-CE, processing not amounting to manufacture, strips of plastics used within factory is to be excluded.
- Value of intermediate products (when final product is exempt under notification other than SSI exemption notification), branded goods manufactured in rural area and cleared without payment of duty, export to Nepal and Bhutan and goods cleared on payment of duty is to be included.
- Value of turnover of goods exempted under notification (other than SSI exemption notification or job work exemption notification) is to be included for purpose of limit of ₹ 400 lakhs, but excluded for limit of ₹ 150 lakhs.

Distinction between mode of calculations of ₹ (150/ 400) lakhs

Generally, provisions for calculation of turnover for ₹150 lakhs and ₹400 lakhs are similar. Major distinction is that if goods are exempt under a notification other than SSI exemption notification or job

work exemption notification, that turnover is included for calculating ₹ 400 lakhs limit but *not* for ₹ 150 lakhs limit. If final product is exempt under job work exemption notification, it is not to be considered either for ₹ 150 lakhs or for ₹ 400 lakhs.

Clearances of goods exempted under any other notification to be excluded for ₹150 lakhs but includible for ₹ 400 lakhs - Some goods may be exempt under some other notification, i.e. other than SSI exemption notification. In some cases, duty may not be payable on such goods for some other reason. Turnover of such goods is not to be considered for calculating exemption limit of ₹ 150 lakhs. *However, this turnover (except clearances to EOU, SEZ, STP, EHTP, UN etc. and job work under notifications 214/86-CE, 83/94-CE and 84/94-CE) will have to be considered for calculating exemption limit of ₹ 400 lakhs.*

If some intermediate product gets produced during manufacture of exempted final product, its turnover will be held as includible for calculating exemption limit of ₹ 150 lakhs, if such intermediate product is dutiable.

Example 51: A Ltd. is having a manufacturing unit at Faridabad. In the financial year 2012-13 the value of total clearances from the unit was ₹ 750 lakhs as per the following details: (i) Exports to USA - ₹ 100 lakhs; to Nepal - ₹ 50 lakhs (ii) Clearances to a 100% export oriented unit - ₹ 75 lakhs (iii) Clearances as loan licensee of goods carrying the brand name of another upon full payment of duty - ₹ 200 lakhs (iv) Clearances exempted *vide* Notification No. 214/86-C.E. dated 25-3-86 - ₹ 125 lakhs. (v) Balance clearances of goods in the normal course: ₹ 200 lakhs. You are required to state with reasons whether the unit is entitled to the benefit of exemption under Notification No.8 /2003-C.E.dated 1-3-2003 as amended for the financial year 2009-10.

Answer:

Following is includible for calculating limit of ₹ 400 lakhs : (i) Exports to Nepal - ₹ 50 lakhs (ii) Normal clearances ₹ 200 lakhs. Total ₹ 250 lakhs. Since the turnover is less than ₹ 400 lakhs, A Ltd. is entitled to SSI concession in 2013-14.

Example 52: Z Associates is a Small Scale unit located in a rural area and is availing the benefit of Small Scale exemption under Notification No. 8/2003-C.E. in the year 2013-14. Determine the value of the first clearance and duty liability on the basis of data given below: (i) Total value of clearances of goods with own brand name - ₹ 75,00,000, (ii) Total value of clearances of goods with brand name of other parties - ₹ 90,00,000, (iii) Clearances of goods which are totally exempt under another notification (other than an exemption based on quantity or value of clearances) ₹ 35,00,000.

Normal rate of Excise duty @12%. Education cess @ 3% of Excise duty. Calculations should be supported with appropriate notes. It may be assumed that the unit is eligible for exemption under Notification No. 8/2003.

Answer:

While calculating SSI exemption limit of ₹ 150 lakhs, goods cleared under brand name in rural area are to be included, since goods manufactured in rural area with brand name of others are entitled for SSI exemption. However, goods which are exempted from duty under notification other than exemption based on quantity or value of clearances is not required to be considered. Thus, for purpose of SSI exemption, his value of turnover is ₹ 165 lakhs. His first turnover of ₹ 150 lakhs is exempt. Thus, he is liable to pay excise duty on ₹ 15 lakhs.

Hence, Excise duty @ 12.36% is ₹ 1,85,400.

Example 53: S & Co., a small scale unit, had cleared goods of the value of ₹ 750 lakhs during the financial year 2012-13. Records show that the following clearances were included in the total turnover of ₹ 750 lakhs : (i) Total exports during the year - ₹ 200 lakhs (30% of total exports were to Nepal), (ii) Job-work in terms of Notification No. 214/86 - ₹ 50 lakhs, (iii) Job-work in terms of Notification No.83 /94-E - 50 lakhs, (iv) Clearances of excisable goods without payment of duty to a 100% E.O.U. ₹ 20 lakhs, (v) Goods manufactured in rural area with others brand - ₹ 100 lakhs. Find out whether the unit is eligible to avail concession for the year 2013-14, under Notification No. 8/2003-CE dated 1st March, 2003, giving reasons for your answer.

Answer:

Turnover not to be considered for ₹ 400 lakhs - (i) ₹ 140 lakhs, (ii) ₹ 50 lakhs, (iii) ₹ 50 lakhs, (iv) ₹ 20 lakhs. Excluding this turnover, his turnover during 2012-13 was ₹ 490 lakhs. Since it is more than ₹ 400 lakhs, he is not eligible for SSI exemption in 2013-14.

Example 54: The clearances of Dreams Ltd. were ₹ 400 lakh during the financial year 2013-14. The following are included in the said clearances: (i) Exports to Nepal and Bhutan - ₹ 120,00,000, (ii) Exports to countries other than Nepal and Bhutan - ₹ 1,00,00,000 (iii) Job work exempted from duty under Notification No. 214/86 - ₹ 90,00,000, (iv) Sales to 100% EOU against Form CT-3 - ₹ 50,00,000. The company is of the view that it is not liable to pay any duty on its clearances in the financial year 2013-14 as per Notification No. 8/2003 dated 1st March, 2003. Do you agree with the company? Give reasons for your answer.

Answer:

SSI exemption is available upto first clearances of ₹ 150 lakhs. While calculating limit of ₹ 150 lakhs, exports to countries other than Nepal and Bhutan, job work under notification No. 214/86-CE and supplies to EOU (deemed exports) are not required to be considered. However, supplies to Nepal and Bhutan are required to be considered. If these are excluded, the turnover of the assessee for purpose of calculation of limit of ₹ 150 lakhs is ₹ 160 lakhs [(= ₹400 – ₹100 – ₹ 90 – ₹50) lakhs]. Thus, the assessee can avail exemption of ₹ 150 lakhs and will have to pay duty on ₹ 10 lakhs.

Example 55: A Small Scale Unit (SSI) has effected clearances of goods of the value of ₹ 460 lakhs during the financial year 2012-13. The said clearances include the following: (i) Clearance of excisable goods without payment of Excise duty to a 100% EOU unit - ₹ 40 lakhs. (ii) Export to Nepal and Bhutan - ₹ 50 lakhs, (iii) Job-work in terms of Notification No. 214/86 C.E., which is exempt from duty - ₹ 60 lakhs. (iv) Goods manufactured in rural area with the brand name of others - ₹ 70 lakhs. Write a brief note with reference to the Notifications governing SSI under the Central Excise Act whether the benefit of exemption would be available to the unit for the financial year 2013-14.

Answer:

Turnover in respect of sale to EOU (₹ 40 lakhs) and job work under notification No. 214/86-CE (₹ 60 lakhs) is required to be excluded for purpose of SSI exemption limit of ₹ 400 lakhs. Turnover of SSI excluding these sales is ₹ 360 lakhs (₹460-₹40-₹60 lakhs). Hence, the SSI unit will be entitled to exemption in 2013-14 upto first turnover of ₹ 150 lakhs.

Example 56: A SSI unit has effected clearances of goods of the value of ₹ 475 lacs during the Financial Year 2012-13. The said clearances include the following: (i) Clearance of excisable goods without payment of excise duty to a 100% EOU unit ₹ 120 lacs, (ii) Job work in terms of notification no. 214/86 CE, which is exempt from duty - ₹ 75 lacs, (iii) Export to Nepal and Bhutan - ₹ 50 lacs, (iv) Goods manufactured in rural area with the brand name of the others ₹ 90 lacs. Examine with reference to the notification governing SSI, under the Central Excise Act whether the benefit of exemption would be available to the unit for the Financial Year, 2013-14.

Answer:

While calculating the turnover of ₹ 400 lakhs, following are not required to be considered -

(a) Deemed exports i.e. supplies to 100% EOU (₹ 120 lakhs);

(b) Job work that amounts to 'manufacture' done under notifications No. 214/86-CE, 83/ 94-CE and 84/94-CE (₹ 75 lakhs).

Turnover in respect of sale to EOU (₹ 120 lakhs) and job work under notification No. 214/86-CE (₹ 75 lakhs) is required to be excluded for purpose of SSI exemption limit of ₹ 400 lakhs. Turnover of SSI excluding these sales is ₹ 280 lakhs (₹475-₹120-₹75 lakhs). Hence, the SSI unit will be entitled to exemption in 2013-14 upto first turnovers of ₹ 150 lakhs.

2.24.3 Goods not Eligible for SSI Concession

Many of goods manufactured by SSI are eligible for the concession. However, some items are not eligible (some of the items not eligible for SSI exemption are eligible for exemption under different notifications. Some are not exempt at all). Thus, SSI exemption is available only if the item is covered in this notification.

Broadly, items generally manufactured by SSI (except in tobacco, matches and textile sector) are eligible for SSI exemption. Some items like pan masala, matches, watches, tobacco products, Power driven pumps for water not confirming to BIS, products covered under compounded levy scheme etc. are specifically excluded, even when these can be manufactured by SSI. Some items like automobiles, primary iron and steel etc. are not eligible for SSI exemption, but anyway, these are beyond capacity of SSI unit to manufacture.

Goods with other's brand name not eligible, but packing material with other's brand name eligible- Goods manufactured by an SSI unit with brand name of others are not eligible for SSI concession, unless goods are manufactured in a rural area. However, SSI exemption will be available to all packing materials meant for use as packing material by or on behalf of the person whose brand name they bear.

2.24.4 Other Provisions in respect of Concession to SSI

Other provisions for concession to SSI are as follows.

'Value' for calculating SSI exemption limit

Value for purpose of calculating the SSI exemption limit of ₹ 150 and ₹ 400 lakhs is the '*Assessable Value'* as per section 4, i.e. transaction value.

However, when goods are assessed on basis of MRP (Maximum Retail Price), the 'value' will be as determined under section 4A.

SSI exemption available in respect of goods exported to Nepal & Bhutan.

The SSI exemption is available for home consumption, i.e. for consumption within India. However, explanations to SSI exemption notifications make it clear that clearances for home consumption shall also include clearances for export to Bhutan & Nepal. Thus, exports to Nepal & Bhutan will qualify for SSI exemption, whether the Indian exporter receives payment in Indian Rupees or foreign exchange.

Question 57: Small and company a small scale industry provides the following details. Determine the eligibility for exemption based on value of clearances for the Financial year 2013-14 in terms of Notfn. No. 8/2003-CE dated 1.3.2003 as: (I) Total value of clearances during the financial Year 2012-13 (including VAT ₹ 50 lakhs) ₹ 870 lakhs, (II) Total exports (including for Nepal and Bhutan ₹ 200 lakhs) ₹ 500 lakhs, (III) Clearances of excisable goods without payment of duty to a Unit in software technology park ₹ 20 lakhs, (IV) Job work under Notfn.No.84/94-CE dated 11.4.1994 ₹ 50 lakhs. Job work under Notfn. No.21 4/86-CE dated 25.3.1986 ₹ 50 lakhs (v) Clearances of excisable goods bearing brand name of Khadi and Village Industries board ₹ 200 lakhs. Make suitable assumptions and provide brief reasons for your answers where necessary.

Answer:

	₹ in Lakhs
Total turnover	870.00
Less: Value of clearances including VAT	50.00
Total Exports excluding Nepal & Bhutan (500-200)	300.00
Clearance for STP jobs	20.00
Clearance for job work	100.00
Turnover (for calculating limit of crores)	400.00

Goods bearing brand name of Khadi and Village Board are eligible for SSI exemption. Hence, its turnover cannot be excluded for calculating limit of ₹ 4 crores.

Thus, his turnover for purpose of SSI exemption limit is 400 lakhs. The requirement is that turnover should not exceed ₹ 400 lakhs.

Since it is not exceeding ₹ 400 lakhs, the company will be entitled to avail exemption upto first ₹ 150 lakhs in financial year 2013-14.

Question 58: M/s Punctual Ltd., (manufacturing watches) has cleared goods of the value of ₹ 120 lakhs during the financial year 2013-14 exclusive of duties and taxes. The goods attract 12% *ad valorem* Excise Duty plus Education cess as applicable. Determine the Excise Duty liability when the assessee opts for CENVAT facility and also in the case when the assessee decides not to avail CENVAT benefit. The turnover of the assessee in the previous year 2012-13 was ₹ 100 lakhs.

Answer:

Watches are not eligible for SSI exemption. Hence, the assessee has to pay excise duty on entire turnover of ₹ 120 lakhs @ 12% plus education cess. Thus, total duty payable is ₹ 14.832 lakh.

Question 59: Mahesh Ltd., which is engaged in manufacturing of excisable goods, started its business on 1st June, 2013. It availed SSI exemption during the financial year 2012-13. The following are the details available to you:

(i) 12,500 Kg of inputs purchased @ ₹1,190.64 per Kg (Inclusive of Central excise duty @8.24%) ₹ 1,48,83,000;

(ii) Capital goods purchased on 31.5.2012 (Inclusive of Excise duty @14.42%) ₹ 80,09,400;

(iii) Finished goods sold (at uniform transaction value throughout the year)₹ 3,00,00,000.

You are required to calculate the amount of excise duty payable by M/s Mahesh Ltd. in cash, if any, during the year 2013-14. Rate of duty on finished goods sold may be taken @12.36% for the year and you may assume the selling price exclusive of central excise duty.

There is neither any processing loss nor any inventory of input and output.

Answer:

Statement showing Excise duty liability of M/s Mahesh Ltd for the financial year 2012-13

Particulars	**Value (₹)**	**Cenvat credit (₹)**
Cost of Purchases [i.e. ₹ 1,48,83,000 × 100/108.24]	1,37,50,000	11,33,000
Cost of Capital goods [i.e. ₹ 80,09,400 × 100/114.42] CENVAT credit on capital goods ₹ 10,09,400 (i.e. ₹ 80,09,400 - ₹ 70,00,000)	70,00,000	10,09,400
Total CENVAT credit		21,42,400
Value of Finished goods	3,00,00,000	
Less: Exemption limit	1,50,00,000	
Value of Finished goods attract excise duty	1,50,00,000	
Excise duty @10.30% on ₹ 1,50,00,000	18,54,000	
Less: CENVAT credit (Note 1)		
— on input goods (note 1)	(5,66,500)	
— on capital goods	(10,09,400)	
Net Excess Excise Duty C/F	2,78,100	

Working Note:

(i) Output value = ₹ 3,00,00,000
Input value = ₹ 1,50,00,000

Eligible Cenvat credit on input goods used for manufacture of finished goods beyond ₹ 150 lakhs is ₹ 5,66,500 (i.e. 11,33,000 × ₹ 150 : ₹ 300).

(ii) For SSI unit, Excise duty is nil, upto ₹ 1,50,00,000 of Finished Goods.

(iii) **Rule 2(a) of the CENVAT Credit Rules, 2004**

CENVAT credit on Capital Goods allowed upto 100% in the year of receipt of such goods for SSI units (w.e.f. 01.04.2010).

Question 60: An SSI unit (manufacturing goods eligible for benefits of SSI exemption notification) has cleared goods of the value of ₹ 60 lakhs during the financial year 2013-14. The effective rate of Central Excise Duty on the goods manufactured by it is 12% Ad valorem. Education cesses are payable at applicable rates. What is the correct amount of duty which the unit should have paid on the above clearances for 2013-14?

Answer:

(a) If unit intends to avail Cenvat credit on inputs, duty payable is normal duty i.e. 12% of ₹ 60 lakhs, i.e. ₹ 7,20,000, plus education cess of ₹ 14,400 (2% of ₹ 7.20 lakhs), plus SAH education cess of ₹ 7,200 (1% of ₹ 7.20 lakhs). (b) If unit does not intend to avail Cenvat credit on inputs, duty payable is Nil.

Question 61: The value of excisable goods viz. Iron and Steel articles manufactured by M/s. Alpha Ltd. was ₹ 120 lakhs during the financial year 2013-14, net of taxes and duties. The goods attract 12% *ad-valorem* basic duty plus education cess of 2% plus SAH education cess as applicable. Determine the excise duty liability when the assessee opts for 'CENVAT' and opts for not to avail 'CENVAT' under SSI exemption notification respectively.

Answer:

M/s Alpha Ltd has no option to opt for SSI exemption benefit since Iron and Steel are ineligible industries for availing the said benefit.

Hence, the duty liability can be calculated is as follows:

Basic excise duty	=	₹ 120 Lakhs × 12%	=	₹ 14.40 Lakhs
Education cess	=	₹ 14.40 Lakhs × 2%	=	₹ 0.288 Lakhs
SAH education cess	=	₹ 14.40 Lakhs × 1%	=	₹ 0.144 Lakhs

Therefore the total excise duty payable is ₹ 14.832 Lakhs

Question 62: A small scale manufacturer had achieved sales of ₹ 86 lakhs in 2012-13. Turnover achieved during 2013-14 was ₹ 1.52 crores. Normal duty payable on the product is 12% plus education cesses as applicable. Find the total excise duty paid by the manufacturer during 2013-14 (a) If the unit has availed Cenvat credit, (b) If the unit has not availed Cenvat credit. [The turnover is without taxes and duties].

Answer:

(a) If the unit has availed Cenvat credit, it has to pay full duty on entire turnover. Hence, duty payable is 12% of ₹ 1.52 crores i.e. ₹ 18.24 lakhs, plus education Cess @ 2% of ₹ 18.24 lakhs i.e. ₹ 36,480, plus SAH education Cess @ 1% of ₹ 18.24 lakhs i.e. ₹ 18,240. Total - ₹ 18,78,720.

(b) If the SSI unit has not availed Cenvat, the duty payable is as follows: (i) On first ₹ 150 lakhs : Nil (ii) On subsequent sales - Normal duty of 12% plus Education cess as applicable. Thus, duty on remaining ₹ 2 lakhs will be ₹ 24,000. Thus, excise duty paid is ₹ 24,000, plus education Cess of ₹ 480 plus SAH Education Cess of ₹ 240.
∴ Total - ₹ 24,720.

Question 63: Z Ltd. is a small-scale industrial unit manufacturing a product X. The Annual report for the year 2013-14 of the unit shows a gross sale turnover of ₹ 1,91,40,000, which includes excise duty and sales tax. The product attracted an excise duty rate of 12% as BED, education cess @ 2% of excise duty and Sales Tax 10%. Determine the duty liability under Notification No. 8/2003-CE, if SSI unit had availed SSI exemption and then paid duty. On the other hand, if SSI had availed Cenvat Credit on all its inputs, what would be the excise duty liability? (Ignore SAH education Cess).

Answer:

Duty liability of Z Ltd. in each case is as follows -

(a) In respect of first net turnover of ₹ 150 lakhs (₹ 1,50,00,000), excise duty is Nil and education cess is also Nil. Sales tax @ 10% is payable on net turnover on ₹ 1,50,00,000. Hence, sales tax @ 10% is ₹ 15,00,000. Thus, gross sale turnover in respect of first net turnover of ₹ 150 lakhs (where excise duty is not paid) is ₹ 1,65,00,000.

Therefore, balance gross sale turnover is ₹ 26,40,000 (₹1,91,40,000 - ₹1,65,00,000). This includes excise duty at 12%, Education Cess @ 2% of duty, SAH Education Cess @ 1% and sales tax @ 10%.

Excise Duty = [(₹26,40,000 × 100/110) × 12.36/112.36] = ₹ 2,64,008

Sales Tax = ₹26,40,000 × 10/110 = 2,40,000

(b) If SSI unit intends to avail Cenvat credit on all its inputs, it has to pay full 12.36% duty on its entire turnover is as follows:

Excise duty = [(₹1,91,40,000 x 100/110) x 12.36/112.36] = ₹ 19,14,062

Sales tax = ₹1,91,40,000 x 10/110 = ₹ 17,40,000.

Example 64: A small scale manufacturer produces a product ' P'. Some of the production bears his own brand name, while some productions bears brand name of his customer. The customer purchases the goods from the small scale unit and sales himself by adding 20% margin over his purchase cost ₹ 3,53,00,000. He achieved clearances SSI unit in 2012-13 was ₹ 445 lakhs. In 2013-14 as per following break up [These clearances are without considering excise duty and sales tax] are

(i) Clearances with his own brand name - ₹80 lakhs, (ii) Clearances of product bearing his customer's brand name - ₹ 365 lakhs. Normal excise duty of his product is 12% plus education cesses as applicable. The SSI unit intends to avail Cenvat benefit on inputs on goods supplied to the brand name owner but intends to avail SSI exemption on his own clearances.

(A) Find the total duty paid by the manufacturer in 2013-14, if(i) Inputs are common but SSI unit is able to maintain separate records of inputs in respect of final products under his brand name and those with other's brand name (ii) The inputs are common and SSI unit is not able to maintain separate records on inputs used in final products manufactured under his brand name and with other's brand name.

(B) What will be the rate of excise duty payable by him in April 2013 (i) on product bearing his own brand name *and* (ii) on product bearing his customer's brand name.

(C) Will there be any difference in duty payable in April 2013 if all his clearances of ₹ 445 lakhs in 2012-13 were of product under his own brand name?

Answer :

(A) SSI unit can avail Cenvat on final products cleared under other's brand name and avail SSI exemption in respect of his own production.

(i) In the first case, he has to pay duty @ 12% on ₹ 365 lakhs, i.e. ₹ 43.80 lakhs plus education cess of ₹ 87,600 plus SAH Education Cess of ₹ 43,800. He cannot avail Cenvat credit in respect of inputs used to manufacture product under his own brand name.

(ii) In the second case, since he is unable to maintain separate record of inputs, he will have to pay 6% on ₹ 80 lakhs as per rule 6(3) (i) of Cenvat Credit Rules. Thus, he has to pay duty of ₹ 43.80 lakhs, plus education cess of ₹ 87,600 plus SAH education cess of ₹ 43,800, plus an

'amount' of ₹ 4.80 lakhs. He can avail Cenvat on all the inputs. — Note that in respect of goods bearing customer's brand name, duty is payable on his selling price to the customer even if customer sells them subsequently at higher price.

The assessee has to carefully do his costing and decide (i) whether to avail Cenvat on all inputs, pay full duty on all final products and 6% on final products cleared under his own brand name or (ii) Not avail Cenvat at all and avail exemption from duty on his own production with his brand name.

(B) The turnover of SSI during 2012-13 was not exceeds ₹ 4 crores. However, for purposes of calculating the upper limit of ₹ 4 crores, clearances with other's brand name are not to be considered. Hence, from 1st April 2013, he can clear goods bearing his own brand name upto ₹ 150 lakhs without payment of duty, if he does not avail Cenvat credit on inputs used in such products. If he is unable to maintain separate records, he will have to pay 6% 'amount' on goods manufactured under his own brand name.

(C) If total turnover of ₹ 4.45 crores in 2012-13 was under his own brand name, the manufacturer is not eligible for any Small industry concession in April 2013, and he will have to pay duty at normal rates on his total clearances in April 2013.

Example 65: The value of clearances from four units of M/s X Ltd. during 2012-13 are as follows:—

Units situated at	Value of clearances (₹ in lakh)
Guwahati	120
Patna	100
Delhi	130
Chennai	170

M/s X Ltd. seeks your advice as a consultant whether benefit under Notification No. 8/2003 shall be available to M/s X Ltd. during 2013-14. You are required to indicate your advice in this context.

Answer:

In the given case M/s X Ltd. total turnover for the year 2012-13 is ₹ 520 Lakh (i.e. ₹ 120 + ₹100 + ₹130 + ₹170). Hence, the benefit of exemption Notification No. 8/2003 shall not be available to M/s X Ltd. in the current year 2013-14.

Example 66: Determine the amount CENVAT Credit available to M/s Y Ltd. in respect of following items procured by them in the month of October 2013:

(I) If the aggregate value of clearances of M/s Y Ltd. for the financial year 2012-13 is ₹ 450 lakhs;

(ii) If the aggregate value of clearances of M/s Y Ltd. for the financial year 2012-13 is ₹ 350 lakhs and in the current year opted to claim the benefit of the SSI exemption from payment of duty.

Items	Excise duty paid (inclusive of Education cess and SAH Ed. Cess) (₹)
Raw materials	52,000
Capital goods used for generation of electricity for captive use within the factory	1,00,000
Motor spirit	40,000
Inputs used for construction of a building	1,00,000
Dairy and bakery products consumed by the employees	5,000
Motor vehicle (not capital goods)	4,50,000

Note: Aggregate clearance of dutiable goods for the month of October 2012 is ₹ 180 lakhs.

Answer:

Statement showing CENVAT Credit allowed or not allowed:

Items	Excise duty paid (inclusive of Education cess and SAH Ed. Cess) (₹)	Remarks
Raw materials	52,000	100% CENVAT Credit allowed
Capital goods used for generation of electricity for captive use within the factory	1,00,000	For SSI Units 100% CENVAT Credit allowed. For other than SSI Units upto 50% in the 1st year of receipt of capital goods and balance in subsequent year's
Motor spirit	Nil	CENVAT Credit not allowed
Inputs used for construction of a building	Nil	CENVAT Credit not allowed
Dairy and bakery products consumed by the employees	Nil	CENVAT Credit not allowed
Motor vehicle	Nil	CENVAT Credit not allowed

Statement showing CENVAT Credit allowed amount:

Despcriptoin	CENVAT Credit eligible for the month of October, 2012 (₹)	
(i) The aggregate value of clearances of M/s Y Ltd. for the financial year 2012-13 is ₹ 450 lakhs.	1,02,000 (i.e. 52,000 + [1,00,000 × 50%])	
(vi) The aggregate value of clearances of M/s Y Ltd. for the financial year 2012-13 is ₹ 350 lakhs.	CENVAT Credit on input goods (i.e. ₹52,000 x 30 lakhs/1 80 lakhs)	8,667
	CENVAT Cenvat on Capital goods	1,00,000
	Therefore, total CENVAT Cenvat	1,08,667

Example 67: XYZ & Co., a SSI unit manufactures different products and the value of the clearances for the financial year 2012-13 is given below:

(₹ lakhs)

Products		A1	A2	A3
(i)	Clearance for home consumption	55	40	60
(ii)	Captive consumption in the manufacture of excisable goods	100	80	60
(iii)	Export to U.S.A.	90	80	Nil
(iv)	Export to Nepal	50	40	39
(v)	Job work done under Notification 214/86-C.E.	55	30	60
(vi)	Goods manufactured in rural area with brand name of others	45	35	35

the unit seeks your advice as to whether they are eligible for SSI unit exemption for the year 2013-14. Explain the basis for your conclusions.

Answer:

Statement showing aggregate clearance in the financial year 2012-13 (₹ in lakhs)

S. No.	Particulars	Product A1	Product A2	Product A3	Total	Remarks
(i)	Clearance for home consumption	55	40	60	155	
(ii)	Captive consumption in the manufacture of excisable goods	-	-	-	-	This turnover not addable, since it is forming part of finished goods
(iii)	Export to U.S.A.	-	-	-	-	Export turnover excluded
(iv)	Export to Nepal	50	40	39	129	Not considered as export turnover.
(v)	Job work done under Notification 21 4/86- C.E.	-	-	-	-	Not addable, because it is exempted from duty in the hands of jobworker
(vi)	Goods manufactured in rural area with brand name of others	45	35	35	115	
	Total	**150**	**115**	**134**	**399**	

Note: Option to claim SSI exemption benefit is applicable only when the previous year turnover is <₹ 400 lakhs.

For current year 2013-14 XYZ & Co. is eligible to avail the SSI exemption since, during the previous year the aggregate clearance is ₹ 399 lakhs.

2.25 DEMANDS AND PENALTIES

2.25.1 Demands of Excise Duty

- If duty is short paid or not paid or erroneously refunded, show cause notice can be issued u/s 11 A(1) of CEA within one year from 'relevant date'.
- In case of allegation of suppression of facts, willful misstatement, fraud or collusion, the show cause notice can be issued within five years.
- Show cause notice is to be issued by authority who is empowered to adjudicate the case.
- Adjudicating authority is required to follow principles of natural justice. He has to pass orders with reasons
- In case of delay in payment of duty, interest @ 13% is payable u/s 11AB(1) of CEA.
- Property of person to whom show cause notice has been issued can be attached provisionally during adjudication, to protect interest of revenue.

2.25.2 Adjudication Powers:

Authority	Remission of duty (upto ₹)	Demand of Duty (upto ₹)
The Superintendent	10,000	1,00,000
The Deputy/Assistant Commissioner	1,00,000	5,00,000
The Joint/Additional Commissioner	5,00,000	50,00,000
Commissioner	without any upper limit	without any upper limit

Note :

1. Demand of duty or differential duty may be relating to * determination of valuation and / or classification or * Cenvat credit cases or * duty short paid or not paid or erroneously refunded for any reason. Such demand may or may not contain for allegation of fraud, suppression of facts etc. (in other words, whether or not there is allegation of fraud/suppression of facts etc., the monetary limit of adjudication remains same.
2. As per CBE&C circular No. 809/6/2005-CX dated 1-3-2005, in case of refund claim, AC/ DC can pass order without any monetary limit. However, claims of ₹ 5 lakhs and above will be subject to pre-audit at level of jurisdictional Commissioner
3. It has been clarified that value of goods/conveyance, plants, machinery, land, building etc. liable to confiscation will not alter the powers of adjudication as the powers solely depend upon the amount of duty/Cenvat credit involved on the offending goods.

   Who can issue show cause notice - Show cause notice should be approved and signed by officer empowered to adjudicate the case.

2.26 APPEALS

Excise and Customs Law empower excise/customs officers to pass adjudication orders demanding duty and interest and imposing penalty and confiscation of goods.

Excise and Customs Act have made elaborate provisions for appeals against adjudication orders passed by excise/customs authorities. There is only one appeal in case of orders of Commissioner, while in case of other orders (i.e. orders of Superintendent, Assistant Commissioner, Dy. Commissioner, Jt. Commissioner, and Additional Commissioner), first appeal is with Commissioner (Appeals) and other with Tribunal. In some matters, revision application lies with Government against order of Commissioner and Commissioner (Appeals). Tribunal is final fact finding authority and no further appeal lies against facts as found by Tribunal (CESTAT). In case of order of Tribunal relating to classification or valuation, appeal lies with Supreme Court. In other matters, appeal can be made to High Court only if substantial question of law is involved.

Pre-deposit for filing appeal - Section 35F of Central Excise Act (similar section 1 29E of Customs Act) provides that person desirous of appealing against the order shall, *pending the appeal ,* deposit the duty demanded or penalty levied. In case of customs, pre-deposit of duty, interest and penalty is required. However, the appellate authority [Commissioner (Appeals) or Appellate Tribunal] is empowered to dispense with such deposit if it is of the opinion that the deposit of duty or penalty will cause undue hardship to the person. Such waiver may be subject to such conditions as may be imposed to safeguard interests of revenue.

Meaning of 'duty demanded' - As per *explanation* to section 35F of CEA (inserted w.e.f. 11-5-2007), 'duty demanded' shall include following – (i) amount determined u/s 11 D, (ii) amountof erroneous Cenvat credit taken, (iii) amount payable under earlier Central Excise Rule 57cc, (iv) amount payable under rule 6 of Cenvat Credit Rules, (v) Interest payable under provisions of Central Excise Act and Rules.

2.27 IMPORTANT PROVISIONS OF CENTRAL EXCISE ACT, 1944

Section No.	Brief Contents
2(d)	'Excisable Goods' means goods specified in the Schedule to Central
	Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Explanation - 'goods' includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable
2(e)	'Factory' means any premises, including the precincts thereof, wherein or in any part of which, excisable goods other than salt are manufactured; or wherein or in any part of which any manufacturing process connected with production of these goods is being carried on or is ordinarily carried on.
2(f)	"Manufacture" includes any process - (i) incidental or ancillary to the completion of manufactured product; (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture; or (iii) which, in relation to goods specified in Third Schedule to the CEA,involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers or declaration or alteration of retail sale price or any other treatment to render the product marketable to consumer; — and the word 'manufacturer' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.
	[Clauses (ii) and (iii) are called deemed manufacture]. The definition of 'manufacture' is inclusive and not exhaustive.
2(h)	'Sale' and 'purchase' with their grammatical variations and cognate expressions, means any transfer of possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuation consideration.
3(1)(a)	This section is the 'charging section' of 'basic excise duty' and Reads as follows - There shall be levied and collected in such manner as may be prescribed duties on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985.
3(2)	Central Government can fix tariff values for puose of levying excise duty. Once tariff value is fixed, valuation section 4 will not apply, as made clear in section 4(2).
3A	On goods to be notified by Central Government, duty will be payable onthe basis of annual capacity of production. The production capacity will be determined by Assistant/Deputy Commissioner on the basis of rules.The provision will not apply to goods manufactured by EOU.
4(1)	Where under this Act,the duty of exciseis chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall—(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value; (b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.
Explanation to section 4(1)	Price actually paid to assessee (less sales tax and other taxes) will be price-cum-duty and shall be deemed to include the duty payable on such goods.

4(3)(b)	Persons shall be deemed to be 'related' if – (i) They are inter-connected undertakings; (ii) They are relatives; (iii) Amongst them, buyer is a relative and a distributor of assessee, or a sub-distributor of such distributor or, (iv)They are so associated that they have interest, directly or indirectly, in the business of each other.
	Explanation (i) inter-connected undertakings shall have meaning assigned to it in section 2(g) of Monopolies and Restrictive Trade Practices Act, 1969 (MRTP), (ii) 'relative' shall have meaning assigned to it in section 2(41) of the Companies Act.
4(3)(c)	'Place of removal' means - (i) a factory or any other place or premises of production or manufacture of the excisable goods from where such goods are removed; (ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed; (iii) A depot, premises of a consignment agent or any other place or premises from where excisable goods are to be sold after their clearance from factory; from where such goods are removed.
4(3)(cc)	"Time of removal", in respect of the excisable goods removed from the place of removal referred to in sub-clause (iii) of clause (c), shall be deemed to be the time at which such goods are cleared from the factory.
4(3)(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 sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.
4A	Section 4A of CEA empowers Central Government to specify goods on which duty will be payable based on 'retail sale price'. The provisions for valuation on MRP basis are as follows -
	(a) The goods should be covered under provisions of Legal Metrology Act, 2009, w.e.f. 1-8-2011 (earlier Standards of Weights and Measures Act, 1976).
	[section 4A(1)].
	(b) Central Government has to issue a notification in Official Gazette specifying the commodities to which the provision is applicable and the abatements permissible. Central Government can permit reasonable abatement (deductions) from the 'retail sale price' [section 4A(2)].
	(c) While allowing such abatement, Central Government shall take into account excise duty, sales tax and other taxes payable on the goods [section 4A(3)].
	(d) The 'retail sale price' should be the maximum price at which excisable goods in packaged forms are sold to ultimate consumer. It includes all taxes, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding charges etc. If under certain law, MRP is required to be without taxes and duties, that price can be the 'retail sale price' [Explanation 1 section 4A].
	(e) If more than one 'retail sale price' is printed on the same packing, the maximum of such retail price will be considered [Explanation 2(a) to section 4A]. If different MRP are printed on different packages for different areas, each such price will be 'retail sale price' for purpose of valuation [Explanation 2(c) to section 4A].

	(f) Removing excisable goods without MRP or wrong MRP or tampering, altering or removing MRP declared on a package is an offence and goods are liable to confiscation [section 4A(4)] If price is altered, such increased price will be the 'retail sale price' for purpose of valuation [Explanation 2(b) to section 4A].
5	Government can provide for remission of duty of excise payable on excisable goods, which due to any natural cause, are found to be deficient in quantity, by making rules in that behalf (Rule 21 provides for remission of duty)
5A(1)	Central Government can exempt any excisable goods, (a) generally (b) either absolutely or subject to such conditions (to be fulfilled before or after removal), (c) from whole or any part of excise duty leviable. Such exemption should be in public interest and it should be by way of a notification published in Official Gazette.
Proviso to section 5A(1)	The exemption notification issued u/s 5A is not applicable in respect of DTA clearances by EOU unit, unless specifically provided in the notification.
5A(1A)	Absolute i.e. unconditional exemption is compulsory.
5A(2)	Central Government can grant exemption, in public interest, in exceptional circumstances by a special order (This is ad hoc exemption and can be granted even retrospectively)
5A(2A)	Central Government, for the purpose of clarifying the scope or applicability of exemption notification or exemption order, may insert an explanation to the exemption notification or order within one year of such notification or order. Such Explanation to an exemption
5A(3)	Notification will have retrospective effect from date of exemption notification.
	Partial exemption under section 5A(1) or 5A(2) can be granted by providing exemption from duty at a rate expressed in form or method different from which statutory duty is leviable. However, the duty prescribed by an exemption notification can never exceed the Statutory Duty.
6	Registration is required to be obtained by any prescribed person who is engaged in (a) every manufacturer or producer of excisable goods i.e. goods specified in First or Second Schedule to Central Excise Tariff Act and (b) wholesale purchase or sale (whether on his own account or as broker or commission agent) or storage of any specified goods included in First or Second Schedule to Central Excise Tariff Act – Rule 9 makes provisions in respect of registration.
9(1)	Following are offences punishable with imprisonment and fine -
	(i) Contravening provisions of restrictions of possession of goods in excess of prescribed quantity as prescribed under section 8.
	(a) Evading payment of duty payable under CEA.
	(b) Removing excisable goods or concerning himself with such removal, in contravention of provisions of Central Excise Act and Rules.
	(c) Acquiring or in any way concerning himself with transporting, depositing, concealing, selling, purchasing or otherwise dealing with excisable goods where he knows or has reason to believe that the goods are liable to confiscation under Central Excise Act or Rules.
	(d) Contravening any provision of Central Excise Act or rules in relation to Cenvat credit.
	(e) Failure to supply information or knowingly supplying false information.
	(f) Attempting to commit or abetting commission of an offence regarding evasion of duty or transit of goods or restriction on storage of goods or non-registration of a unit.

	Punishment imposable is imprisonment upto seven years and fine (without limit) if (a) the duty leviable on the excisable goods exceeds one lakh of rupees [section 9(1) or (b) a person already convicted for offence under Central Excise Act is convicted again [section 9(2)]
9A	Section 9A is being amended to make an offence cognizable and non-bailable when the duty liability exceeds ₹ 50 lakh and punishable under clause (b) or clause (bbbb) of Sub-section (1) of Section 9.
9C	Mens rea (culpable mental state) shall be presumed by Court. Accused can prove that he had no culpable mental state.
11	Excise authorities can recover excise duty by any of the following means –
	• Adjusting against money payable to the person (e.g. if refund is due to him)
	• By attachment and sale of excisable goods belonging to the assessee.
	• As Arrears of Land Revenue, by issuing certificate to District Collector of Revenue, who is empowered to recover the amount as arrears of land revenue.
Proviso to Section 11	If a person transfers his business or trade or disposes of his business to a third person, any duty or any other sum due from predecessor can be recovered from successor in trade or business, by attaching all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles which was transferred to the successor.
	Section 11 of Central Excise Act, 1944/142(d) of Customs Act, 1962 is being amended/ inserted so as to provide for (i) recovery of money due to the government from any person other than from whom money is due after giving a proper notice, if that other person holds money for or an account of the first person; (ii) the other person to whom such notice has been issued is bound to comply and (iii) if the other person to whom the notice is served fails to comply, he shall face all the consequences under this Act.
11A(1)	Central Excise Officer can, within one year from relevant date, serve show cause notice on person chargeable to duty, if – (a) duty of excise has not been levied or paid or (b) short levied or paid or (c) erroneously refunded. The show cause notice should ask the person why he should not pay the amount specified in the notice.
Proviso to Section 11A(1)	In case of fraud, collusion, wilful mis-statement and suppression of facts, or contravention of any provision of Central Excise Act or rules with intent to evade payment of duty, demand for duty can be raised within 5 years
11A(1A)	Where notice has been served on assessee under proviso to section 11A(1) of Central Excise Act (CEA), for short payment or non-payment of duty on account of fraud, collusion or wilful misstatement or suppression, the person to whom notice is service can pay full duty or in part as accepted to him within 30 days. In addition, he should pay interest payable under section 11AB of Central Excise Act and penalty equal to 25% of excise duty specified in the notice or 25% of duty as acceptable to him. In such cases, other persons to whom notices have been sent shall be deemed to be concluded, as per proviso to section 11A(2) of Central Excise Act.
11A(2)	After considering representation of the person on whom notice is served, the central excise officer will determine the duty payable and then the person shall pay the duty so determined
11A(2B)	If assessee pays duty due on his own, the officer shall not issue any show cause notice. However, if the officer is of the opinion that there is short payment in respect of the amount, he can issue notice for payment of balance amount. In such case, the time limit for issue of show cause notice will be counted from the receipt of information of payment. Further, the provision does not apply if the short payment or non- payment or erroneous refund was due to collusion, wilful mis-statement or suppression of facts.

11A(3)(ii)	The prescribed period for service of show cause notice cum demand is one year or 5 years from "relevant date". The relevant date will be one of the following :
	i. If Return is to be filed as per provision of law, the actual date of filing of return [section 11A(3) (ii) (a) (A)].
	ii. If the return was required to be filed but was not filed, then the date on which return should have been filed [section 11A(3)(ii)(a)(B)].
	iii. If no return is required to be filed under the relevant provisions of Excise law, then date of payment of duty [section 1 1A(3) (ii) (a) (C)].
	iv. In case of provisional assessment, date of adjustment of duty after final adjustment [section 11 A(3) (ii) (b)].
	v. In case of demand on account of erroneous refund, dare of such refund [section 11 A(3) (ii) (c)].
11A(7A)	Service of a statement containing details of duty not paid, short levied or erroneously refunded shall be deemed to be a service of notice under Sub-section (1) or (3) or (4) or (5) of this section.
11AB(1)	If duty is not paid when it ought to have been paid, interest is payable at the rates specified by Central Government by notification in Official Gazette (present rate is 13% w.e.f. 12-9-2003). The interest is payable from the first day of the month following the month in which the duty ought to have been paid, till the date of payment.
11AC	A mandatory penalty equal to the duty short paid or not paid or erroneously refunded is payable if such non-payment or short payment or erroneous refund was due to fraud, collusion, wilful mis-statement or suppression of facts etc. If duty and interest along with penalty is paid within 30 days, penalty will be 25%
	[There is dispute whether the penalty is mandatory or can be reduced in deserving cases].
11B(1)	Person claiming refund of excise duty and interest, if any, paid on such duty, to make application within one year of 'relevant date' to AC/DC. The limitation of one year shall not apply if duty was paid under protest.
11B(2)	Doctrine of unjust enrichment – Refund, after sanction, to be credited to Consumer Welfare Fund.
Proviso to section 11 B(2)	Refund will be paid to assessee only in following cases –
	• Rebate of excisable goods exported out of India (if he had exported on section 11 B(2) payment of duty;
	• Rebate of excise on excisable materials used in manufacture of goods exported out of India (if he has not availed Cenvat credit);
	• Refund of duty paid on inputs (if payable according to any rule or notification);
	• To Manufacturer, if he has not passed on incidence of the duty to another person;
	• To Buyer, if he has borne the duty and if he has not passed on incidence of the duty to another person;
	• To any other class of applicant if borne by any such class of applicants, as may be notified by Government of India, if the incidence of duty has not been passed on to any other person (not specified so far).

11B(3) Explanation B to section 11B	Section 11 B(2) to have overriding effect over any judgment or rule
	Relevant date for purpose calculation of period of one year for filing refund claim is as under :
	(a) In case of exports (i) when the ships or aircraft leaves India (ii) if the goods are exported by land, the date on which the goods leave Indian frontier (iii) if export is by post, date of despatch of goods by post office to a place outside India.
	(b) If Compound levy scheme is applicable, if assessee pays the full duty and if rate is subsequently reduced by Government, then date on which notification regarding reduction of rate is published.
	(c) In case of refund claim filed by purchaser, date of purchase of the goods
	(d) If duty is exempted by a special order under section 5A(2), the date of issue of such order
	(e) If duty was paid on provisional basis, the date of adjustment of duty after final assessment of duty.
	(f) Where duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, CESTAT or any Court, date of such judgment, decree, order or direction (This clause inserted by Finance Act, 2007 w.e.f. 11-5-2007)
	(g) In other cases, date of payment of duty
11BB	Interest on delayed refund if not paid within three months from date of receipt of application u/s 11B(1), at rate notified (Presently, 6% w.e.f. 12-9-2003). As per explanation, order for refund by Commissioner (Appeals), Tribunal or Court, refund is also deemed to be an order passed u/s 11 B(2).
11C	***Exemption if duty not paid as per past general practice -*** If (a) there was a generally prevalent practice of levy or non-levy of any excisable goods and (b) such goods were actually liable for duty at higher rates; Central Government may, by notification in Official Gazette, direct that such excess duty payable, need not be paid.
11D(1)	Duty collected from buyer must be paid - Every person, who is liable to pay duty under Central Excise Act and Rules and has collected from buyer any amount in excess of the duty assessed or determined and paid on any excisable goods under CE Act or rules, representing as duty of excise; must pay the amount immediately (forthwith) to the credit of Central Government
11D(1A)	Every person who has collected from buyer any amount in excess of the duty assessed or determined and paid on any excisable goods under CE Act or rules, representing as duty of excise; must pay the amount immediately (forthwith) to the credit of Central Government.
11DD	Interest on amount payable under section 11D
11DDA	Omitted w.e.f 1.3.2013.
12	Central Government can apply provisions of Customs Act regarding levy, exemption, drawback, warehousing, offences, penalties, confiscation and procedure relating to offences and appeal to Central Excise, making suitable modifications and alterations to adapt them to circumstances.
12A	Every person liable to pay duty of excise, shall prominently indicate in all documents relating to assessment, sales invoice and other like documents, the amount of duty, which forms part of the price at which such goods are sold. (This is also required under rule 11(2) of Central Excise Rules).

12B	Every person who had paid duty shall be deemed to have passed on the burden to buyer of the goods.
12C	Constitution of Consumer Welfare Fund - Section 12D provides that the fund should be utilised for welfare of consumers.
12E(1)	Central Excise Officer can exercise powers and discharge duties conferred on CE officer subordinate to him.
13	Powers of arrest with prior approval of Commissioner.
14(1)	Powers to issue summons to a person to attend and give evidence or produce document.
14A and 14AA	Special audit by Cost Accountant of Value u/s 14AA and of Cenvat credit u/s 14AA
18	Search and arrest under the Act to be made in accordance with Code of Criminal Procedure.
20	Section 20 is being amended so as to make the provisions applicable only to offence which is non-cognizable.
21	Section 21 is being amended so as to make the provisions regarding release of arrested person on bail or personal bond applicable only to offence which is non-cognizable.
22	Vexatious search and seizure by Central Excise Officer.
23A to 23H	Advance ruling
31 and 32 to 32PA	Settlement of Cases.
33	Powers of adjudication of confiscation and penalty – Unlimited to Commissioner and limited to lower officers as per limits prescribed by CBE&C
34	Option to pay fine in lieu of confiscation.
34A	Even if goods re confiscated or penalty is imposed, other punishment can be imposed.
35(1)	Appeal to Commissioner (Appeals) within 60 days from order of officer lower in rank than Commissioner.
35(1A)	Commissioner (Appeals) can adjourn the hearing but not more than three adjournments can be given.
35A(3)	Commissioner (Appeals) can pass order confirming, modifying or annulling the decision or order appealed against.
35B(1)	Appeal to Tribunal (CESTAT) against order of Commissioner or Commissioner (Appeals).
35B(2)	Committee of Commissioners can direct any Central Excise Officer to file appeal against order passed by Commissioner (Appeals). If there is difference of opinion between two Commissioners, the matter will be referred to jurisdictional Chief Commissioner who will decide whether to file appeal.
35B(3)	Appeal to be filed within three months from date of communication of order to Commissioner or other party, as the case may be. As per section 35B(5), Tribunal can condone delay in filing appeal if sufficient cause is shown.
35B(4)	Other party can file cross-objection within 45 days from receipt of copy of appeal filed by other party.
35B(6)	Appeal to be filed in prescribed form with prescribed fees.
35C(1A)	Tribunal can give maximum three adjournments.

35C(2)	Tribunal can correct a mistake apparent from record, within six months from date of order, if mistake brought to notice by Commissioner or other party.
35C(2A)	A new proviso is being inserted in sub-section (2A) of Section 35C so as to provide that in cases where delay in disposing of the appeal is not attributable to the appellant, the Tribunal may extend the period of stay by a period not exceeding 185 days subject to the condition that if the appeal is not disposed of within the total period of 365 days from the date of order, the stay shall stand vacated.
35D(3)	Single member bench can determine issue if duty involved or amount of fine/penalty involved is less than ₹ 50 lakhs. However, issue relating to rate of duty or value cannot be determined by a single member bench.
35E(1)	Committee of two Chief Commissioners can direct any Commissioner to apply to Tribunal for the determination of points arising out of order of Commissioner of Central Excise (This will be treated as departmental appeal). If there is difference of opinion between two Chief Commissioners, the matter will be referred to CBE&C (Board) who will decide whether to file appeal.
	As per section 35E(3), order directing to file appeal shall be made within three months from date of communication of order. After that, as per section 35E(4), authorised officer should file appeal with Tribunal within one month.
35E(2)	Commissioner can direct any excise officer subordinate to him to apply to Commissioner (Appeals) for the determination of points arising out of order of an adjudicating authority subordinate to him (This will be treated as departmental appeal). As per section 35E(3), order directing to file appeal shall be made within three months from date of communication of order. After that, as per section 35E(4), authorised officer should file appeal with Commissioner (Appeals) within one month.
35EE(1)	In case of following order of Commissioner or Commissioner (Appeals), appeal does not lie with Tribunal, but revision application can be made to Central Government - (a) loss of goods occurring in transit from factory to warehouse or to another factory (b) rebate of duty on goods exported outside India or excisable goods used in manufacture of goods which are exported and (c) goods exported without payment of duty.
35EE(2)	Revision application should be filed within three months from date of communication of order. Delay upto three months can be condoned by Central Government.
35F	Duty, penalty, interest, erroneous Cenvat credit or 'amount' to be deposited pending appeal. Pre-deposit can be dispensed with if it may cause undue hardship to assessee.
35FF	If the amount deposited u/s 35F becomes refundable pursuance to order passed by Commissioner (Appeals) or Tribunal, the amount should be refunded within three months from date of communication of the order to adjudicating authority. If not so refunded, interest is payable at the rate specified in section 11BB of the Act
35G(1)	Appeal to High Court on substantial question of law. Appeal to High Court can be made if the order of CESTAT does not relate, among other things, to the determination of any question having a relation to rate of duty or to value of goods. Appeal to be filed within 180 days.
	Appeal against judgment of High Court lies with SC u/s 35L(a)(i).
35L(b)	Appeal to Supreme Court, if the order of CESTAT relates, among other things, to the determination of any question having a relation to rate of duty or to value of goods.
35Q	Appearance of authorised representative before Central Excise Officer or Tribunal.

36A	Documents produced by a person or seized from him shall be presumed to be true. Document will be admissible as evidence even if not duly stamped.
36B	Microfilms, fax copies and computer print puts will be admissible as evidence.
37B	Board empowered to issue orders, instructions and directions to Central Excise Officers for purposes of uniformity in the classification of excisable goods or with respect to levy of excise duties on such goods. However, such order cannot require central excise officer to make assessment in a particular way or interfere with discretion of Commissioner (Appeals).
37C	Any decision or order passed or any summons or notice under the Act shall be served (a) by tendering the same or by sending it with registered post with acknowledgement due to the person for whom it is intended or his authorised agent, (b) If it cannot be served as aforesaid, then by affixing a copy at a conspicuous space in factory or warehouse, (c) If this is also not possible, then affixing a copy on the notice board of the office or authority which issued the notice, order, summons or decision.
	Section 37C is being amended to specify additional modes of delivery of specified documents i.e. by speed post with proof of delivery or through courier approved by the Central Board of Excise & Customs.
37D	Duty, interest, penalty or fine to be rounded off to nearest rupee
Third Schedule	List of goods where packing, repacking, labelling etc. will amount to manufacture u/s 2(f) (iii) [These are same goods which are covered under MRP provisions under section 4A].

2.28 IMPORTANT PROVISIONS OF CENTRAL EXCISE RULES, 2002

2(b)	'Assessment' includes self-assessment of duty made by the assessee and provisional assessment made under rule 7.
2(c)	'Assessee' means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored, and includes an authorized agent of such person.
	A taxpayer who is registered under Central Excise or Service tax provisions and is an assessee under Income Tax Act and has PAN number, and who fulfils prescribed conditions is 'Large Tax payer'.
5	Duty will be payable at rate and valuation as applicable at the time of actual removal from factory or warehouse, except in case of khandsari molasses [rule 5(1)]. Rate of duty applicable in case of khandsari molasses shall be the rate in force on date of receipt of such molasses in the factory of the procurer of such molasses [Rule 5(2)].
6	Assessee shall himself assess the duty payable on excisable goods, except that that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal of goods.
7	Provisional assessment can be requested by the assessee. Department cannot itself order provisional assessment. Final assessment will be made later by Assistant / Deputy Commissioner after getting the required details.
7(5)	Provide that where the assessee is entitled to a refund consequent to an order of final assessment under sub-rule (3), then, subject to sub-rule (6), there shall be paid an interest on such refund as provided under section 11BB of the Act. The period for which interest shall be paid has been removed from Rule 7(5) and the period for payment of Interest will be same as per Section 11BB.

8	Duty is payable by 5th of following month (6th in case of e-payment). SSI units availing SSI exemption have to pay duty by 15th of following month (16th in case of e-payment).
	For the month of March, duty is payable by 31st March, both by large units as well as SSI.
8(2)	Duty is deemed to have been paid for purpose of availment of Cenvat credit by the buyer.
8(3)	If duty is not paid fully on due date, assessee is liable to pay the outstanding amount along with interest on unpaid amount at the rate specified under section 11AB. If part of duty is paid, the provision of interest will apply to that part of duty which is not paid [present rate of interest is 13%]
8(3A)	If duty and interest is not paid within 30 days after due date, assessee will forfeit the facility to pay duty in monthly instalments. He will have to pay duty through PLA before clearance of goods. He cannot utilise Cenvat credit for payment of duty during that period. This forfeiture of facility is automatic and mandatory. If despite such restrictions, assessee clears goods without payment of duty and consequences and penalties as applicable for removal of goods without payment of duty will follow.
9(1)	Every person who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods shall get registered.
9(2)	Board is authorised to issue notifications (a) specifying conditions and procedures for registration and (b) granting exemption to person or class of persons from provisions of registration.
10(1)	Daily Stock Account of manufactured goods - A daily stock of goods manufactured or produced has to be maintained by every assessee.
10(2) and 10(3)	The first page and last page of such account book shall be duly authenticated by the producer or manufacturer or his authorised agent [rule 10(2)]. All such records shall be preserved for 5 years [rule 10(3)].
11(1)	Goods should be removed from a factory or warehouse only under an invoice signed by owner or his authorised agent. In case of cigarettes, invoice shall be counter-signed by Inspector.
11(2)	Invoice shall contain Registration Number, Address of jurisdictional Central Excise Division (added w.e.f. 1-4-2007), Name of consignee, Description and classification of goods, Time and date of removal, Mode of transport and vehicle registration number, Rate of duty, Quantity and Value of goods and Duty payable on the goods.
11(3)	Invoice should be in triplicate and should be marked as follows (i) Original shall be marked 'ORIGINAL FOR BUYER', (ii) Duplicate copy shall be marked 'DUPLICATE FOR TRANSPORTER', (iii) Triplicate shall be marked 'TRIPLICATE FOR ASSESSEE'.
11(4)	Only one copy of invoice book at a time, unless otherwise allowed by AC/DC.
11(5)	Each foil of the Invoice shall be pre-authenticated by the assessee - by owner, working partner, Managing Director or Secretary or any person duly authorised for this purpose, before being brought into use.
11(6)	Before making use of the invoice book, serial numbers shall be intimated to Range Superintendent.
11(7)	Provisions of rule 11 (which is applicable to manufacturers) shall apply mutatis mutandis to goods supplied by a first stage dealer or a second stage dealer.
Proviso to rule 11(7)	If a first stage or second stage dealer receives goods under an invoice which mentions that Cenvat credit of the special CVD paid u/s 3(5) of Customs Tariff Act is not admissible, he should make similar endorsement in his invoice to buyer.

12(1)	A monthly return is to be submitted by every assessee to Superintendent of Central Excise, of production and removal of goods, and Cenvat credit availed, by 10th of the following month in form ER-1. SSI unit availing concession on basis of annual turnover have to file return on quarterly basis within 20 days from close of quarter in form ER-3.
12(2)	Assessees paying duty of Rupees One crore or more per annum through PLA are required to submit Annual Financial Information Statement for each financial year by 30th November of succeeding year in prescribed form ER-4.
12(3)	The Range Officer will scrutinise the monthly/quarterly return. He can call for documents from the assessee as he considers necessary.
12(4)	It will be responsibility of assessee to provide necessary records as and when required by excise officer.
12AA	Procedure for job work in articles of Jewellery.
12BB	Procedures by LTU [Large Taxpayer Unit]
15	Central Government can notify scheme for payment of duty under 'Compounded Levy Scheme'.
16	Duty paid goods can be brought in factory for being re-made, refined, reconditioned or for any other reason under rule 16(1). After processing/repairs, if the process amounts to 'manufacture', excise duty based on assessable value is payable. If process does not amount to manufacture, an 'amount' equal to Cenvat credit availed should be paid. [rule 16(2)]. If the above procedure cannot be followed, permission of Commissioner is required [rule 16(3)].
16C	A manufacturer can, with specific permission of Commissioner, remove excisable goods manufactured in his factory for carrying out tests or any other process not amounting to manufacture, to some other premises, without payment of duty. The provision does not apply to prototype which are sent out for trial or development test. Conditions as specified in permission of Commissioner of CE will have to be followed [The rule is useful in cases where Cenvat provisions do not apply].

2.29 IMPOTANT RULES OF CENTRAL EXCISE VALUATION RULES, 2000

2(b)	"Normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold.
	If goods are not sold at the time of removal, then value will be based on the value of such goods sold by assessee at any other time nearest to the time of removal, subject to reasonable adjustments.
5	Some times, goods may be sold at place other than the place of removal e.g. in case of FOR delivery contract. In such cases, actual cost of transportation from place of removal upto place of delivery of the excisable goods will be allowable as deduction. Cost of transportation can be either on actual basis or on equalized basis.
6	If price is not the sole consideration for sale, the 'Assessable Value' will be the price charged by assessee, plus money value of the additional consideration received.
	The buyer may supply any of the following directly or indirectly, free or at reduced cost.
	(a) Materials, components, parts and similar items
	(b) Tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used

	(c) Material consumed, including packaging materials
	(d) Engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of the goods
	In such cases, value of such additional consideration will be added to the price charged by assessee to arrive at the 'transaction value'.
	[explanation 1 to Rule 6].
Explanation 2 to Rule 6	Where an assessee receives any advance payment from the buyer against deliver of any excisable goods, no notional interest on such advance shall be added to the value unless the Central Excise Officer has evidence to the effect that the advance received has influenced the fixation of the price of the goods.
7	When goods are sold through depot, there is no 'sale' at the time of removal from factory. In such cases, price prevailing at depot (but at the time of removal from factory) shall be the basis of Assessable Value. The value should be 'normal transaction value' of such goods sold from the depot at the time of removal or at the nearest time of removal from factory.
8	In case of captive consumption, valuation shall be done on basis of cost of production plus 10% (Cost of production is required to be calculated as per CAS-4)
9	If entire production is sold to 'related person' other than inter- connected undertakings, the assessable value will be 'normal transaction value' at which the related person sells the goods to unrelated buyers.
Proviso to rule 9	If assessee sales goods to 'related person', but related person uses them in captive consumption (and not sell them), valuation will be done on basis of cost of production plus 10%, as per rule 8.
10	If entire production is sold to 'related person' who are inter- connected undertakings, the assessable value will be as follows – (a) If they are 'related person' as defined in other clauses or is a holding or subsidiary company of assessee, 'normal transaction value' at which the related person sells the goods to unrelated buyers (b) In other cases, the value will be as if they are not 'related person'
10A	In case of job worker manufacturing goods on behalf of Principal Manufacturer, value will be the value at which the Principal Manufacturer sales goods to unrelated buyer.
	'Job worker' means a person engaged in manufacture or production of goods on behalf of a principal manufacturer, from any inputs or capital goods supplied by the said principal manufacturer or by any other person authorised by him.
11	Residuary method - If value cannot be determined under any of the foregoing rules, value shall be determined using reasonable means consistent with the principles and general provisions of section 4 and Valuation Rules.

2.30 RULES OF CLASSIFICATION

General Rules for Interpretation of Schedule to Central Excise Tariff and Customs Tariff are given in First Schedule to the Tariff. The rules are same for excise and customs. The highlights of rules are given below.

Rule	Brief contents
1	Classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or Notes do not otherwise require, according to other provisions of the rules
First part of rule 2(a)	Any reference to complete goods also includes incomplete or un-finished goods, if such incomplete or un-finished goods have the essential characteristic of finished goods.
Second part of rule 2(a) 2(b)	Heading will also include finished goods removed un-assembled or disassembled i.e. in SKD or CKD packs.
	Any reference in heading to material or substance will also include the reference to mixture or combination of that material or substance with other materials or substance. The classification of goods consisting of more than one material or substance shall be according to the principles contained in rule 3.
3	When by application of sub-rule (b) of rule 2 or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as given in rule 3(a), 3(b) or 3(c).
3(a)	The heading which provides most specific description shall be preferred to heading providing a general description.
3(b)	If Mixture and Composite goods consisting of different materials or different components cannot be classified based on above rule i.e. rule 3(a), it should be classified as if they consisted of the material or component which gives it their *essential character.*
3(C)	If two or more headings seem equally possible and the dispute cannot be resolved by any of the aforesaid rules, if both the headings appear equally specific, the heading which occurs last in numerical order is to be preferred *(i.e. latter the better)*.
4	If the classification is not possible by any of the aforesaid rules 1, 2 and 3, then it should be classified under the heading appropriate to goods to which they are most akin. [This is only a last resort and a desperate remedy to resolve the classification issue]
5	Cases for camera, musical instruments, drawing instruments, necklaces etc. specially shaped for that article, suitable for long term use will be classified along with that article, if such articles are normally sold along with such cases. Further, packing materials and containers are also to be classified with the goods *except when the packing is for repetitive use* (This provision is obviously made to ensure that the packing and the goods are charged at same rate of duty).
6	Classification of goods in sub-headings shall be determined in terms of those sub-headings. Only sub-headings at the same level are comparable.

PRACTICAL PROBLEMS

Example 68: M/s XYZ. are in the business of supplying "Turbo-alternators" to various customers. They manufacture steam turbines in the factory, which are removed to the customer's site on payment of Central Excise Duty. They purchase duty paid alternators from the market which are delivered at the customer's site. M/s XYZ assemble both the items and fix them permanently on a platform at the site. Department demands central excise duty payable on "Turbo-alternator" when it comes into existence after being assembled on the platform embedded to the earth. Is the view taken by the department correct. Discuss with the help of case laws, if any.

Answer:

In the present case two issues are involved

(i) Whether assembly of steam turbines and duty paid alternators amounts to manufacture of turbo alternators, and

(ii) Whether such assembly results in manufacture of excisable goods.

The facts of the case are similar to the case of *Triveni Engineering and Industries Ltd. v C. CEX, 2000* (120) EI,T 273 (SC)

In the present case, the Appellants were, according to specified designs, combining steam turbine and alternator by fixing them on a platform and aligning them. As a result of this activity of the Appellants, an new product, turbo alternator, came into existence, which has a distinctive name and use different from its components. Therefore, the process involved in fixing steam turbine and alternator and in coupling and aligning them in a specified manner to form a turbo alternator, a new commodity, is nothing but a manufacturing process.

Though the process of assembling results into a new commodity and therefore is a process amounting to manufacture, yet the turbo alternator set (known in the market as such) comes into existence only when a steam turbine and alternator with all their accessories are fixed at the site. Further, in order to be brought in the market the turbo would not remain turbo alternator. Thus, its is obvious that without fixing to the ground the turbo alternator does not come into being. The installation or erection of turbo

alternator on the platform specially constructed on the land cannot be treated as a common base, therefore, such alternator would be immovable property. Accordingly, such activity could not be considered as 'excisable goods'.

Example 69: Snow White Ltd. Manufactures paper and in the course of such manufacture, "waste paper" is produced (paper being the main product and dutiable goods). The Central Excise Tariff Act, 1985 (CET) was amended w.e.f. 1-3-1995, so as to include waste paper. White Ltd. was issued a show cause notice by the Central Excise Officer, demanding duty of ₹ 2 lakhs on waste paper produced during October, 1994 to February, 1995, but cleared during April-May, 1995. A reply is due to be filed immediately to the notice. As Counsel of Snow White Ltd. you we required to advise the company about –

(i) The legality and validity of the proposed levy and collection of duty on waste paper for the period prior to 1-3-1995; and

(ii) State (with the help of decided cases) the reasons for your advice/opinion.

Answer:

The issue involve in the given case is determination of taxable event for the purpose of levy of excise duty.

As per section 3 of the Central Excise Act, 1944, the taxable event for levy of Central Excise is "manufacture of excisable goods". The date for determination for rate of duty and tariff valuation is the date of actual removal of the goods from the factory or warehouse.

However, there must be a levy of duty of excise at the time of manufacture and only then, the duty can be collected at the time of removal as has already been held in Vazir Sultan Tobacco Industry's case 1996 (83) ELT 3(SC).

Therefore, the waste paper produced prior to the levy will not be chargeable to duty of excise even though it has been cleared after such levy and the proposed show cause notice demanding ₹ 2 lakhs of excise duty on such waste paper is invalid and illegal and liable to be quashed.

Example 70: Kagaz Karkhana Ltd., manufactures paper in the year 1995, it embarked on a major expansion programme, and for the purpose, fabricated at site, 75% of the portion of papermaking machine and procured (paying excise duty) the remaining parts of the papermaking machine from other suppliers. Having done so, it assembled all the parts together into a paper-making machine at site. The erection and installation was completed during November, 1995 and the machine was firmly fastened to the earth, with the help of bolts, nuts and grouting material on a concrete bed, to prevent rattling and ensure wobble-free operation and presently the machine is functional and operating. During July, 1998, the Central Excise authorities served the company a show cause demanding excise duty of ₹ 5 crores, on the paper-making machine, alleging that the activity resulted in manufacture of excisable goods, failing under chapter 84 of CET. The company engages you as 'counsel' to represent them and desires to contest the case on the grounds :

(i) That the activity of erection and installation was not manufacture,

(ii) That the activity resulted in "immovable property" emanating at site and

(iii) That the demand is time-barred

You are required to discuss the tenability or otherwise of the contentions of the notice client and advice them drawing support from the judicial decision.

Answer:

There are three issues involved in the present case:

(i) Whether the activity of erection and installation was not manufacture,

(ii) Whether the activity resulted in "immovable property" emanating at site and

(iii) Whether the demand is time-barred

In respect of the first issue, it is to be noted that the excise duty is levied on the excisable goods manufactured in India, and hence it will not be attracted where goods are not produced from the manufacturing process.

A commodity is said to be manufactured if by application of the process its identity is changed and it is known in the market as a separate and distinct commodity having separate name, character and use.

The assembly of parts results in paper-making machine which has distinct identity, name and character and use and hence such assembly amounts to manufacture.

The second issue is whether erection and installation of such machine on a concrete bas results in a immovable property. The Supreme Court, in Sirpur Paper Mills v C.C.Ex., Hyderabad 1998(97) ELT 3 (SC), has held that papermaking machine if assembled and erected at site and embedded in concrete base to ensure wobble free operation will not become an immovable property. The machine can be dismantled from its base and sold in parts. Hence, the assessee's first two contentions are untenable and incorrect as the activity has resulted in the manufacture of goods and there is no immovable property brought into existence and assembly operations are liable to duty of excise.

The third issue is whether the demand notice is time barred. Under section 11A of the Central Excise Act, 1944, the extended period of limitation can be invoked only when there is a fraud, collusion, willful misstatement, suppression of facts or contravention of the provisions of the Act with an intent to evade the payment of duty of excise. If the manufacturing activity of paper-making machine was known to the department then the department cannot invoke the extended period of limitation. Hence, the contention of the assessee is an arguable point and the same is legally tenable.

Example 71: Regarding the applicability of excise duty, Computers are covered under Heading no 84.71 of the First schedule to the Central Excise Tariff Act, 1985 which describes computers as automatic data processing machines. XYZ Ltd. has undertaken upgradation of its computers both in terms of storage capacity and processing speed by increasing the hard disc capacity, RAM, changing of processor chip from 386 to 486 and in certain cases from Pentium III to Pentium IV. The Department's contention is that new goods with a different name character and use have come into existence and the upgraded products are chargeable to excise duty. Discuss in the light of provision of section 2(f) of the Central Excise Act, 1944 relating to "manufacture" whether this stand of the Department is justified.

Answer:

The computers covered under heading No. 84.71 of the Schedule to the Central Excise Tariff Act, 1985 are described as automatic data processing machines. An automatic data processing machine will be known by this name, irrespective of its capacity of storage and processing, which may be enhanced by increasing the hard disk capacity. RAM or by changing the mother board or the processor chip. However, it cannot be said that new goods with a different name, character and use have come into existence, which can be subjected to duty again.

Accordingly, upgrading of old and used computer systems would not amount to manufacture, in so far as the upgradation does not bring into existence goods with a distinct new name, character and use.

Example 72: Full exempt ion is granted by exercising Central Excise Notification which e xplains all products of printing industry including newspapers and printed periodicals." A manufacturer, who is manufacturing cardboard cartons and subsequently doing varied printing on them, claims benefit of the said exemption notification on the ground that every material on which printing is done becomes a product of the printing industry. Is the claim of the manufacturer justified? Give reasons for your view.

Answer:

The cited Central Excise exemption notification grants full exemption to – "all products of printing industry including newspapers and printed periodicals". The products in respect of which exemption is claimed are cardboard, cartons although subsequently varied printing is done on them. These products relate to the packaging industry. The mere fact that printing is done on these products will not render these products as the products of the printing industry.

Accordingly, the products of the packaging industry shall not be entitled to the exemption granted to "all products of printing industry including newspapers and printed periodicals".The case in support is *Rollatainiers Ltd. v UOI* (1994) 72 ELT 793(SC).

Example 73: How would you arrive at the assessable value for the purpose of levy of excise duty from the following particulars-Cum-Duty selling price exclusive of sales Tax ₹ 10,000, Rate of excise duty applicable to the product - 12.36% (including education cess), Trade discount allowed – ₹ 1,200, Freight ₹ 750 from factory to buyer place.

Answer:

In computation of assessable value for the purpose of Levy of excise duty, trade discount and freight are allowed as deductions.

Thus,

Net price	=	Selling Price – (Trade Discount + Freight)
	=	₹ 10,000 – (1,200 + 750)
	=	₹ 8,050

Since the price is inclusive of excise duty @12.36 %,

Therefore,—

Assessable Value	=	₹ 8,050 x 100/112.36
	=	₹ 7,164.47

Excise Duty will be ₹ 8,050 – ₹ 7,164.47 = ₹ 885.53

Check : 12.36% of ₹ 7,164.47 is ₹ 885.53.

Example 74: X Ltd. is engaged in the manufacture of 'paracetamol' tablets that has an MRP of ₹ 9 per strip. The company cleared 1,00,000 tablets and distributed as physician's samples. The goods are not covered by MRP, but the MRP includes 12.36% Excise Duty and 2% CST. If the cost of production of the tablet is 40 paise per tablet, determine the total duty payable.

Answer:

If the product is not covered under MRP provisions, valuation provisions under section 4A do not apply. In that case, valuation is required to be done as per Central Excise Valuation Rules.

As per the CBEC's circular, any physicians samples or other samples distributed free of cost are to be valued under Rule 11 read with Rule 8 of Central Excise Valuation Rules, 2000.

As per Rule 8, such samples are to be valued at 110% of cost of production or manufacture. The given cost of production is 40 Paise, Assessable Value will be 44 Paise. Therefore, duty payable @ 12.36% on 44 paise = 12.36% × 0.44 = 0.0544 paise per tablet.

Example 75: M/s. A.U.L. avail of CENVAT credit of the duty paid on the inputs namely, steel sheets. The scrap generated during the manufacture of their final product was cleared by them without payment of duty. Subsequently the Department raised a demand of Excise duty on waste and scrap. M/s. A.U.L. accepted the duty liability, but contended that the price at which waste and scrap had been sold should be considered to be cum-duty price and assessable value should be determined after deducting the element of excise duty. The contention of the Department is that as no central Excise duty was paid by them while clearing the scrap, no deduction on account of excise duty is available to M/s. A.U.L.

Answer:

The facts of the given ease are similar to those decided by the Supreme Court in *C.C.Ex. v Maruti Udyog Ltd.* (2002) 141 ELT 3 (SC) in the said case, the department raised duty demand on waste and scrap and the price realized by the assessee was taken as the assessable value. The assessee contended that the price of such waste and scrap was includive of excise duty. The Supreme Court decided the issue in favour of the assessee. Accordingly, in the given case, as the Department has raised duty demand on waste and scrap, the price collected by M/s. A.U.L. will be considered as the Cum-Duty price and it shall be deemed that the element of excise duty is already included in such price. The manufacturer

will therefore be entitled for deduction on account of such price. Thus the assessable value will be worker out as under –

$$\text{Assessable value} = \frac{(\text{Cum-Duty Price} - \text{Permissible Deduction}) \times 100}{100 + \text{Rate of Duty}}$$

Example 76: State whether the following elements are to be included or not as part of the 'Transaction value' under section 4 of the Central Excise Act, 1944.

(i) Erection and commissioning charges

(ii) System software etched in the computer system

(iii) Cylinder holding charges

(iv) After-sales warranty charges –

Answer:

(i) Any payment made by buyer to assessee is includible in assessable value only if it is in 'connection' with sale. In case of erection and commissioning charges for erecting machinery at site, these are incurred after goods are removed from the factory. These may be in 'relation' to sales but are not in 'connection' with sales as there is no 'cause and effect' relationship between the two. Hence these are not includable in assessable value. This is also confirmed *vide* CBE&C Circular No. 643/34/2002-CX, dated 1-7-2002.

(ii) A computer manufacturer loads bought out computer software on computer while selling. Thus, the system software is loaded on computer while computer is cleared from the factory. Computer software as such is exempt from duty. Department had earlier clarified that value of computer software etched or loaded on computer will be includible. However, if computer software is supplied separately on floppy disc or tapes, its value will not be includible. [However, as per CBE&C circular dated 28-2-2003, value of computer software will not be includible in assessable value of computer].

(iii) In case of durable and returnable containers, the container is returnable after the gas or other material inside is used. Often, manufacturing companies take some deposit and charge some rent for the container. These are 'cylinder holding charges'. CBE&C, *vide* its Circular No. 643/34/2002-CX, dated 1-7-2002, has clarified that rental charges or cost of maintenance of reusable metal containers like cylinders etc. are to be included in assessable value. This view is correct as such rental charges and the sale of gas are so intrinsically connected that there can be no sale without such charges.

(iv) Compulsory after sales warranty charges are includible as the sale goods and such charges are inseparable. However, optional service charges are not includable as there is no connection between the sale of goods and the optional service charges.

Example 77: A Ltd., a manufacturer to tyres was extending a warranty discount on any tyres that, were defective. The scheme of warranty discount operated thus, the customers lodged their claim with regard to any defects in the tyres. Such claims were then scrutinized by a Technical Committee of A Ltd., which would decide the amount of refund due to the customer on the basis of the reduction in the normal life of

tyre attributable to the defect. This refund was to be given by the Technical Committee. This practice was being followed by A Ltd. for the last 15 years. A Ltd. claimed the 'warranty discount' as a Trade discount which is deductible in computing the assessable value of the tyres. Is this correct? Discuss in the light of the provisions under Section 4 of the Central Excise Act, 1944.

Answer:

According to section 4 of the Central Excise Act, 1944, regarding discounts, transaction value does not make a direct reference. Now actually the excise duty is paid/payable on the net price of the goods after deduction of discounts. If in any transaction discount is allowed in accordance with normal practice of trade and it is passed on to the buyer, tile inclusion of such discount is not justified. However, the said amount to be allowed as deduction must be in the nature of discount.

From the facts of the above case, the manufacturer was extending warranty discount on any tyres that were defective. Though this was known as discounts, but it was only a compensation for defects in tyres, which was given to the customers. Hence, it will not be allowed as deduction from the transaction value as was held in *GOI v MRF* (1995) 77 ELT 433(SC).

Example 78: How would you arrive at the assessable value for the purpose of levy of excise duty from the following particulars :

i. Cum-duty selling price exclusive of sales tax ₹ 20,000

ii. Rate of excise duty applicable to the product 12.36%

iii. Trade discount allowed ₹ 2,400

iv. Freight ₹ 1,500

Answer:

Trade discount of ₹ 2,400 and freight of ₹ 1,500 are allowed as deductions. Hence, net price will be ₹ 16,100 [₹ 20,000 – ₹ 2,400 – ₹ 1,500].

Since the price is inclusive of excise duty of 12.36%, Excise Duty will be ₹ 1,771.06 (₹ 16,100 × 12.36)/112.36) and Assessable Value will be ₹ 14,328.94 [₹16,100 – ₹1,771.06]

Example 79: M/s U.T.A. manufacture welding electrodes which are put first in Polythene bags and then packed together ill cardboard cartons. They sell electrodes at the factory gate packed in cardboard cartons whereas such electrodes are also packed in wooden boxes when sold to their customers located at outstations. Is the department justified to include the cost of wooden boxes in the assessable value of the welding electrodes? Discuss with the help of case laws, if any.

Answer:

The new Section 4 of the Central Excise Act, 1944, does not make any specific reference to packing charges. In normal commercial transactions the price of goods charged includes the cost of packing charges. The charges that are recovered on account of packing are obviously the charges in relation to sale of goods under assessment and will form the part of transaction value. Whatever be the nature of packing that is whether the packing is primary or secondary or special or packing for the purpose of transportation, the cost of such packing shall be includible.

In light of the new Section 4, the earlier case laws hold no significance now.

Example 80: A1 Ltd., manufactures three soft drinks namely Coke, Pep, and Maaza. Coke was sold only to A2 Ltd., a subsidiary company of A1 Ltd. Pep was sold to A3 Ltd., were the Managing Director of A1 Ltd., is a Manager. Maaza was sold to A Ltd, who is sole distributor of A1 Ltd., and was coming under same management of A1 Ltd.

Determine the assessable value of the three products in the hands of A1 Ltd. on the basis of the following information:

Price of A1 Ltd to A2 Ltd. is	₹ 1,00,000
Price of A1 Ltd. to A3 Ltd. is	₹ 50,000
Price of A1 Ltd. to A Ltd. is	₹ 20,000
Price of A2 Ltd. to Consumer is	₹ 1,20,000
Price of A3 Ltd. to Consumer is	₹ 60,000
Price of A Ltd. to consumer is	₹ 30,000

Note: sale prices are exclusive of duties and taxes.

Answer: (Rule 10)

Statement showing computation of Assessable value for A1Ltd.

Particulars	**Assessable value (₹)**	**Relation ship**	**Applicable Rule**	**Remarks**
Coke sold to A2 Ltd.	1,20,000	Relative	Rule 10 of the Valuation Rules, 2000	Price at which relative buyer, sells goods in the open market to non relative buyer
Pep sold to A3 Ltd.	50,000	Non relative	--	Relation ship will come into exist only when there is holding and subsidiary concept persist.
Maaza sold to A Ltd.	20,000	Non relative	--	Relation ship will come into exist only when there is holding and subsidiary concept persist.
Total	1,90,000			

Example 81: M/s R.M.T. Industries manufactures cigarettes which are sold in wholesale, exfactory, at cum-duty price to wholesale dealers. The price charged to all the dealers from the cigarettes is the same. However, the dealers who purchase on credit are required to deposit interest free security with M/s R.M.T. The department has demanded duty from M/s R.M.T. contending that they had earned notional interest in the security deposit received from the dealers which should be included in the assessable value of the cigarettes being the additional consideration. Duty on cigarettes is being charged on advalorem basis. Discuss the stand taken by the department with decided case laws, if any.

Answer:

The facts of this case are similar to the case of *VST Industries Ltd. v C.C.Ex.* (1998) 97 ELT 395 (SC).

In the instant case the interest free deposit scheme was introduced by the assessee because of commercial consideration of covering the risk of credit sales, no special consideration flowing form the assessee to the buyer keeping tile deposit, the Supreme Court held that the notional interest cannot be included in the assessable value.

Example 82: Determine the value on which Excise duty is payable in the following instances. Quote the relevant section/rules of Central Excise Law.

(a) A. Ltd. sold goods to B Ltd., at a value of ₹ 100 per unit, In turn, B Ltd. sold the same to C Ltd. at a value of ₹ 110 per unit. A Ltd. and B Ltd. are related, whereas B Ltd. and C Ltd. are unrelated.

(b) A Ltd. and B. Ltd. are inter-connected undertakings, under section 2(g) of MRTP Act. A Ltd. sells goods to B Ltd. at a value of ₹ 100 per unit and to C Ltd. at ₹ 110 per unit, who is an independent buyer.

(c) A Ltd. sells goods to B Ltd. at a value of ₹ 100 per unit. The said goods are captively consumed by B Ltd. in its factory. A Ltd. and B Ltd. are unrelated. The cost of production of the goods to A Ltd. is ₹ 120 per unit.

(d) A Ltd. sells motor spirit to B Ltd. at a value of ₹ 31 per litre. But motor spirit has administered price of ₹ 30 per litre, fixed by the Central Government.

(e) A Ltd. sells to B Ltd. at a value of ₹ 100 per unit. B Ltd. sells the goods in retail market at a value of ₹ 120 per unit. The sale price of ₹ 100 per unit is wholesale price of A Ltd. Also, A Ltd. and b Ltd. are related.

(f) Depot price of a company are -

Place of removal	Price at depot on 1-1-2013	Price at depot on 31-1-2013	Actual sale price at depot on 1-2-2013
Amritsar Depot	₹ 100 per unit	₹ 105 per unit	₹ 115 per unit
Bhopal Depot	₹ 120 per unit	₹ 115 per unit	₹ 125 per unit
Cuttack Depot	₹ 130 per unit	₹ 125 per unit	₹ 135 per unit

Additional information : (i) Quantity cleared to Amritsar Depot – 100 units, (ii) Quantity cleared to Bhopal Depot – 200 units, (iii) Quantity cleared to Cuttack Depot – 200 units, (iv) The goods were cleared to respective depots on 1-1-2013 and actually sold at the depots on 1-2-2013.

Answer:

(a) Transaction value ₹ 110 per unit (Rule 9 of Transaction value Rules). [Sale to unrelated party].

(b) Transaction value ₹ 100 per unit for sale to B and ₹ 110 for sale to C – Rule 10 read with Rule 4 [Note that inter connected undertaking will be treated as 'related persons' for purpose of excise valuation only if they are 'holding and subsidiary' or are 'related person' as per any other part of the definition of 'related person'. Note that A is selling directly to C as per the question, and not through B Ltd].

(c) Transaction value will be ₹ 100. – section 4(1)—Incase of sale to unrelated person, question of cost of production does not arise.

(d) Transaction value ₹ 31. – section 4. – Since the goods are actually sold at this price, administered price is not considered.

(e) Transaction value ₹ 120 per unit – Rule 9 read with section 4 of Central Excise Act. Sale to an unrelated buyer. [Under new rules, there is no concept of 'wholesale price and retail price']

(f) Under Rule 7, the price prevailing at the Depot on the date of clearance from the factory will be the relevant value to pay Excise duty.

Therefore –

(i) Clearance to Amritsar depot will attract duty based on the price as on 1-1-2013. Transaction value ₹ 110x 100 units = ₹ 11,000

(ii) Clearance to Bhopal depot, so depot price on 1-1-2013. Therefore, transaction value ₹ 120x 200 units = ₹ 24,000

(iii) Clearance to Cuttack Depot, depot price on 1-1-2013. Transaction value ₹ 130x120 units = ₹ 26,000. Note the relevant date is 1-1-2013, since the goods were cleared to the depots on that date. No additional duty is payable even if goods are later sold from depot at higher price.

Example 83: Having regard to the provisions of section 4 of the Central Excise Act, 1944, compute/derive the assessable value of excisable goods, for levy of duty of excise, given the following information :

Cum-duty wholesale price including sales tax of ₹ 2,500	₹ 15,000
Normal secondary packing cost	₹ 1,000
Cost of special secondary packing	₹ 1,500
Cost of durable and returnable packing	₹ 1,500
Freight	₹ 1,250
Insurance on freight	₹ 200
Trade discount (normal practice)	₹ 1,500
Rate of C.E. duty as per C.E. Tariff	12% Advalorem

State in the footnote to your answer, reasons for the admissibility or otherwise of the Deductions.

Answer:

The assessable value from cum-duty price can be worked out by the under-mentioned formula

$$\text{Assessable Value} = \frac{(\text{Cum-Duty Price} - \text{Permissible Deduction}) \times 100}{100 + \text{Rate of Duty}}$$

Computation of Assessable Value

	₹	₹
Cum-duty price		15,000
Less : Deductions (See Notes)		
Sales tax	2,500	
Durable & returnable-packing	1,500	
Freight	1,250	
Insurance	200	
Trade-Discount	1,500	6,950
		8,050
Less: Central Excise Duty thereon @ 12.36%		
8,050 × 12.36/112.36		885.53
Assessable value		**7,164.47**

Notes :

1. The transaction value does not include Excise duty, Sales tax and other taxes.
2. The Excise duty is to be charged on the net price, hence trade discount is allowed as deduction.
3. With regards to packing, all kinds of packing except durable and returnable packing is included in the assessable value. The durable and returnable packing is not included as the such packing is not sold and is durable in nature.
4. Freight and insurance on freight will be allowed as deduction only if the amount charged is actual and it is shown separately in the invoice as per Rule 5 of the Central Excise Valuation Rules, 2000.

Example 84: Explain whether the following items can be included in/excluded from the transaction value under section 4 of the Central Excise Act, 1944.

(1) Collection expenses incurred in respect of empty bottles for filling aerated waters from the premises of buyers to the manufacturers.

(2) Delivery and collection charges of gas cylinders and collection of empty cylinders.

(3) Interest notional or real accruing on deposits for sale/return of gas cylinders as well as rentals.

(4) Cash discount known at the time of clearance of goods but not availed by the customer.

(5) Value of system software in case of computers.

Answer:

(1) Transaction value includes any amount charged in addition to the price of the goods by reason of or in connection with the sale. Since collection expenses are incurred by reason of or in connection with the sale, it would be included in the transaction value.

(2) CBEC has vide Circular No. 643/34/2002, dated 1-7-2002 clarified that delivery and collection charges of gas cylinders are by reason of or in connection with the sale of goods and therefore, the same would be included in the transaction value.

(3) The interest on advances taken from the customers would not be included in the assessable value, unless the receipt of such advance had no effect of depressing the wholesale price.

In *VST Industries Ltd. v C.C.Ex, Hyderabad* 1998 (97) ELT 395(SC), where interest free deposits were taken because of commercial consideration of covering the risk of credit sales, no special consideration flowing from the assessee to the buyer keeping the deposit was found and the Supreme Court held that notional interest cannot be included in the assessable value.

(4) However, in such case, the burden of proof lies on the Department to prove a nexus between the fact of advance taken and the depression in the value.

(5) The transaction value is the price actually paid or payable for the goods. In the given situation, as the case of cash discount has not been passed on to tile customer, it will not be allowed as deduction.

As per tile CBEC & Circular No. 644/35/2002-CX, dated 12-7-2002 the Software can be of the following types – *Systems software/Operating software* – which is designed to control the operation of the computer system.

Application software – Which is developed for specific applications only.

Valuation of goods is done in the form in which it is cleared. Therefore, computer *systems* will be valued by including the value of the software loaded on the hard disc. No distinction is to be made between an 'operating software' and an 'application software'.

Example 85: Thunder TV Ltd is engaged in the manufacture of colour television sets having its factories at Bangalore and Pune. At Bangalore the company manufactures picture tube; which are stock transferred to Pune factory where it is consumed to produce television sets. Determine the Excise duty liability of the captively consumed picture tubes from the following information:

Direct material cost (per unit)	₹ 600
Indirect material	₹ 50
Direct Labour	₹ 100
Indirect Labour	₹ 50
Direct Expenses	₹ 100

Indirect Expenses	₹	50
Administrative overheads	₹	50
Selling and Distribution overheads	₹	100

Additional Information:

Profit margin as per the Annual Report for the company for 2012-2013 was 15% before income tax.

(i) Material cost includes Excise duty paid ₹ 100.

(ii) Excise duty rate applicable is 12.36%.

Answer:

As per Rule 8 of The Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, the valuation of captively consumed goods is 110% of the cost of production. The cost of production of goods would include cost of material, labour cost and overheads including administration cost and depreciation etc.

The cost of material would be net of excise duty if CENVAT credit is availed in respect of such inputs.

Accordingly, the assessable value will be determined as follows :

Raw materials Cost (net of excise duty)	₹	500
Indirect material	₹	50
Direct Labour	₹	100
Indirect Labour	₹	50
Direct Expenses	₹	100
Indirect Expenses	₹	50
Administrative overheads	₹	50
Total cost of production	₹	900
Assessable value	₹	990

(i.e. 110% of the cost of production)

Total Duty Liability = ₹ 990 x 12.36/100 = ₹ 122.36

The raw material cost has been taken at ₹ 500 after deducting the duty element assuming that the CENVAT credit has been availed.

Example 86: Mrs. E fails to pay Excise Duty of ₹ 60,000 on the goods cleared in February by 5th March of 2013. The assessee, Mrs. E, is owner of a SSI unit. What is the interest payable under Rule 8 of Central excise Rules, 2002 if the duty was actually paid on 10th May of 2013?

Answer:

Interest = ₹ 60,000 x 18/100 x 40 days /365 days = ₹ 1,184

Note: w.e.f. 1-4-2011 rate of interest is @18% p.a. simple interest

Example 87: From the following data, determine the CENVAT allowable if the goods are produced or manufactured in a FTZ or by a 100% EOU and used in any other place in India.

Assessable value : ₹ 770 per unit,

Quantity cleared 77,770 units,

BCD— 10%,

CVD – 12%

Answer:

As per Rule 3 of CENVAT Credit Rules, 2002 the following formula is to be used if a unit in DTA purchases goods from EOU –

Assessable value	= ₹ 770	
Add: 50% on BCD 10%	= ₹ 38.50	(10% x 50%= 5% on ₹ 770)
Balance	= ₹ 808.5	
Add: CVD 12%	= ₹ 97.02	(12% on ₹ 808.50)

CENVAT Credit allowed to the extent of CVD. Therefore, ₹ 97.02 per unit for 77,770 units is ₹ 75,45,245.

Example 88: X Ltd. purchased a Boring-Drilling machine at a cum-duty price of ₹ 37,27,360. The Excise duty rate charged on the said machine was @16.48%. The machine was purchased on 1.4.2010 and disposed of on 30.6.2012 for a price of ₹ 12,00,000 in working condition as second hand machinery (Excise duty @12.36%). The company was claiming depreciation @25% following Straight Line Method on the value of machine. Using the said information, answer the following questions:

What is the excise duty paid on the machine?

What is the CENVAT credit allowable under CENVAT Credit Rules?

What is the amount of CENVAT credit reversible or duty payable at the time of clearance of the said machinery?

Answer:

(a) Excise duty is ₹ 5,27,360 (i.e.₹ 37,27,360 x 16.48/116.48)

(b) Upto 50% allowed as CENVAT credit in the year 2010-11 on 1-4-2010 and balance CENVAT credit in the year 2011-12 on 1-4-2011.

(c)

Year	No. of quarter	Workings
2010	3	April – December
2011	4	January – December
2012	2	January – June
Total	9	

Particulars	Amount (₹)	Workings
Cenvat credit on capital goods	5,27,360	
Less: Reduction	(59,328)	₹ 2,63,680 x 2.5% x 9 qtrs.
	(32,960)	₹ 2,63,680 x 2.5% x 5 qtrs.
Amount to be paid	4,35,072	
Or		
Excise duy on transaction value	1,48,320	₹ 12 lakhs x 12.36%
Amount to be paid	4,35,072	Whichever is higher

Example 89: Prepare a Cenvat account in the books of A Ltd., and determine the balance as on 30-9-2013 from the following data :

Opening balance as on 1-4-2013 ₹ 47,000.

Inputs received on 04-04-2013 involving excise duty paid ₹ 14,747

Purchased a lathe for ₹ 1,16,000-cum duty price @ excise duty rate of 12% on 5-4-2013 and received the lathe into the factory on 5-1 2-2013.

On 6-4-2013 paid excise duty on final products @ 12% through Cenvat A/c (cum duty price of the goods ₹ 2,32,000).

Inputs cleared as such to a job worker on 1-4-2013 not returned in 180 days, quantity 1,000 Kgs; Asssessable value ₹ 2 lacs; ED @ 12% of the above, 50% of the inputs were received on 1-10-2013.

Common inputs were used in a product, which was exempted from payment of duty cleared at a price of ₹ 100/unit, which included taxes of ₹ 20/unit ; quantity cleared 1,000 units.

On 7-4-2013 duty paid on inputs amounting to ₹ 17,867 was taken credit for in the Cenvat A/c as ₹ 17,687.

Answer:

CENVAT Credit Receivable Account in the Books of A Ltd., as on 30-9-2013

Date	Particulars	Debit (₹)	Credit (₹)
1-4-2013	To Opening Balance	47,000	
4-4-2013	To Sundry Creditors	14,747	
6-4-2013	By Excise duty paid on Final product		25,521
7-4-2013	To Sundry Creditors	17,687	
30-9-2013	To Sundry Creditors (Credit short taken on 7-4-2013)	180	
30-9-2013	By Reversal of Cenvat Account (5% Amount on Exempted goods)		6,180
30-9-2013	By Reversal of Cenvat Account (Amount equal to duty on inputs not return within 180 days)		24,720
	By Balance Carry Forward		23,193

Notes :

(i) Since capital goods (lathe) was received only on 5-12-2013, the credit is permissible only on 5-12-2013 and not before that date.

When 50% of inputs are received on 1-10-2013 (sent on job work), the credit is allowable for 50% only on 1-10-2013.

(iii) Where goods are exempted, an 'amount' is payable @ 5% on sale price less taxes.

(iv) For wrong amount of credit, rectification entry is passed.

(v) The 'amount' paid on 30-9-2013 is reversal of Cenvat credit. It is not 'excise duty'. Hence, a separate account 'Reversal of Cenvat Account' or "Payment of 'Amount' under Central Excise Rules" may be opened. At the year end, the balance may be transferred to expenses account. Strictly legally, it is not 'excise duty' paid.

Example 90: M/s Tips and Toes Ltd., manufactures four types of "Nail Polishes", namely Sweety, Pretty, Beauty, Tweety. The company has availed CENVAT credit of ₹ 4,00,000 on the common inputs used in the manufacture of 'Nail Polishes'. During the financial year 2012-2013, the company manufactured 1000 litres of each type of 'Nail Polishes". The CENVAT availed input was used in equal proportion in all the four types of the products. Calculate the CENVAT credit amount not available or amount payable under CENVAT Rules 57AA read with 57AD of CENVAT Rules of Central Excise, using the following additional data :

Product	**Nature of Sale**	**Sale price excluding Sales Tax & other local taxes**
Sweety	Sale to Home Consumption	₹ 30 per 20 ml bottle
Pretty	Sold to a 100% EOU	₹ 40 per 20 ml bottle
Beauty	Fully exported	₹ 50 per 20 ml bottle
Tweety	Supplied to Defence Canteen under exemption	₹ 60 per 20 ml bottle

Answer:

Cenvat credit is available in respect of the products Sweety (Home Consumption), Pretty (sale to EOU) and Beauty (Goods exported). However, Cenvat credit is not available in respect of goods cleared for home consumption under exemption notification. Thus, Cenvat credit is not available in respect to 'Tweety' *i.e.* goods supplied to defence canteen under exemption.

Assessee has two options –

(a) Maintain separate records right from receipt stage in respect of inputs used in 'Tweety'.

(b) If this is not possible, pay an amount of 5% on the exempted goods.

In this case, since the inputs are common, it is assumed that assessee was not in a position to maintain separate records. The price of goods is ₹ 60 per 20 ml bottle *i.e.*₹ 300 per 100 ml, *i.e.* ₹ 3,000 per 1000 ml, *i.e.* ₹ 3,000 per litre. Thus, total value of goods is 1,000 liters x 3,000 *i.e.* ₹ 30,00,000.

Therefore, he is required to pay 5% of ₹ 30,00,000 *i.e.* ₹ 1,50,000.

Example 91: A manufacturer brings some inputs valued at ₹ 25,000 on which duty of ₹ 5,000 has been paid @ 20%. Subsequently, the manufacturer sold the input as such, which goods he sold for ₹ 30,000. What is the duty payable by the manufacturer if –

1. Rate of duty on the date of clearance on inputs was 25%.

2. Rate of duty on the date of clearance on input was 10%.

Answer:

CENVAT Credit Rules, 2002, provide that in case the inputs are removed as such then the removal of such goods will be under cover of Invoice and the manufacturer will have to pay duty as if the inputs are manufactured in his premises.

Hence, in –

Case 1 : The duty payable by the manufacturer will be 25% of ₹ 30,000 = ₹ 7,500

Case 2 : The duty payable by the manufacturer will be 10% of ₹ 30,000 = ₹ 3,000

However, the Finance Bill, 2003 has amended CENVAT credit Rules, 2002. As per the amended Rule 3(4), now if the inputs are removed as such, the manufacturer will have to pay excise duty equal to the credit availed in respect of such inputs.

Therefore, as per the amendment the duty payable in both the above cases will be ₹ 5,000.

Example 92: ABC and Co. are manufacturing the products specified below from excise duty paid high density polyethylene granules. Part of the goods are captively consumed and other part of the goods cleared for home consumption in India and for export to Bhutan and United Kingdom. The effective rate of duty, and the value of clearances during the preceding year 2012-13, and the current assessment period 2013-2014 are as follows –

1. Rate of duty —

   Product 'A' – 12.36%. Product 'B' – 12.36%. Product 'C' (Waste & Scrap)- Exempt from duty.

2. Value clearances in 2012-13 –

   Product 'A'–

   (a) Clearance for home consumption – ₹ 130 Lakhs.
   (b) For captive consumption in the manufacture of excisable goods –₹ 135 lakhs.
   (c) Exports to Bhutan – ₹ 35 lakhs
   (d) Exports to UK under bond – ₹ 100 lakhs

   Product 'B'—

   (a) Clearance for home consumption – ₹ 80 lakhs
   (b) For captive consumption in the manufacture of excisable goods – Nil
   (c) Exports to Bhutan – ₹ 50 lakhs.
   (d) Exports to UK under bond – ₹ 200 lakhs.

   Product 'C'–

   (a) Clearance for home consumption – ₹ 40 lakhs
   (b) For captive consumption in the manufacture of excisable goods – ₹ 20 lakhs
   (c) Exports to Bhutan – Nil
   (d) Exports to UK – Nil

3. Value of clearances during current year *i.e.* 2013-14 —

   Product 'A'–

   (a) Clearance for home consumption – ₹ 50 lakhs.
   (b) For captive consumption in the manufacture of excisable goods – ₹ 40 lakhs
   (c) exports to Bhutan – Nil
   (d) Exports to UK under bond ₹ 50 lakhs.

   Product 'B'–

   (a) Clearance for home consumption – ₹ 80 lakhs
   (b) For captive consumption in the manufacture of excisable goods- Nil
   (c) Exports to Bhutan – ₹ 50 lakhs.
   (d) Exports to UK under bond – ₹ 100 lakhs.

   Product 'C'–

   (a) Clearance for home consumption – ₹ 50 lakhs.
   (b) For captive consumption in the manufacture of excisable goods- Nil
   (c) Exports to Bhutan – ₹ 50 lakhs.
   (d) Exports to UK under bond – ₹ 100 lakhs.

Advise the manufacturers as to whether they are entitled to small scale exemption and the amount of excise duty payable for their clearances during 2013-14, if the assessee intends to avail Cenvat credit.

Answer:

Turnover in 2010-11 for purpose of considering SSI exemption limit is as follows –

Product A – ₹ 165 lakhs [130 + 35]

Product B – ₹ 130 lakhs [80 + 50]

Product C – ₹ 20 lakhs.

If final product is exempt from duty, the goods used for captive consumption are liable to duty. Therefore, total turnover during 2012-13 is ₹ 315 lakhs.

Since total turnover does not exceeds ₹ 400 lakhs, the assessee is entitled to exemption in 2013-14 and has to pay normal duty @ 12.36% on ₹ 165 lakhs (₹ 315 lakhs - ₹ 150 lakhs)= ₹ 20.39 lakhs

If assessee avails cenvat credit, duty payable will be = 12.36% of ₹ 315 lakhs = ₹ 38.93 lakhs

Example 93: The value of excisable goods viz. Iron and Steel articles manufactured by M/s. Alpha Ltd., was ₹ 120 lakhs during the financial year 2012-13. The goods attract 10.30% ad valorem duty. Determine the excise duty liability when the assessee opts for 'CENVAT' and 'opts for not to avail CENVAT' under SSI exemption notifications respectively.

Answer:

If the assessee does not avail Cenvat, duty will payable will be ₹ 2.60 lakhs. [Nil for first 100 lakhs and ₹ 2.06 lakhs for subsequent ₹ 20 lakhs]. If assessee avails Cenvat credit, duty payable will be ₹ 8.24 lakhs (₹ 6.18 lakhs on first ₹ 100 lakhs and ₹ 2.06 lakhs on balance ₹ 20 lakhs)

Example 94: M/s NML, a unit registered as a small scale unit, manufactures coloured television sets under the brand name "SONY" in India, which brand name is owned by a Foreign Company. M/s NML has the exclusive right to use the Brand name "SONY" in India.

Explain briefly with reference to Notifications governing Small Scale Industrial Undertakings under the Central Excise Act, 1944 and the Rules, whether the manufacturer in this case M/s NML is entitled to the benefit of the exemption as applicable to small scale industrial undertakings.

Answer:

The benefit of SSI exemption is not applicable incase an SSI unit is manufacturing under the brand name or trade name of another person whether registered or not.

In the present case, since NML is manufacturing the TV sets under the brand name of "Sony", it will not be entitled for the benefit of SSI exemption.

Case in support is *Namtech Systems Ltd. v C.C.Ex, (Tribunal)*.

Example 95: M/S RPL has three units situated in Bangalore, Delhi and Pune. The total clearances from all these three Small Scale units of excisable goods was ₹ 350 lakhs during the financial year, 2012-2013. However, the value of individual clearances of excisable goods from each of the said units was Bangalore Unit ₹ 150 lakhs; Delhi Unit ₹ 100 lakhs; and Pune Unit ₹ 1000 lakhs.

Discuss briefly with reference to the Notifications governing small scale industrial undertakings under the Central Excise Act, 1944 whether the benefit of exemption would be available to M/s RPL for the financial year, 2013-2014.

Answer:

Any SSI unit whose turnover was less than ₹ 4 crore in the previous year is entitled for exemption irrespective of their investment in plant & machinery or number of employees.

Where the manufacturer has more than one factory, the turnover of all factories will have to be clubbed together for the purpose of calculating the SSI exemption limit of ₹ 400 lakhs.

Since in the above case, the total value of clearances during the preceding financial year 2012-2013 is 350 lakhs, hence it will be entitled for the SSI benefit.

Example 96: An assessee has factory in Kolkata. As a sales policy, he has fixed uniform price of ₹ 2,000 per piece (excluding taxes) for sale anywhere in India. Freight is not shown separately in his invoice. During F.Y. 2013-14, he made following sales: (i) Sale at factory gate in Kolkata – 1,200 pieces – no transport charges; (ii) Sale to buyers in Gujarat – 600 pieces, actual transport charges incurred ₹ 28,000; (iii) Sale to buyers in Bihar – 400 pieces, actual transport charges incurred – ₹ 18,000, (iv) Sale to buyers in Kerala – 1,000 pieces, actual transport charges ₹ 54,800. Find assessable value.

Answer:

The total pieces sold are 3,200 (1,200 + 600 + 400 + 1000). The actual total transport charges incurred are ₹ 1,00,800 (Nil + 28,000 + 18,000 + 54,800). Thus, equalized (averaged) transport charges per piece are ₹ 31.50. Hence assessable value will be ₹ 1968.50 (₹ 2,000 – ₹ 31.50). This will apply to all 3,200 pieces sold by the manufacture.

Study Note - 3

CENVAT CREDIT

This Study Note includes

3.1 Background of Cenvat Credit

3.2 Highlights of Cenvat Credit Scheme

3.3 Utilization of Cenvat Credit

3.4 Reversal of Cenvat Credit

3.5 Refund of cenvat Credit

3.6 Obligation of a manufacturer or Producer of final Products and a provider of taxable services

3.7 Input service Distributors

3.8 Documents and Accounts

3.9 Other Provision

3.1 BACKGROUND OF CENVAT CREDIT

Excise and Service tax are central taxes, expected to be consumption based taxes to the extent practicable. Till the goods or service is finally consumed, the burden of excise duty and service tax is passed on to next buyer, who gets credit of the tax and excise duty paid by the supplier/ service provider. Thus, effectively, tax is paid on value added at each stage, as illustrated in following example. It means to say that CENVAT Credit eliminates cascading effect of tax.

Cascading effect of tax: it means goods suffered tax suffering again and again in addition to tax on taxes, whereas CENVAT Credit eliminates the cascading effect of tax.

Example 1:

	Transaction without VAT		**Transaction With VAT**	
Details	A (₹)	B (₹)	A (₹)	B (₹)
Purchases	–	110	–	100
Value Added	100	40	100	40
Sub–Total	100	150	100	140
Add Tax 10%	10	15	10	14
Total	110	165	110	154

'B' is purchasing goods from 'A'. In second case i.e. under Vat, his purchase price is ₹ 100 as he is entitled to Cenvat credit of ₹ 10 i.e. tax paid on purchases. His invoice shows tax paid as ₹ 14. However, since he has got credit of ₹ 10, effectively he is paying only ₹ 4 as tax, which is 10% of ₹ 40, i.e. 10% of 'value added' by him. Cenvat (Central Value Added Tax) scheme is used to achieve the aim of levying tax only on 'value added' at each stage.

Example 2:

Particulars	Value ₹
Goods Purchased by Mr. Y by paying ₹ 224 from Mr. X out of which ₹ 24 towards excise duty which is not considered as cost)	200.00
Add: Value Addition	80.00
Taxable Turnover	280.00
Add: CENVAT @12%	33.60
SALES INCLUSIVE OF E.D.	313.60

Total excise duty payable = ₹ 33.60
Less: CENVAT Credit = ₹ 24.00
Net excise duty payable = ₹ 9.60
Value Added Tax is ₹ 9.60

3.2 HIGHLIGHTS OF CENVAT CREDIT SCHEME

CENVAT Credit is an integration of excise duty and service tax. It means while paying excise duty service tax can claim as Cenvat credit and while paying service tax excise duty can claim as Cenvat credit. The same has been explained in the following example:

Example 3:

M/s X Ltd. (not a SSI unit) is a manufacturer produced dutiable finished goods in the month of April 2012 for ₹ 20,00,000, exclusive of excise duty payable is @12.36%. Input goods (i.e. raw material) purchased for ₹5,61,800 inclusive of excise duty @ 12.36%. Capital goods purchased in the same month for ₹ 10,00,0000 (exclusive of excise duty 12.36%). Input services used from a consultant for ₹ 2,00,000 (exclusive of service tax 12.36%). Finished goods removed from the factory in the month of April 2012. Find the net excise duty payable by M/s X Ltd., and due date of payment of excise duty?

Answer: **(Amount in ₹)**

Particulars	**Basic Excise Duty (₹)**	**2% Edu. Cess (₹)**	**1% S.A.H Edu. Cess (₹)**	**Workings**
Finished Goods	2,40,000	4,800	2,400	₹ 20 L x 12%
Less: CENVAT CREDIT on input goods	(60,000)	(1,200)	(600)	5,61,800 x 12.36/112.36 = ₹ 61,800
Less: CENVAT CREDIT on capital goods	(60,000)	(1,200)	(600)	₹ 10,00,000 x 12.36%= ₹ 1,23,600 Up to 50% allowed as CENVAT credit in the first year of receipt of capital goods and balance allowed in the subsequent year or years
Less: CENVAT CREDIT on input services	(24,000)	(480)	(240)	₹ 2,00,000 x 12.36% = ₹ 24,720
Net excise duty payable	96,000	1,920	960	Due date of payment of excise duty is on or before 5th May 2012

3.2.1 Cenvat Credit Rules, 2004

Rule 1: Title, extent and commencement:

These rules called as CENVAT Credit Rules, 2004. They extended to the whole of India. However, these rules not applicable to the State of Jammu and Kashmir with regard to availment and utilization of credit of service tax.

Definitions under Cenvat Credit Rules, 2004

Rule 2: Definitions:

Rule 2(a): capital goods:

The term "Capital goods" under CENVAT Rules is Different from capital goods as understood in accounting or in income-tax. Items like spare parts, tools, dies, tubes fittings etc. are never capitalized in accounts for income-tax purposes but are defined as capital goods for CENVAT.

(A) Capital goods are —

(i) All goods falling under Chapters 82, 84, 85, 90, heading number 6805, grinding wheels and the like parts thereof falling under heading 6804 of the First Schedule to Central Excise Tariff Act, 1 985.Tools, hand tools

Chapter 82: Tools, Implements, Cutlery etc.

Chapter 84: Nuclear Reactors, Boilers, Machinery and Mechanical appliances parts thereof

Chapter 85: Electrical Machinery & Equipment & parts thereof, sound recorders, and parts and accessories of such articles

Chapter 90: Optical, photographic, medical & surgical instruments and apparatus parts and accessories thereof.

(ii) Pollution control equipment

(iii) Components, spares and accessories of goods specified at (i) and (ii) above

(iv) Moulds and dies

(v) Refractories and refractory materials

(vi) Tubes, pipes and fittings thereof, used in the factory

(vii) Storage tank and

(viii) Motor vehicles other than those falling under tariff heading 8702, 8703, 8704, 8711 and their chassis, (but including dumpers and trippers) Used—

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(1A) Outside the factory of the manufacturer of the Final products for generation of electricity for captive use within the factory (w.e.f. 1-4-2011); or

(2) For providing output service;

(B) w.e.f. 1-7-2012 motor vehicle designed for transportation of goods including their chassis registered in the name of the service provider, when used for

(i) providing an output service of renting of such motor vehicle; or

(ii) transportation of inputs and capital goods used for providing an output service; or

(iii) providing an output service of courier agency

(C) w.e.f 1-7-2012 motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of

(i) transportation of passengers; or

(ii) renting of such motor vehicle; or

(iii) imparting motor driving skills.

(D) w.e.f. 1-4-2012 components, spares and accessories of motor vehicles which are capital goods for the assesse;

Rule 2(b): Customs Tariff Act means the Customs Tariff Act, 1975

Rule 2(c): Excise Act means Central Excise Act, 1944

Rule2(d): As per Rule 2(d) of Cenvat Credit Rules, 2004, exempted goods (i.e. non-dutiable goods) means goods which are exempted from whole of duty of excise leviable thereon and includes goods which are chargeable to ₹ Nil' rate of duty and the goods in respect of which the benefit of an exemption under Notification No. 1/2011-CE dated 1-3-201 1 is availed (i.e. goods on which 1% or 2% (w.e.f 17-3-2012) of excise duty has been paid).

Rule 2(e): As per Rule 2(e) of Cenvat Credit Rules, 2004, exempted services means taxable services which are exempted from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act, 1994 and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken. For removal of doubts, it is hereby clarified that ₹ exempted services' includes trading (w.e.f. 1-4-2011).

Trading goods: A manufacturer or service provider may also be trading in goods. For example authorized service station of automobiles is also selling spare parts of motor car. For the purpose of valuation, the value of exempted service shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards the purchases) or 10%of the cost of goods sold, whichever is higher (vide

— Notification No. 13/201 1-CE dated 3 1-3-2011).

Taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken, but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.

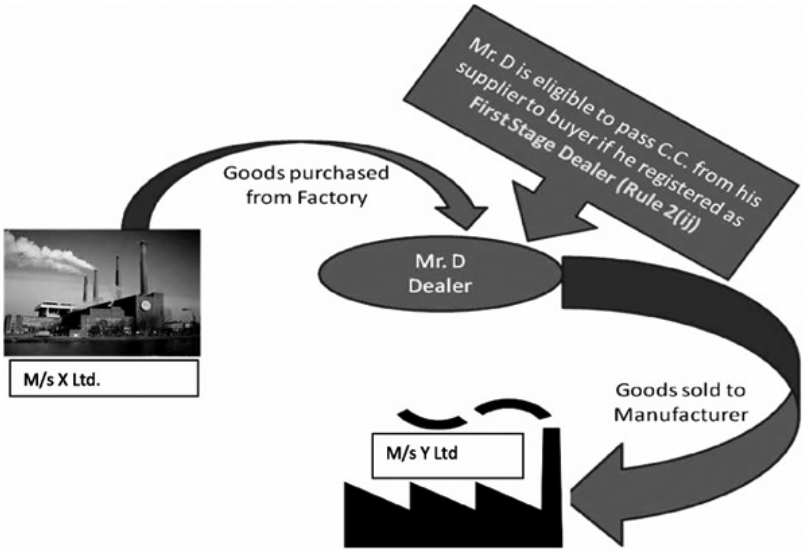
Rule 2(f): Excise Tariff Act means the Central Excise Tariff Act, 1985

Rule 2(g): Finance Act means the Finance Act, 1994

Rule 2(h): Rule 2(h) of CENVAT Credit Rules defines **final products** under Central Excise to mean those goods that are excisable and have come into existence from manufacturing activity making use of inputs or by using input services. Here final products mean only excisable goods i.e. those goods which are liable for excise duty which may be at nil rate or a rate higher than zero. Assessees are generally under the misconceived notion that only goods which suffer duty at a rate higher than zero percent are excisable goods whereas that is not the case. This definition of exempted goods is vital as there are certain restrictions as to availability of CENVAT credit. However the goods against which there is no rate prescribed in the CET may not be said to be excisable goods.

Rule 2(ij): first stage dealer **"First stage dealer"** means a dealer, who purchases goods directly from manufacturer OR importer or from the depot of an importer or from the premises of the consignment agent of importer, under cover of an invoice;

Example 4: Mr. D purchased dutiable goods from M/s X Ltd by paying excise duty and the same sold to M/s Y Ltd. In the given case Mr. D (registered under Central Excise as registered dealer) is competent to pass the excise duty as CENVAT Credit from M/s X Ltd to M/s Y Ltd. The same has been explained in the following diagram:



C.C. = CENVAT CREDIT

Rule 2(k): (w.e.f. 1-4-2011) "input" means—

(i) all goods used in the factory by the manufacturer of the final product; or

(ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or

(iii) all goods used for generation of electricity or steam for captive use; or

(iv) all goods used for providing any output service;

but excludes—

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

(B) w.e.f. 1-7-2012 any goods used for—

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works contract or construction service as listed under clause (b) of section 66E of the Act;

(c) capital goods except when used as parts or components in the manufacture of a final product;

(d) Motor vehicles;

(e) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee;

(f) any goods which have no relationship whatsoever with the manufacture of a final product.

Explanation:- For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer;

What is Input

Any input

- which is used "in the manufacture" or
- which is used "in relation to manufacture"
- which is not defined as capital goods will be eligible as inputs.

All goods (except High Speed Diesel, Light Diesel Oil and Petrol) used in or in relation to the manufacture of the final product, directly or indirectly and whether contained in the final product or not, and includes (i) Lubricating oils, (ii) Greases, (iii) cutting oils, (iv) accessories of the final products, (v) goods used as paints, as packing material, as fuel or for generation of electricity or steam used for manufacture of final products are eligible for CENVAT.

Example 5: X Ltd. removed cookers along with packing material from factory but used for packing at depot had to be considered as have been used in or in relation to the manufacture of final products and credit of duty paid on such master cartons (i.e. packing material) could not have been denied. The entire packing material is to be considered as has been used in or in relation to the manufacture of the final product. Accordingly they are entitled to avail the credit of duty paid on the packing material *Hawkins Cookers Ltd. (2010) (HC)*.

Construction service is not an 'input service to any manufacturer or service provider w.e.f. 1-4-2011

Example 6: Laboratory, test or quality check is always in relation to the manufacture of finished goods. It is immaterial whether or not the input is physically present in the final finished product as such; therefore, the laboratory test in relation to the manufacture of final product is a part of manufacture. Hence Cenvat Credit is available on raw material destroyed in laboratory test. *Tata Engineering & Locomotive Co. Ltd. 2010 (HC)*.

What is not input?

(a) Any input which is used as "facilitation to the manufacture" is not considered as an eligible Input.

(b) Input like steel, cement, angles, channels, CTD (Cold Twisted Deformed) or TMT (thermo mechanically treated) bar, other material used for following purpose is not eligible for credit

- Construction of building or civil structure or part thereof
- Laying of foundation or making of structures for support of Capital goods

Conditions one should satisfy to avail CENVAT Credit:

Cenvat Credit can be claimed only in respect of eligible inputs subject to the following conditions.

Condition 1: The input should be used in factory (Material sent for job work is acceptable provided these are brought back within 180 days from the date of dispatch). This condition is not applicable to the service provider.

Condition 2: Central Excise duty should be paid on inputs (Actual payment of duty by the buyer cum- manufacturer may not be required)

Condition 3: Final product must be dutiable goods.

Rule 2(l): input service (w.e.f. 1-4-2011), "input service" means any service,—

(i) used by a provider of output service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, upto the place of removal, and includes

(a) services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises,

(b) advertisement or sales promotion,

(c) market research,

(d) storage upto the place of removal,

(e) procurement of inputs,

(f) accounting,

(g) auditing,

(h) financing,

(i) recruitment and quality control,

(j) coaching and training,

(k) computer networking,

(l) credit rating,

(m) share registry,

(n) security,

(o) business exhibition,

(p) legal services,

(q) inward transportation of inputs or capital goods and

(r) outward transportation upto the place of removal;

but excludes

(A) (w.e.f. 1-7-2012) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they used for

a. Construction or execution of works contract of a building or a civil structure or a part thereof; or

b. Laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) Services provided by way of renting of a motor vehicle in so far as they relate to a motor vehicle which is not a capital goods; or

(C) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods except when used by-

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by a such person; or

(c) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

The following service is excluded from the definition of *'input service'* only so far as they relate to a motor vehicle, which is not a capital goods (w.e.f. 1-7-2012).

- Renting of a motor vehicle

However, these services will be eligible as 'input service' if used for provision of taxable services for which CENVAT CREDIT of motor vehicle is available as capital goods.

The following services are excluded from the definition of *'input service' (w.e.f. 1.7.2012)*

- *General Insurance Service*
- *Servicing*
- *Repair and maintenance in relation to motor vehicle which is not a capital goods.*

However, these services will be eligible as 'input service' if used by

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by him or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person .

Note: Construction service is not an 'input service to any manufacturer or service provider w.e.f. 1-4-2011

Clarifications from the CBE&C (Circular No. 943/04/201 1-CX, dated 29-4-2011) with regard to input and input services

Since, definition of 'input', and 'input service' has been changed w.e.f. 1-4-2011, the Central Board of Excise and Customs has been issued clarifications in this regard *vide* CBE&C No. 943/04/2011 -CX., dated 29-4-2011, the same were explained with the help of examples;

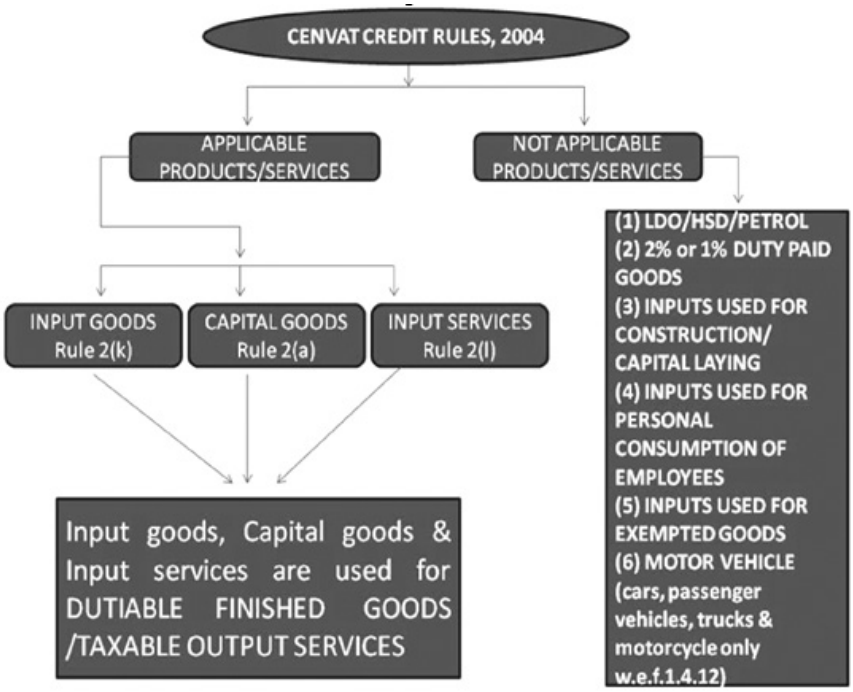
Sl. No.	Issue	Clarification	Examples
1	Can credit of capital goods be availed of when used in manufacture of dutiable goods on which benefit under Notification 1/2011- CE is availed or in provision of a service whose part of value is exempted on the condition that no credit of inputs and input services is taken?	As per Rule 6(4) of the CENVAT credit Rules, 2004, no credit can be availed on capital goods used exclusively in manufacture of exempted goods or in providing exempted service. Goods in respect of which the benefit of an exemption (i.e. Excise duty @1% is paid) under notification No. 1/2011-CE, dated the 1st March, 2011(or excise duty 2% w.e.f 17-3-2012) is availed are exempted goods [Rule 2(d)]. Taxable services, whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken, are exempted services [Rule 2(e)]. *Hence credit of capital goods used exclusively in manufacture of such goods or in providing such service is not allowed.*	(1) M/s. X Ltd. is a manufacturer of Mathematical boxes, geometry boxes and colour boxes, pencil sharpeners. These goods are subject to excise duty @2% (w.e.f. 1-4-2012. Machinery purchased for Rs 1,12,360 (inclusive of excise duty @12.36%) to produce aforesaid final products. Hence, M/s. X Ltd. is not eligible to claim CENVAT credit of duty paid on capital goods. (2) M/s. CDS Builders provided construction of commercial contract services. While executing construction contract, service provider purchased Drilling Machine (i.e. Capital Goods) for Rs 2,24,720 (inclusive of excise duty @12.36%). Service tax was paid by service provider after claiming abatement @67%. Hence, M/s. CDS Builders are not eligible to claim CENVAT credit of duty paid on capital goods.

Sl. No.	Issue	Clarification	Examples
2	Is the credit of only specified goods and services listed in the definition of inputs and input services not allowed such as goods used in a club, outdoor catering etc, or is the list only illustrative?	The list is only illustrative. The principle is that cenvat credit is not allowed when any goods and services are used primarily for personal use or consumption of employees. **Illustrative list :** • Outdoor catering, • Beauty treatment, • Health services, • Cosmetic and plastic surgery, • Membership of a club, • Health and fitness centre, • Life insurance, • Health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession etc.	M/s. A Ltd. is a manufacturing company regularly providing lunch to their employees. For this purpose M/s. A Ltd. received outdoor catering service from Mr. B. Since, this service meant primarily for the personal use or consumption of employees will not constitute an input service. Therefore, service tax paid on outdoor catering service is not allowed as CENVAT credit. *However, outdoor catering service should be considered as input service if used for sales promotion, training, auditing (i.e. lunch to auditors), legal services, security or to directors who are not employees.*
3	How is the "*no relationship whatsoever with the manufacture of a final product*" to be determined?	Credit of all goods used in the factory is allowed except in so far as it is specifically denied. The expression "*no relationship whatsoever with the manufacture of a final product*" must be interpreted and applied strictly and not loosely. The expression does not include any goods used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not. Only credit of goods used in the factory but having absolutely no relationship with the manufacture of final product is not allowed.	(1) M/s. Ram Ltd. purchased Steel, cement and other material used for construction of factory building is not eligible as input goods. (2) Part of inputs goes in process loss, may not be reflected in final product. However, CENVAT credit is available on entire quantity of inputs. Since, inputs are used in the manufacture of final product. (3) *Goods such as furniture and stationary used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of same is allowed.*
4	Is the credit of input services used for repair or renovation of factory or office available?	*Credit of input services used for repair or renovation of factory or office is allowed.* Services used in relation to renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, are specifically provided for in the inclusive part of the definition of input services.	M/s. X Ltd. paid Rs1,10,300 (inclusive of service tax @12.36%) to a provider of taxable services towards renovation of factory and office relating to such factory. M/s. X Ltd. is allowed to claim CENVAT credit on input services (i.e. renovation and repairs of a factory) as per Rule 2(l) of CEVNAT Credit Rules, 2004 (w.e.f. 1-4-2011).

Sl. No.	Issue	Clarification	Examples
5	Is the credit of Business Auxiliary Service (BAS) on account of sales commission now disallowed after the deletion of expression "activities related to business"?	The definition of input services allows all credit on services used for clearance of final products upto the place of removal as per the Rule 2(1)(ii) of the CENVAT Credit Rules, 2004 (w.e.f. 1-4-2011). Moreover activity of sale promotion is specifically allowed and on many occasions the remuneration for same is linked to actual sale. Reading the provisions harmoniously it is clarified that credit is admissible on the services of sale of dutiable goods on commission basis.	Mr. X is a commission agent of M/s Y Ltd., manufacturer of furniture. A sum of Rs 11,030 (inclusive of service tax) has been paid by M/s Y Ltd., towards commission to Mr. X. Service tax paid on input service (Business Auxiliary Service) is allowed as CENVAT credit.
6	Can the credit of input or input services used exclusively in trading, be availed?	Trading is an exempted service. Hence the credit of any inputs or input services used exclusively in trading cannot be availed.	An assessee is a dealer of Air Condition Machines. These goods are purchased from a manufacturer by paying value of goods as well as excise duty. However, excise duty is not allowed as CENVAT credit.
7	Are the taxes and year end discounts to be included in the sale price and cost of goods sold while calculating the value of trading?	Generally accepted accounting principles need to be followed in this regard. All taxes for which set off or credit is available or are refundable/ refunded may not be included. Discounts are to be included.	**Value of trading:** selling price of a product is Rs 250 and the purchase price is Rs 200, the difference is Rs 50 or Rs 20 (i.e. Rs 200 x 10%) whichever is higher will be considered as value of exempted service for the purpose of payment of amount @6% or for proportionate reversal of credit. *Selling price includes discounts but excludes taxes and duties for which credit is allowed.*
8	Does the expression "in or in relation" used in Rule 6 override the definition of "input" under Rule 2(k) for determining the eligibility of Cenvat credit?	The definition of "input" is given in Rule 2(k) and Rule 6 only intends to segregate the credits of inputs used towards dutiable goods and exempted goods. While applying Rule 6, the expression "in or in relation" must be read harmoniously with the definition of "inputs".	

Sl. No.	Issue	Clarification	Examples
9	Sub-rules 3B and 3C of rule 6 apply to whole entity or independently in respect of each registration?	The sub-rules 6(3B) and 6(3C) impose obligation on the entities providing banking and financial services (in case of a bank and a financial institution including a non-banking financial company) or life insurance services or management of investment under ULIP service. The obligation is applicable independently in respect of each registration. When such a concern is exclusively rendering any other service from a registered premise, the said rules do not apply. In addition to BoFS and life insurance services if any other service is rendered from the same registered premises, the said rules will apply and due reversals need to be done.	
10	Is the credit available on services received before 1.4.11 on which credit is not allowed now?	The credit on such service shall be available if its provision had been completed before 1.4.2011.	rent-a-cab service

For easy understanding we have presented the entire concept so far explained in the following diagram:



Rule 2(m)	input service distributor means an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards purchase of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.
Rule 2(n)	job worker means processing or working upon of raw material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for aforesaid process and the expression "job worker" shall be construed accordingly.
Rule 2(na)	large taxpayer shall have the meaning assigned to it in the Central Excise Rules, 2002;
	A Large Taxpayer Unit (LTU) is one who meets ANY ONE of the following conditions:
	• excise duty in cash (account current) of ₹ 5 crore or more; or
	• service tax in cash (account current) of ₹ 5 crore or more; or
	• advance (income) tax/corporation tax of ₹ 10 crore or more
Rule 2(naa)	manufacturer or producer
	(i) in relation to ariticles of (jewellery or other articles of precious metals falling under heading 7113 or 7114 as the case may be) of the First Schedule to the Excise Tariff Act, includes a person who is liable to pay duty of excise leviable on such goods under sub-rule of rule 12AA of the Central Excise Rules, 2002;
	(ii) in relation to goods falling under Chapter 61, 62 or 63 of the First Schedule of Excise Tariff Act, includes a person who is liable to pay duty of excise leviable on such goods under sub-rule (1 A) of rule 4 of the Central Excise Rules, 2002.
Rule 2(o)	notification means the notification published in the Official Gazette;
Rule 2(p)	output service (w.e.f 1-7-2012) "Output Service" means any service provided by a provider of service located in the taxable territory but shall not include a service-
	(i) specified in section 66D of the Finance Act, or
	(ii) where the whole of service tax is liable to be paid by the recipient of service.
Rule 2(q)	person liable for paying service tax has the meaning as assigned to it in clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994.
Rule 2(r)	provider of taxable service include a person liable for paying service tax.
Rule 2(s)	second stage dealer means a dealer who purchases the goods from a first stage dealer.
Rule 2(t)	words and expressions used in these rules and not defined but defined in the Excise Act or the Finance Act shall have the meaning respectively assigned to them in those Acts.

Types of CENVAT Credit

In terms of Rule 3 of CENVAT Credit Rules, credit is available to the manufacturer of excisable goods which either may be dutiable or non dutiable and the provider of taxable service. CENVAT credit is not available to the dealer as the dealer does not engage himself in any processing amounting to manufacture as defined under law which would entitle him to CENVAT credits and therefore, merely passes on the CENVAT benefit which is equal to the duty per unit of the final product, paid by the manufacturer on clearances effected by him. The following duties paid on inputs are eligible as CENVAT Credit for the manufacturer of Excisable goods:

(i) Basic duty of excise specified under First Schedule to Central Excise Tariff Act.

(ii) Special duty of excise specified under Second Schedule to Central Excise Tariff Act.

(iii) The additional duty of excise under Section 3 of Additional duties of excise (T & TA) Act, 1978 (40

of 1978) **and** wherein restrictions are provided as to utilization i.e. it can be utilized only towards payment of excise duty leviable under additional duties of excise (T & TA) Act 1978.

(iv) The additional duty of excise leviable under section 3 of Additional duties of excise (Goods of special importance) Act, 1957 (58 of 1957) and it can be utilized towards payment of either basic or special excise duty.

(v) The National Calamity Contingent duty leviable under section 136 of Finance Act, 2001 (14 of 2001) and this duty can be utilized for payment of NCCD.

(vi) Education Cess on excisable goods or on taxable services leviable under section 91 read with section 93 of Finance Act, 2004 and this is to be utilized only towards the payment of education cess either on goods or taxable output services.

(vii) Secondary and Higher education cess on inputs and input services leviable under section 136 read with section 138 of Finance Act. 2007 (22 of 2007) and it can be utilized only towards payment of secondary and higher education cess either on excisable goods or on taxable output service.

(viii) The additional duty leviable under section 3(5) of the Customs Tariff Act, No restrictions are provided for its utilization but however the duty leviable under this section cannot be availed by service providers.

(ix) The additional duty of excise leviable under section 157 of the Finance Act and this can be utilized towards payment of additional duty of excise under section 157.

(x) Additional duty of excise equivalent to duty of excise leviable under section 3 of Customs Tariff Act to offset the effect of Central Excise Duty on locally manufactured goods. This is known as CVD

(xi) Service tax leviable under section 66, 66A (import of services under erstwhile service tax law) or Section 66B (charging section under negative list based taxation). No restrictions as to utilization is provided and this credit can be utilized towards payment of either excise duty or for paying service tax.

(xii) Additional duty of excise leviable under section 85 of the Finance Act and this is to be utilized towards payment of additional duty of excise leviable under section 85 of the Finance Act.

However duty paid at the rate of 1% in terms of Notification No. 1/2011-CE dated 1-3-201 1 cannot be availed as Credit. It is also set out in proviso to Rule 3(I)(v/7) that credits upto 85% of additional duty of Customs under section 3(1) of Customs Tariff Act, 1975, on ships, boats and other structures for breaking up can be allowed.

CENVAT Credit is available either to the manufacturer or producer of excisable products or provider of taxable services on:

(a) Inputs received in the factory of manufacture of final products on or after 10th September 2004.

(b) Capital goods received in the factory of manufacture of final products (except in case capital goods installed outside the factory for generation of electricity for captive use) on or after 10th September, 2004.

(c) Input services received by the manufacturer of final product on or after 10th September, 2004.

(d) Any inputs or input services used in the manufacture of intermediate products by a job worker and received by the manufacturer for further use in relation to manufacture.

Transitional Credit

Rule 3(2) provides for availment of credit on inputs when the assessee enters into the tax net for the first time, as in the normal course the manufacturer would have stock in hand (raw materials, consumables, packing materials) as on that date. The removals from that date would suffer duty; therefore credit on the inputs contained in finished goods and work in progress is available and on the other hand any

assessee who opts out of CENVAT scheme should also reverse the credit contained in the raw material, finished goods and work in progress. For availing the transitional credit, the inputs must satisfy all the conditions as to definition of inputs under Central Excise Law. This provision is mainly invoked by SME units availing the benefit of Notification No. 8/2003-CE as they are required to pay duty on crossing ₹ 150 lacs and avail credit while at the end of the year they are required to reverse the credit on excising the option available under Notification No. 8/2003-CE.

3.3 UTILIZATION OF CENVAT CREDIT

Rule 3: Cenvat Credit allowed or may be utilized for various types of duties and taxes explained under the sub rules of rule 3.

Cenvat Credit allowed or may be utilized for various types of duties and taxes explained under the sub rules of rule 3.

As per Rule 3(4) of CENVAT Credit Rules 2004, credit may be utilized for payment of

(a) any duty of excise on any final products or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002 (it means if the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken) service tax on any output service.

The following table will provide clear picture in respect of claiming of credit.

Particulars	BED	2% EDU. Cess	1% EDU. Cess	Remarks
Finished Goods	XXXX	XX	XX	
OUTPUT SERVICE	XXXX	XX	XX	
AMOUNT	XX	--	--	AMOUNT DOES NOT ATTRACT CESS
LESS: C.C. ON I.G.	(XX)	(XX)	(XX)	
LESS: C.C. ON I.S.	(XX)	(XX)	(XX)	
LESS: C.C. ON C.G.	(XX)	(XX)	(XX)	UPTO 50% 1ST YEAR
LESS: C.V.D.	(XX)	--	--	Equal to B.E.D.
LESS: SPL. CVD	(XX)	--	--	Equal to VAT / CST
NET PAYABLE	XX	XX	XX	

C.C. ON I.G = cenvat credit on input goods

C.C. ON I.S = cenvat credit on input services

C.C. ON C.G = cenvat credit on capital goods

C.V.D. = countervailing duty (also called as additional customs duty)

SPL. CVD = special countervailing duty (also called as special additional customs duty)

Rule 3(1)(i): Additional Customs Duty (i.e. CVD) Imported Goods

Ships, boats and other structures imported for breaking up which will attract excise duty falling under 8909 00 00, because various items like washing machine, furniture, air condition machine and so on will come out. Therefore, CVD paid on account of import of ships, boats allowed as cenvat credit only to the extent of 85% (w.e.f 1.3.2011) while paying excise duty on products extracted from ships, boats or other structures.

Rule 3(2):Ceases to be exempted

Manufacture is allowed to take cenvat credit lying in stock or in process (work in progress) or inputs contained in the final goods lying as stock on the date on which any goods manufactured by the said manufacturer ceases to be exempted goods (i.e. goods become dutiable). The same provision is also applicable for service provider rule 3(3).

3.4 REVERSAL OF CENVAT CREDIT

Rule 3(5) Removal of Goods as such

When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 of the Cenvat Credit Rules, 2004.

It is provided that if the manufacturer of goods or the provide of output service fails to pay the amount payable under sub-rules (5), (5A) and (5B) of Rule 3 (Payment on removal of Inputs/Capital goods as such or after use and write off of Inputs/Capital goods), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT Credit wrongly taken.

Exceptions:

(a) Cenvat credit not required to be reversed if input goods or capital goods removed outside the premises of the provider of output service for providing the output service;

(b) Cenvat credit shall not be required to be reversed where any inputs are removed outside the factory for providing free warranty for final products.

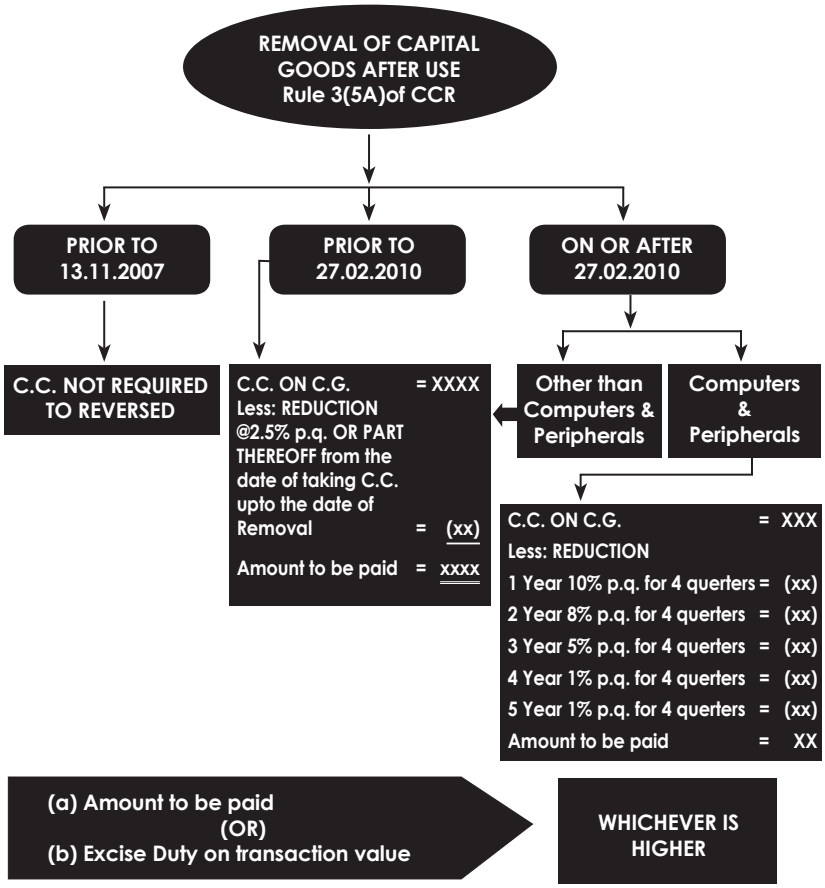
Rule 3(5A) Removal of Capital goods after use (w.e.f. 1-4 -2012)

If the capital goods, on which CENVAT credit has been taken, are removed after being used, whether as capital goods or as scrap or waste, the manufacturer or provider of output services, shall pay

(a) an amount equal to the CENVAT Credit taken on the said capital goods reduce by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit or

(b) equal to excise duty payable on transaction value (i.e. Sale value)

(c) WHICHEVER IS HIGHER



Rule 3(6): The buyer can avail Cenvat credit of the amount paid:

The buyer can avail Cenvat credit of the amount paid on removal of the capital goods.

Rule 3(5B): CENVAT credit to be reversed/paid

Any inputs or capital goods before being put to use, are written off fully or partly or any provision is made in books of account to write off fully or partially, the manufacturer or service provider is required to pay fully an amount equal to CENVAT credit taken in respect of such inputs or capital goods (w.e.f. 1-3-2011).

Rule 3(5C): Damage/Destruction of Finished goods

Earlier, Circular No. 800/33/2004 provided for reversal of CENVAT credit where the excise duty on finished goods had been remitted under Rule 21 on account of damage or destruction etc. and this is now provided for in Rule 3(5C). Where the duty of excise on goods manufactured or produced is remitted u/r 21, the credit on inputs used in manufacturing or producing such goods would have to be reversed if the same had been availed earlier. The reversal is only in respect of inputs and not required for input services or for that matter capital goods.

Example 7: Y Ltd. manufactured cars which have been destroyed by fire within the factory. If Y Ltd. obtained remission of duty on finished goods, then duty on input goods had availed as CENVAT credit should be reversed.

Rule 3(7): CENVAT Credit on purchases from EOU/EHTP/STP

Goods removed from a 100% Export Oriented Unit to Domestic Tariff Area are liable to pay excise duty. As per Rule 17 of Central Excise Rules, 2002 goods shall be removed from a 100% Export Oriented Unit

to Domestic Tariff Area under an invoice by following the procedure specified in rule 11 of CENVAT Credit Rules, 2004, and the duty leviable on such goods shall be paid by utilizing the CENVAT credit or by crediting the duty payable to the account of the Central Government in the manner specified in rule 8 of the Central Excise Rules, 2002 *[CCEx. & Cus.* **v** *Suresh Synthetics* (2007) (SC)].

As per present law, duty on clearances of goods to DTA from 100% EOU will be equal to 50% of basic customs duty, countervailing duty under section 3(1) of the Customs Tariff Act, 1975 plus special additional duty under section 3(5) of Customs Tariff Act, 1975, if applicable (i.e. VAT exempted), and cess as applicable.

Example 8 : M/s X Ltd (a unit of 100% EOU) sold goods to M/s A Ltd. for ₹ 20 lac. BCD @10%, CVD 16% and Spl. CVD @4% (VAT exempted) are applicable.

Find the total duty of excise. How much Cenvat Credit allowed to M/s A Ltd. Answer:

Particulars	**Value in ₹**	**Workings**
Assessable value	20,00,000	
Add: Basic Customs Duty 10%	1,00,000	20,00,000 X 10% X 50%
Balance	21,00,000	
Add: CVD @16%	3,36,000	21,00,000 X 16%
Balance	24,36,000	
Add: 2% CESS	8,720	4,36,000 X2%
Add: 1% SAH CESS	4,360	4,36,000 X1%
Balance	24,49,080	
Add: SPL. CVD 4%	97,963	24,49,080 X 4%
Value of import	25,47,043	

Cenvat Credit allowed is ₹ 4,33,963 (i.e. CVD + Spl. CVD)

Rule 4: Conditions for availing CENVAT Credit

In all taxation laws, the benefit is always available with some Conditions and the conditions for utilizing the CENVAT credits are provided in Rule 4 of CENVAT Credit Rules 2004:

1. The CENVAT Credit in respect of inputs can be availed immediately on receipt of the inputs in the factory of the manufacture and in respect of final products falling under chapter 7113, the CENVAT on inputs may be taken immediately on receipt of inputs in the registered premises of the person who gets the final products manufactured on his behalf on job work basis subject to the condition that inputs are used by the job worker for manufacturing such final product. Physical receipt of inputs is very important for availment.

Further CENVAT credit in respect of inputs may be taken by the provider of output service when the inputs are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the inputs.

2. The CENVAT Credit in respect of capital goods received in a factory at any point in a given financial year shall be taken only to the extent of 50% of the duty paid. [Manufacturer eligible for SSI exemption would be eligible to avail 100% in the 1st year]

Further CENVAT credit in respect of capital goods may be taken by the provider of output service when the capital goods are delivered to such provider, subject to maintenance of documentary evidence of delivery and location of the capital goods.

3. Rule 4(2)(a)) which provides for availing credits on receipt of capital goods into factory, is amended w.e.f. 1-4-2011, to state that the CENVAT credit would be allowed even on capital

goods which is received outside the factory and used for generation of electricity for captive used in factory.

4. However if the capital goods are cleared as such in the same financial year, whole of the duty paid shall be taken as CENVAT. Availment of Credit upto 50% in the year of receipt is not applicable to additional duty of excise levied under section 3(5) of Customs Tariff Act. Similar to what is stated in the aforesaid clause, physical receipt is important for availment of CENVAT credit. Facility has been provided to SSI units that are eligible to avail the benefit of Notification No. 8/2003-CE to take the full CENVAT credit on capital goods in one installment in the year of receipt of goods.

5. The balance of CENVAT credit may be taken in any financial year subsequently only if the capital goods are in the possession of the manufacturer and in case the manufacturer has not availed duty of excise in the year of procurement, then entire credit would be available in the next year. This requirement as to possession in the subsequent year would not apply to components, spares and accessories, moulds, tools and dies and refractories and refractory materials.

6. The manufacturer is not expected to own the capital goods for the purpose of availment, relaxations are provided in Rule 4(3) allowing credit in respect of capital goods even if the capital goods are acquired either on lease, hire or loan agreement from a financing company.

7. Rule 4(4) provides that CENVAT credit in respect of capital goods shall not be allowed on such value of capital goods representing duty when the manufacturer has claimed depreciation under section 32 of Income Tax Act on the said amount of duty. In other words, the manufacturer or the service provider cannot claim CENVAT credit and again include the CENVAT amount in the cost of the capital goods for the purpose of claiming depreciation.

8. Rule *4(5)(b)* has been amended during 2010 budget changes to provide that CENVAT credit shall be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to another manufacturer for production of goods or to a job worker for the production of goods on his behalf. Therefore, these items can also be sent to another manufacturer for manufacture of goods as per his specifications.

9. Rule 4(7) provided prior to 1-4-2011 that credit can be availed on input services only after making payment of value and service tax. But after 01.04.2011, it is amended to say that the credit can be taken on receipt of invoice. However the payment for the same should be made within three months of date of invoice. If the payment is not made the credit availed should be reversed. Subsequently on making payment, the credit reversed can be taken.

10. The Rule 4 (7) is amended by way of proviso, w.e.f. 1-4-2011, to state that when any payment made towards the input service is returned then the manufacturer or service provider who has taken the credit on such input service shall pay proportionate amount to the CENVAT availed in respect of such amount returned. This payment can be by utilizing the CENVAT credit or otherwise.

3.5 REFUND OF CENVAT CREDIT

Rule 5: Refund of Cenvat Credit

Following the amendment in Rule 5, the Government has issued a fresh Notification No. 27/2012 –CE (N.T.) dated 18 June 2012 (the Notification) which has superseded earlier Notification in this regard i.e. Notification No. 5/2006 – CE (N.T.) dated 14 March 2006. The Notification prescribes new procedures, safeguards, conditions and limitations with respect to the manner in which the refund would be claimed by the exporter of goods / services.

The key changes are as under:

(a) In case of person exporting goods and services simultaneously, option has been provided to submit two refund claims, one in respect of export of goods and the other in respect of export of services;

(b) Option to submit monthly claims under certain circumstances has been withdrawn. Therefore, every person will now have to file the refund claim on a quarterly basis;

(c) In addition to the maximum cap provided in Rule 5 (to the extent of export turnover / total turnover), the Notification further provides for a restriction, wherein the amount of refund claim can neither exceed the closing balance of credit lying at the end of quarter to which the refund claim relates nor the balance of credit lying at the time of filing of refund claim;

(d) The amount of refund would have to be debited to CENVAT credit amount at the time of filing of such claim. However, if the sanctioned amount of refund is less than the amount of refund filed, the difference may be taken back as credit by the claimant;

(e) Credit is being allowed on motor vehicles (except those of heading nos. 8702, 8703, 8704, 8711 and their chassis).

The Credit of tax paid on the supply of such vehicles on rent, insurance and repair shall also be allowed;

(f) Credit of insurance and service station service is being allowed to –

(i) Insurance companies in respect of motor vehicles insured and re-insured by them; and

(ii) Manufacturers in respect of motor vehicles manufactured by them.

(g) At present, credit on goods can be taken only after they are brought to the premises of the service provider. Rule 4(1) and 4(2) are being amended to allow a service provider to take credit of inputs or capital goods whenever the goods are delivered to him, subject to specified conditions.

(h) Rule 7 for input service distributors is being amended to provide that credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit and that the credit of service tax attributable to service used in more than one unit shall be distributed prorate on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates.

(i) Rule 9(1) (e) is being amended to allow availment of credit on the tax payment challan in case of payment of service tax by the service receiver on reverse charge basis.

W.e.f 1.4.2012 Simplified scheme introduced for exporter and service providers who are exported goods and services.

$$\text{REFUND AMOUNT} = \frac{\text{EXPORT TURNOVER OF GOODS \& SERVICE}}{\text{TOTAL TURNOVER}} \times \text{Net CENVAT CREDIT}$$

EXPORT TURNOVER	VALUE ₹
DUTIABLE F.G. EXPORTED DURING THE RELEVANT PERIOD	XXXX
INTERMEDIATE PRODUCTS CLEARED FOR EXPORT DURING RELEVANT PERIOD	XXXX
TOTAL	XXXX

EXEMPTED GOODS EXPORTED REMAINS CALLED AS EXEMPTED GOODS ONLY

Export Turnover of Service	Value ₹
Payments received during the relevant period for export service	XXXX
Export services whose provision has been completed for which payment had been received in advance	XXXX
Less: Advance received for export of services for which services not completed during the relevant period	XXXX
Total	**XXXX**

Total Turnover	Amount ₹
Dutiable goods cleared during relevant period for export as well as for D.T.A	XXXX
Exempted goods cleared during relevant period for export as well as for D.T.A	XXXX
Export of services and services provided in D.T.A	XXXX
Input goods and capital goods removed as such against an invoice for the relevant period - rule 3(5)	XXXX
Total	**XXXX**

Net Cenvat Credit	Amount ₹
Total cenvat credit on input goods and input services	XXXX
Less: Amount reversed for the relevant period as per rule 3(5c) of CCR	(XXX)
Total	**XXXX**

Example 7: Export of dutiable goods = ₹ 60,000

Domestic turnover = ₹ 30,000

Cenvat Credit = ₹ 4,500

Excise duty Liability = ₹ 3,708

Answer:

Refund is ₹ 792

(₹ 60,000/ ₹ 90,000) x ₹ 4,500 = ₹ 3,000

Or

Cenvat Credit balance = ₹ 792 (i.e. 4500 – 3708)

Whichever is less.

Refund claim should be after paying excise duty liability.

Note: Time limit for claiming refund is ONE year from the date of provision of the services.

3.6 OBLIGATION OF A MANUFACTURER OR PRODUCER OF FINAL PRODUCTS AND A PROVIDER OF TAXABLE SERVICES

Rule 6: Obligation of a manufacturer or producer of final products and a provider of taxable service
Option 1: As per rule 6(2) of the CENVAT Credit Rules, 2004 (w.e.f. 1-4-2011)

If separate accounts maintained for the receipt, consumption and inventory of inputs, then the assessee shall take CENVAT credit on inputs which are used:-

in or in relation to the manufacture of dutiable final products excluding exempted goods; and for the provision of output services excluding exempted services.

If separate accounts maintained for the receipt and use of input services, then the assessee shall take CENVAT credit on input services which are used:-

- in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal; and
- for the provision of output services excluding exempted services

If the capital goods used by the manufacturer or service provided for dutiable as well as non-dutiable goods and for taxable services as well as exempted services then the available Cenvat Credit can be claimed fully (i.e. upto 50% in the first year of receipt and the balance in the subsequent years).

If separate accounts are not maintained

In this case the manufacturer or service provider has following three options:

Option 2: As per rule 6(3)(i) of the Cenvat Credit Rules, 2004, *pay an amount*:

The manufacturer of goods shall pay an amount equal to 6% of '*value*' of exempted goods (w.e.f. 1-4-2012) and the provider of output services shall pay an amount equal to 6% (w.e.f. 1-4-2012) of '*value*' of the exempted services.

(Or)

Option 3: As per rule 6(3) (ii) of the Cenvat Credit Rules, 2004, pay an amount proportionately attributable to CENVAT credit utilized for exempted final product and exempted output services as provided in rule 6(3A) of the Cenvat Credit Rules, 2004.

Option 4: As per rule 6(3)(iii) of the Cenvat Credit Rules, 2004, maintain separate account for inputs and pay 'amount' as determined under rule 6(3A) in respect of input services (w.e.f. 1-4-2011).

Goods Exported under bond are not exempted goods: Final products 9dutiable goods0 are exported under bond without payment of duty. They are not exempted goods. Hence, an amount @6% is not required to be paid. At the same time proportionate reversal of CENVAT credit is also not required as per rule 6(6)(v) of the Cenvat Credit Rules, 2004. Exported goods are considered as dutiable goods for the purpose of calculation of formulae as per rule 6(3A).

Rule 6(6A): the provisions of rule 6(1), 6(2), 6(3) and 6(4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a unit in a Special Economic Zone or to a Developer of a Special Economic Zone for their authorized operations.

Important points with regard to Rule 6:

(i) Pay an *Amount'* to the department without charging Education cess and Secondary and 1-ligher education cess.

(ii) The buyer of exempted product is not eligible to get the CENVAT credit. Hence, the buyer of such exempted goods will not be eligible to avail CENVAT credit of 'amount' paid to the manufacturer or service provider (CBE & C circular No. 870/08/2008-C.Ex., dated 16-5-2008).

(iii) At the end of the year, assessee should calculate the ratios on actual basis and make fresh calculations and pay difference if any on or before 30th June. If any excess is paid, such an excess amount can be adjusted in CENVAT credit.

(iv) Delay in payment of shortfall amount will attract interest @ 24% per annum after the due date (i.e. 30"' June.) till the date of payment of short amount.

(v) If assessee opts to pay ₹ amount' on exempted services under 6(3)(i) of Cenvat credit Rules, 2004, the amount will be calculated on the value so exempted under abatement scheme. For example Mr. Raj provider of commercial construction services opted abatement 67%. Gross value of contract is ₹ 100 lakhs. Exempted services are ₹ 67 lakhs and taxable services are ₹ 33 lakhs. Hence, he is liable to pay service tax on ₹ 33 lakhs and ₹ amount' @6% on ₹ 67 lakhs.

(vi) Value for purpose of Rule 6(3) and 6(3A) of the Cenvat Credit Rules, 2004 (w.e.f, 1-4-2011): Assessee has to either pay ₹ amount' on value of exempted goods or services as per rule 6(3) or opt for proportionate reversal of credit as per rule 6(3A). As per rule 6(3D) of the Cenvat Credit Rules, 2004, ₹ Value' in both the cases will be as follows:

(a) Gross amount of works contract is ₹ 1,00,000 were service provider opted for composition scheme (i.e. @4.8%). Service tax will be ₹ 4,800. Hence, value of exempted services is ₹ 40,000 (i.e. 1: 4,800 x 100/12).

(b) Provider of commercial construction services opted abatement 67%. Gross value of contract is ₹ 100 lakhs. Exempted services are ₹ 67 lakhs and taxable services are ₹ 33 lakhs. Hence, he is liable to pay service tax on ₹ 33 lakhs and 'amount' @6% on ₹ 67 lakhs. That is value of exempted services is ₹ 67 lakhs.

(c) In case of trading goods, selling price of a product is ₹ 250 and the purchase price is ₹ 200, the difference is ₹ 50 or ₹ 20 (i.e. ₹ 200 x 10%) whichever is higher will be considered as value of exempted service for the purpose of payment of amount @6% or for proportionate reversal of credit.

Rule 6(3B): Bank or NBFC services

A substantial part of the income of a bank is from investment or by way of interest in which a number of inputs and input services are used (i.e. exempted as well as taxable). Hence, a banking company or a financial institution including NBFC, providing banking and financial services are being obligated to pay an amount equal to 50% of the credit availed on inputs and input services as per rule 6(3B) of the Cenvat Credit Rules, 2004, w.e.f. 1-4-2011. Therefore, other options of payment of amount under Rule 6 shall not be available for this service provider.

Rule 6(3C): Insurance Company services: A substantial part of the income of an insurance company is from investment or by way of interest in which a number of inputs and input services are used (i.e. exempted as well as taxable), Therefore, general insurance services and life insurance services or management of ULIPs, amount payable is equal to 20% of Cenvat credit availed on inputs and input services in the month as per rule 6(3C) of the Cenvat Credit Rules, 2004, w.e.f, 1-4-2011. Therefore, other options of payment of amount under Rule 6 shall not be available for this service provider. However, Rule 6(30 has been withdrawn w.e f 1.4.2012. It means Insurance companies now can avail full cenvat credit.

Rule 6(4): No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon tinder Notification No, 8/2003 namely SMALL SCALE UNIT's

Rule 6(6): Goods sold to EOU, SEZ, EHTP, STP, UN Agencies: Dutiable goods removed without payment of duty to Export Oriented Units (EOUs), Special Economic Zone (SEZ units), Electronic Hardware Technology Park (EHTP), Software Technology Park (STP), United Nations (UN) agencies as per rule 6(6) of Cenvat Credit Rules, 2004, then the Cenvat credit on inputs/capital goods / input services used in the manufacture of such final products shall be allowed. It means CENVAT Credit need not required to be reversed or pay an ₹ amount'. It means these goods are not 'exempted goods'.

Exempted goods cannot be exported under bond & benefit of rule 6(6) of Cenvat Credit Rules, 2004 is not available. i.e. Manufacturer is not eligible to take Cenvat credit of Inputs/capital goods/input services used in such goods. It means these good are to be considered as exempted goods only.

3.7 INPUT SERVICE DISTRIBUTOR

Rule 7: Manner of distribution of credit by input service distributor (w.e.f. 1-4-2012):

The input service distributor may distribute the CENVAT CREDIT in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely:-

(a) The Input service distributor must ensure that such a distribution should not exceed the service tax paid.

(b) In case an input service is attributable to service use in a unit exclusively engaged in manufacture of exempted goods or exempted services, then such credit of service tax shall not be distributed.

(c) Credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and

(d) Credit of service tax attributable to service used in more than one unit shall be distributed prorata on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates.

Rule 7A: Distribution of credit on inputs by the office or any other premises of output service provider:

Cenvat credit on input goods and capital goods can be distributed by the service provider only if such person registered as first stage dealer or a second stage dealer.

Rule 8: Storage of input outside the factory of the manufacturer: In exceptional cases, AC/DC may permit the manufacturer considering the nature of goods and shortage of space to store the inputs on which CENVAT credit has been availed, outside the factory premises. Condition may be prescribed to safeguard revenue. This relaxation is available only to inputs and not capital goods.

3.8 DOCUMENTS AND ACCOUNTS

Rule 9: Documents and accounts:

CENVAT Credit can be taken based on the following any documents:

- invoice
- supplementary invoice
- bill or challan
- debit note / credit note

The above documents if does not contain full information then deputy commissoiner or the assistant commissioner of central excise is satisfied that the said goods have been accounted for in the books of the assessee he may allow the Cenvat credit.

Rule 9(4): Purchases from first stage or second stage dealer

Rule 9(4) provides that CENVAT credit in respect of inputs and capital goods shall be allowed only if the dealer has maintained proper records and should indicate that the goods are cleared from the duty paid stock. CENVAT Credit shall be allowed only if the duty portion is expressly provided on the invoice *i.e.* on pro rata basis. The dealer should ensure that he has proper stock records to take care of this issue.

Rule 9(5): Admissibility of CENVAT Credit

Rule 9(5) of CENVAT Credit Rules provides that it is the duty of the manufacturer to prove the admissibility of credit and the manufacturer shall maintain proper records for receipt, disposal, consumption and

inventory of input and capital goods. The manufacturer shall also' maintain a statement presenting the information as to value, availment and utilization of CENVAT credit and the name of the manufacturer or dealer from whom the inputs or capital goods were procured. In short the burden of proving the admissibility is on the person availing the CENVAT.

Return of CENVAT Credit

The manufacturers availing CENVAT benefits are required to file a CENVAT credit return along with monthly return within ten days' from the close of the month. The due date for filing of quarterly returns for SSI units is changed wherein it has to be filed within 10 days from the end of the quarter instead of 20 days from the end of the quarter. The dates are aligned with the date for Non-SSI units so that all the returns are required to be filed by 10th of the month following the said month for non SSI's and 10th of the month following the quarter for SSI units.

Rule 9A: Information in respect of Principal Inputs

The information that is required to be furnished under Rule 9A is:

- The Central Government has notified manufacturers who have remitted excise duty of more than one hundred lakhs during the preceding financial year to furnish the declaration in form ER 5 and monthly return in for ER 6.
- The manufacturer shall file a declaration in form ER 5 containing the information as to the excisable goods manufactured or to be manufactured and also the quantity of principal inputs required for manufacture of one unit of finished goods. The said declaration is to be made annually and filed within 30th April. If there is any alteration to the information already provided in ER 5, then the manufacturer shall within 15 days of such change, inform the superintendent of central excise.
- The manufacturer shall file a return in form ER 6 within 10 days from the end of month containing the details as to the quantity of finished goods manufactured and information relating to receipt and consumption of each principal input.
- Explanation to Rule 9A was provided to explain principal inputs to mean any input which is used in the manufacture of final product and the cost of such input is not less than 10% of the total cost of raw material for the manufacture of unit quantity of a given final product.

Rule 10: Transfer of CENVAT Credit

In terms of Rule 10 of CENVAT Credit Rules, relaxations in the form of transfer of credit is available to manufacturer of final products when the manufacturer shifts his factory to another location or transfers his business on account of change in ownership or on sale, merger, amalgamation, lease or transfers his property to a joint venture with the specific provision for transfer of liabilities, and only then the manufacturer shall be allowed to transfer the unutilized CENVAT credit to the transferee.

The transfer of unutilized credit is allowable only if the stock of inputs or inputs in process or capital goods is also transferred along with the factory and it should be duly accounted to the satisfaction of ACCE or DCCE.

Rule 10A: Inter-unit transfer of Additional CVD

A new Rule 10A is introduced wherein if manufacturer has more than one registered premises, it provides for transfer of CENVAT Credit of additional CVD (additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act) from one unit to another unit, such credit lying in balance at the end of quarter.—

The credit can be transferred as follows:

(i) making an entry for such transfer in the documents maintained for CENVAT Credit;

(ii) issuing a transfer challan containing registration number, name and address of the registered premises transferring the credit and receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (/) above,

(iii) based on such transfer challan, the recipient premises may take CENVAT credit

The above benefit is restricted if the transferring unit is the benefit of following notification:

(a) 32/99- CE -Goods produced in specified areas like north-east, J&K, Uttarakhand, Himachal Pradesh, Sikkim and Kutch (Gujarat)

(b) 33/99-CE specified goods of factories in North-East (Assam, Tripura, Meghalaya, Meghalaya, Mizoram, Manipur, Nagaland or Arunachal Pradesh)

(c) 39/2001-CE - Exemption to excisable goods cleared from units in Kutch (Gujarat)

(d) 56/2002-CE - Exemption to all goods produced (except cigars, tobacco and its products, soft drinks and their concentrates) produced in Jammu & Kashmir by units located in Industrial Growth Centre, IIDC, EPIP or industrial Estate.

(e) 57/2002-CE - exemption to specified goods produced by units in Jammu & Kashmir

(f) 56/2003-CE - exemption to specified goods cleared from new units in Sikkim

(g) 71/2003-CE - Exemption to all goods produced(except cigars, tobacco and its products, Specified Carry bags, mineral oils, branded aerated beverages, pollution causing paper and paper products) Cleared from specified areas of Sikkim by unit in Industrial Growth Centre, IIDC, EPIP or industrial Estate from excise duty other than duty paid on account of Cenvat credit

(h) 20/2007-CE Exemption to north East including Sikkim on all goods (except as specified) cleared from Assam, Tripura, Meghalaya, Mizoram, Manipur, Nagaland or Arunachal Pradesh or Sikkim from duty Paid other than by utilization of Cenvat credit.

(i) 1/2010-CE - exemption to all goods except cigarettes, cigars, tobacco products and soft drinks or their concentrates cleared from new units (established/expanded after 6-2-2010) in J&K.

3.9 OTHER PROVISIONS

Rule 11: Transitional provision:

Final product fully exempted from Excise Duty due to any one of the following reasons:

(a) As per Rule 11(2) of the CENVAT Credit Rules, 2004, a manufacturer claiming CENVAT credit on inputs or input services, subsequently opt for full exemption from excise duty under Notification No. 8/2003 (i.e. Small Scale Industrial (SSI) exemption).

(b) As per Rule 11(3) of the CENVAT Credit Rules, 2004, a manufacturer of final product opts for full exemption from excise duty, if the said final products are exempted absolutely under section 5A of the Central Excise Act, 1944.

(c) As per Rule 11(4) of the CENVAT Credit Rules, 2004, a service provider opts for full exemption from payment of tax on his output service.

In such cases, an '*amount*' is payable equivalent to CENVAT credit taken on such —

- inputs lying in stock or
- inputs lying in process or
- inputs contained in final products or
- input services.

The said '*amount*' can be paid by utilizing the CENVAT credit receivable account. The balance CENVAT credit, if any, receivable will lapse.

Rule 12: Special Dispensation in respect of inputs manufactured in factories located in specified areas of North East region, Kutch district of Gujarat, State of Jammu & Kashmir and State of Sikkim where a manufacturer has cleared any inputs or capital goods, in terms of notifications of the Govt. of India, the cenvat credit on such inputs or capital goods shall be admissible as if no portion of the duty paid on such inputs or capital goods was exempted under any of the said notifications.

Rule 12A: Large Tax payer Unit (LTU) — Special Enabling provisions

Large tax payer means any person, engaged in the manufacture or production of goods, except the goods falling under chapter 24 or Pan Masala falling under chapter 21 of the First schedule of the Central Excise Tariff Act, 1985 and has remitted during the financial year preceding the year under consideration:

(i) Duties of excise of more than rupees five hundred lakhs in cash or through account current; or

(ii) Advance tax of more than rupees ten hundred lakhs, under the Income Tax Act, 1961.

Rule 12A facilitates the large tax payer to remove CENVATABLE inputs or capital goods except petrol, diesel and LDO without payment of duty under CENVAT Credit Rules either under the cover of an invoice or challan to another premise for further use in the manufacture of final products in the recipient premises provided that:

- The goods are manufactured using the said transferred inputs and are cleared on payment of duty or exported under bond or letter of undertaking within a time span of six months from the receipt of such inputs.
- Any other conditions that are prescribed by the Commissioner of Central Excise would have to be followed.
- Explanation is provided prescribing the requirements that the transfer challan shall be serially numbered containing registration number, name, address of the transferor unit, description, classification, time and date of removal, mode of transport and vehicle registration number, quantity of goods and registration number and name of the consignee.

If default is made in following the above mentioned procedure or conditions stipulated by the Commissioner of Central Excise or the inputs are cleared as such, then the large tax payer shall pay an amount equal to the credit taken in respect of such inputs along with interest specified under Rule 14 of the CENVAT Credit Rules.

Yet another proviso is added to recover CENVAT credit availed on capital goods by the LTU, when the capital goods are exclusively used in manufacture of exempted goods or such goods are cleared from recipient premises. However in this case too recovery is made from the recipient's premises along with interest specified under Rule 14 of CENVAT Credit Rules.

The above conditions shall not be applicable if the recipient is availing either the benefits under Notifications provided below or the unit is an export oriented unit or a unit located in electronic hardware technology park (EHTP) or software technology park (STP).

No 32/99, dt. 8-7-1999	33/99 dt. 8-7-1999	39/2001 dt. 31-7-2001
56/2002, dt. 14-11-2002	57/2002 dt. 14-11-2002	56/2003 dt. 25-6-2003
71/2003, dt. 9-9-2003	20/2007 dt. 25-4-2007	01/2010-CE dt. 6-2-2010

The other salient features of this Rule are provided below:

- The first recipient premise may avail the benefit of CENVAT credit of the amount paid under the proviso discussed above as if the duty is discharged by the sender premises and the document should expressly provide duty details.
- The CENVAT credit of any specified duties availed under Rule 3 of CENVAT Credit Rules shall neither be denied or varied in respect of input or capital goods if removed as such under Rule 12(1) and cannot be treated as removed without payment of duty under Rule 3(5) of the CENVAT Credit

Rules or the said inputs or capital goods arc used in the manufacture of intermediate goods which are removed without payment of duty under Rule 12BB of Central Excise Rules.

- The large tax payer unit (LTU) shall submit a monthly return for each of the registered premises.

Rule 12A (4): Transfer of Credits within units

The LTU has the facility to transfer the credits available from one registered manufacturing unit to another registered premises by making an entry for such transfer in a record maintained under Rule 9(5) and by issuing a transfer challan containing the particulars as to registration number, name and address of the registered premises transferring the credit as well as receiving such credit and amount, the challan is specified to enable the recipient to avail the credit.

Rule 12A (4) provides for transfer of credit from one unit to another but correspondingly Rule 3 which speaks about availment of CENVAT credit and Rule 9 which states the documents for availment has neither spoken about availment of credit nor states that CENVAT credit can be availed by the recipient unit on the basis of transfer challan, but merely provides that utilization is subject to the conditions/ restrictions specified in Rule 3(7)(b) of CENVAT Credit Rules.

Rule 12AA: Power to impose restrictions in certain types of cases like misuse of credit Central Govt. of India is empowered to impose restrictions on manufacturer, first stage and second stage dealer or an exporter if they misuse of CENVAT Credit.

Nature of restrictions:

- Restrictions on utilization of CENVAT Credit
- Suspension of registration in case of a dealer and type of facilities to be withdrawn

Rule 13: Power of Central Government to notify goods for deemed CENVAT credit:

The Central Govt. may, by notification, declare the input or input service on which the duties of excise, or additional duties of customs or service tax paid, shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in that notification and allow CENVAT CREDIT of such duty or tax deemed to have been paid in such manner and subject to such conditions as may be specified in that notification even if, in the case of input, the declared input, or in the case of input service, the declared input service, as the case may be, by the provider of taxable service, declared in that notification, but contained in the said final products, or as the case may be, used in providing the taxable service.

Rule 14: Recovery of CENVAT credit wrongly taken or erroneously refunded (w.e.f 1-4-2012):

Where the CENVAT Credit has been taken and utilized wrongly or has been erroneously refunded, the same alone with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11 A and 11 AA of the Excise Act, or section 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.

Rule 15: Confiscation and penalty in case of wrongly or in contravention of any provisions of these rules:

If any person, takes or utilizes CENVAT Credit in respect of input or capital goods or input services, wrongly or in contravention of any of provisions of these rules, then, all such goods shall be liable to confiscation and such person shall be liable to a penalty: ₹ 2,000 or duty / service tax on such goods or services whichever is higher is the penalty.

Rule 15A: General penalty:

Whoever contravenes the provisions of these rules for which no penalty has been provided in the rules, he shall be liable to a penalty which may extend to ₹ 5,000.

Rule 16: Supplementary provisions (i.e. any notification, circular, instruction, standing order, trade notices or other orders issued under the CENVAT Credit Rules, 2002 or the Service Tax Credit Rules, 2002 by the Central Govt., shall be deemed to be valid under CENVAT Credit Rules, 2004.

PRACTICAL PROBLEMS WITH ANSWERS

Payment of Excise Duty after Adjusting Cenvat Credit

Example 9: An assessee cleared various manufactured final products during June 2012. The duty payable for June 2012 on his final products was as follows:

Basic Excise duty ₹ 2, 00,000, Education Cess as applicable.

During June he received various inputs on which total duty paid by suppliers of inputs was as follows:

Basic Excise Duty₹ 50,000, Education Cess as applicable.

Excise duty paid on capital goods received during the month was as follows: Basic Excise Duty₹ 12,000 Education Cess as applicable.

Service Tax paid on input services was as follows:

Service Tax₹ 10,000 Education Cess ₹ 200 and SAH ₹ 100.

Due date of payment of duty is 5th July 2012. He receives some inputs on 4th July, 2012 on which the excise duty paid is ₹ 1,000 plus education cess as applicable. Compute the amount of excise duty payable by him for the month of June 2012?

Answer :

Excise duty liability for the month of June 2012

Particulars	**BED (₹)**	**ST (₹)**	**Cess (₹)**	**SAH (₹)**
On final product	2, 00,000		4,000	2,000
Duty payable	2, 00,000		4,000	2,000
Input tax credit	50,000		1,000	500
On other than capital goods				
On capital goods	6,000	-	120	60
On input services	-	10,000	200	100
CENVAT Credit	56,000	10,000	1,320	660
Net duty payable (₹)	1,34,000		2,680	1,340

Note: Input tax credit ₹ 1,000 received during the month of July 2012 can be adjusted against the duty liability due as on 31st July, 2012.

Example 10: A manufacturer purchased certain inputs from Z. The, assessable value was ₹ : 20,000 and the Central Excise duty was calculated at ₹ 3,296 making a total amount of invoice at ₹ 23,296. However, the buyer manufacturer paid only ₹ 20,800 to Z in full settlement of this bill. How much CENVAT credit can be availed by the manufacturer and why?

Answer :

CENVAT credit that can be availed by the manufacturer is ₹ 3,296.

CENVAT credit cannot be reversed just because the supplier of inputs has given some reduction in price after removal of goods or the buyer manufacturer paid only reduced amount than that of invoice [unless supplier of inputs claims and get refund of excise duty paid by him].

[CCE v *Trinetra Texturisers* 2004 (CESTAT].

Example 11: Prepare a CENVAT account in the books of A Ltd., and determine the balance as on 31.3.2012 from the following data:-

(i) Opening balance as on 1.4.2011 ₹ 47,000

(ii) Inputs received on 15.8.2011 involving excise duty paid ₹ 14,747

(iii) Purchased a Lathe for ₹ 1,10,300 (excise duty @10.30% inclusive) on 5.10.2011 and received the Lathe into factory on 1.4.2012.

(iv) On 6.10.2011 paid excise duty on final products @10.30% through CENVAT credit account (cum duty price of the goods ₹ 3,52,960).

(v) Inputs worth ₹ 2,00,000 (excise duty @16.48%) cleared as such to a job worker on 1.7.2011, these goods were received back on 1.4.2012.

(vi) Common inputs were used for manufacture of dutiable and exempted final products. Manufacturer opted to pay 6% as an amount on exempted final products. These goods (1,000 units) are cleared from the factory on 1.12.2011 at a price of ₹ 100 per unit inclusive of VAT ₹ 20 per unit.

(vii) On 15.3.2012 duty paid on input amounting to ₹ 1 7,867 was taken credit for in the CENVAT account as ₹ 1 7,687.

Answer :

In the books of A Ltd.

Dr. CENVAT Credit Receivable Account for the Year 2011-12 Cr.

Date	Particulars	Amount (₹)	Date	Particulars	Amount (₹)
1.4.2011	To Opening bal. b/d	47,000	6.10.2011	By Excise duty payable	32,960
15.8.2011	To Bank	14,747	1.12.2011	By Profit and Loss A/c (6% on final goods exempted from duty)	4,800
15.3.2012	To Bank	17,687	28.12.2011	By Profit and Loss A/c (reversal of CENVAT credit on 181 days)	32,960
31.3.2012	To Bank	180	31.3.2012	By Balance c/d	8,894
	TOTAL	**79,614**		**TOTAL**	**79,614**
1.4.2012	To Opening bal. b/d	9,694			

Note:

(1) Purchased a lathe (i.e. Capital goods) for ₹ 1,10,300 (excise duty @10.30% inclusive) on 5.10.2011 and received the lathe into factory on 1.4.2012.

Excise duty =₹ 10,300 (i.e. ₹ 1,10,300 x 10.30/110.30).

Up to 50% of ₹ 10,300 is allowed in the year of receipt of capital goods and balance will be allowed in the subsequent year or years. However, lathe received into factory on 1.4.2012, and hence, ₹ 5,150 can be allowed as CENVAT credit in the year 2012-13 and balance in the subsequent year. Thereby, no CENVAT credit is allowed for the year ended 3 1st March, 2012.

(2) On 6.10.2011 paid excise duty on final products @10.30% through CENVAT credit account (cum duty price of the goods ₹ 3,52,960).

Excise duty on final goods = ₹ 32,960 (i.e. ₹ 3,52,960 x 10.30 /110.30)

(3) Inputs worth ₹ 2,00,000 (excise duty @16.48%) cleared as such to a job worker on 1.7.2011, these goods were received back on 1.4.2012.

In case goods sent for job work are not returned within 180 days from the date of dispatch, then the input tax credit on those goods need to reverse or pay the amount equal to input tax credit availed. Therefore, on 28th Dec 2011 CENVAT credit of ₹ 32,960 has been reversed (i.e. on 181 day).

However, CENVAT credit is allowed only when these goods were returned to factory. In the given case these goods are returned into factory on 1.4.2012, and hence, the manufacturer is eligible to take credit on 1.4.2012.

(4) Common inputs were used for manufacture of dutiable and exempted final products. Manufacturer opted to pay 6% as an amount on exempted final products. These goods are cleared from the factory on 1.12.2011 at a price of ₹ 100 per unit inclusive of VAT ₹ 20 per unit.

Assessable value = ₹ 80 per unit (i.e.₹ 100– ₹ 20)

An Amount = ₹ 4,800 (i.e. 1,000 units x₹ 80 x 6%)

Example 12: M/s X & Co. Ltd. have cleared their goods manufactured final products during April, 2012 and the duty payable is ₹ 2,40,000 plus education cess as applicable. Given below are the details of excise duty payable by them during the month at the time of purchase of goods.

		₹	
(i)	On inputs (RM)	1,00,000	(Invoice for excise duty of ₹ 20,000 paid was received by the assessee on 4.5.2012)
(ii)	On input service	20,000	
(iii)	On welding electrodes for repairs and maintenance of capital goods	5,000	
(iv)	Fuel (excluding HSD/Petrol)	6,000	
(v)	Storage tank	8,000	
(vi)	Tubes and Pipes (used in the factory)	14,000	
(vii)	Air Conditioner for the office of the Factory Manager	12,000	

Note: All the above payments are exclusive of education cesses as applicable. Find the total duty payable by the assessee for the month of April, 2012 after taking into account the Cenvat credit available.

Answer :

Cenvat Credit receivable as on 30th April 2012: (value in ₹)

Sl. No.	Particulars	Basic Excise Duty (₹)	Service Tax (₹)	Education Cess @2% (₹)	SAH Education Cess @1% (₹)	Remarks	Workings
(i)	Input Goods	80,000	-	1,600	800	₹20,000 allowed as Cenvat credit in the month of May 2010.	₹ 1,00,000 - ₹ 20,000 = ₹ 80,000
(ii)	Input services		20,000	400	200	It is assumed that input service tax was paid	

(iii)	On welding electrodes for repairs and maintenance of capital goods	2,500		50	25	Considered as capital goods as per the Supreme Court judgment in case of *Hindustan Zinc Ltd.*	₹ 5,000 x 50% = 2,500
(iv)	Fuel (excluding HSD/Petrol)	6,000		120	60	Considered as inputs	
(v)	Storage tank	4,000		80	40	Capital goods	₹ 8,000 x 50% = ₹ 4,000
(vi)	Tubes and Pipes (used in the factory)	7,000		140	70	Capital goods	₹ 14,000 x 50% = ₹ 7,000
(vii)	Air Conditioner for the office of the Factory Manager	—	—	—	—	Not considered as input goods	
	CENVAT Credit Receivable at the end of April 2012	99,500	20,000	2,390	1,195		

Excise duty payable for the month of April, 2012; **(Value in ₹)**

Sl. No.	Particulars	Basic Excise Duty (₹)	Service Tax (₹)	Education @ 2% (₹)	SAH Education Cess @ 1% (₹)	Remarks	Workings
(i)	Output	2,40,000	--	4,800	2,400		
	Total	2,40,000	--	4,800	2,400		

Statement showing total duty payable by the assessee for the month of April 2012. **(Value in ₹)**

Sl. No.	Particulars	Basic Excise Duty (₹)	Service Tax (₹)	Education Cess @ 2% (₹)	SAH Education Cess @ 1% (₹)	Remarks	Workings
(i)	Output	2,40,000	--	4,800	2,400		
(ii)	CENVAT Credit Receivable	1,19,500	--	2,390	1,195		₹ 99500 + ₹ 20,000 = ₹ 1,19,500
	Excise Duty liability after CENVAT Credit.	1,20,500	--	2,410	1,205		

Eligibility of CENVAT Credit

Example 13: C Limited is engaged in manufacturing water pipes. Compute the CENVAT credit admissible to C Ltd. The excise duty paid at the time of purchase of following goods is:—

	(Value in ₹)
Raw Steel	12,000
Water pipe making machine	25,000
Lubricating oil	2,000
Equipments used in the office	10,000
Petrol	15,000
Pollution control equipment	22,000
Components, spares and accessories used in machinery	12,000

Answer :

Calculation of Cenvat Credit admissible to C Ltd.

Particulars	**Nature of goods**	**Value (₹)**	**Eligibility**	**Cenvat Credit (₹)**
Raw Steel	Other than capital goods	12,000	100%	12,000
Water pipe making machine	Capital goods	25,000	50%	12,500
Lubricating oil	Other than capital goods	2,000	100%	2,000
Equipment used in office	Capital goods	10,000	Not eligible	----
Petrol	Other than capital goods	15,000	Not eligible	----
Pollution control equipment	Capital goods	22,000	50%	11,000
Components, spares and accessories used in machinery capital goods	Capital goods	12,000	50%	6,000
Total Cenvat Credit admissible				43,500

Example 14: Following transactions took place in the factory of A Ltd.:

(i) An imported consignment of raw materials was received vide Bill of Entry dated 2.12.12 showing the following customs duty payments: Basic Customs duty ₹ 25,000; Additional duty (CVD) ₹ 20,000; Special Additional duty ₹ 5,800.

(ii) A consignment of 1,000 kgs of inputs was received. The Excise duty paid as per the invoice was ₹ 10,000. While the input was being unloaded 50 kgs were damaged and were found to be not usable.

(iii) A vehicle containing machinery was received. The machinery was purchased through a dealer and not from the manufacturer. The dealer's Invoice No. 925, dated 3.4.12 marked 'original for buyer' certified that the Excise duty paid by the manufacturer of machinery was ₹ 24,000. The dealer is registered with the Central Excise Authorities.

(iv) Some inputs for final products were received. These were accompanied by a certified Xerox copy (photo copy) of Invoice No. 286 dated 15.1.2013 indicating that Excise duty of ₹ 6,400, has been paid on inputs. The original or duplicate copies of invoice are not traceable.

Indicate the eligibility of CENVAT Credit in each case under the CENVAT Credit Rules, 2004 with explanations where necessary.

Answer :

(i) CENVAT credit available for the following:

Additional duty (CVD) ₹ 20,000;

Special Additional duty ₹ 5, 800

(ii) CENVAT credit available for 950 Kgs

Eligible CENVAT credit = ₹ 10,000 x 950/1000 = ₹ 9,500.

(iii) CENVAT credit can be availed if the goods are purchased from a first or second stage dealer. The eligible CENVAT credit for the first year = ₹ 24,000 x 50% = ₹ 12,000.

The balance CENVAT credit for the second and subsequent years

(iv) CENVAT credit is not available based on the certified Xerox copy of invoice. CENVAT credit can be availed only when any one of the following invoices available:

(a) Original for buyer

(b) Duplicate for transporter

(c) Triplicate for seller.

However, It is pertinent to note that the High Court held that Cenvat Credit could be taken on the strength of private challans (i.e. other than prescribed documents) as the same were not found fake and there was proper certification that duty has been paid ***(CCEx. v Stelko Strips Ltd.* 2010 (255) E.L.T. 397 (P&H)).**

Therefore in the given case Xerox copy of invoice can be considered as a valid document for taking CENVAT credit.

Removal of Capital Goods after use

Example 15: X Ltd received capital goods on 15-12-2009 for ₹ 9,00,000 (Excise Duty @ 10.30%). The said machinery was sold for ₹ 5,50,000 from the factory after being used in the manufacture of dutiable goods on 1st July 2012. Excise duty attributable for said machine at the time of removal @12.36%. You are required to compute the amount of CENVAT credit to be reversed.

Answer :

Year	No. of quarters	Workings
2009	1	October to December
2010	4	January to December
2011	4	January to December
2012	3	January to September
Total	12	

Statement Showing CENVAT Credit to be Reversed:

Particulars	Amount (₹)	workings
Cenvat credit taken on capital goods	92,700	9,00,000 x 10.30%
Less: Reduction @2.5% per quarter or part thereof from the date of taking Cenvat credit up to the date of removal 46,350 x 2.5% x 12 quarters = ₹ 13,905 46,350 x 2.5% x 10 quarters = ₹ 11,588	(25,493)	Up to 50% taken on 15-12-2009 (2009-2010) Balance 50% taken on 1-4-2010 (2010-11)
Amount to be paid	67,207	
Or		
Excise duty on transaction value	67,980	5,50,000 x 12.36%
Amount payable or credit to be reversed under Rule 3(5A) of Cenvat Credit Rules, 2004.	67,980	Whichever is higher is required to pay as an 'AMOUNT'

Example 16: S Ltd. purchased 25 computer systems, eligible as capital goods under CENVAT Credit Rules, 2004 on 1.7.2010 paying a duty of ₹ 2,600 on each computer system. However, since these systems became outdated, it sold 20 computer systems out of 25 on 25.6.2012 at a residual value of ₹ 2,000 each. Excise duty on such residual value @12.36%. Determine the amount of CENVAT credit required to be reversed in the financial year 2012-13.

Answer :

Year	No. of quarters	Workings
2010	2	July to December
2011	4	January to December
2012	2	January to June
Total	8	

Statement Showing CENVAT Credit to be Reversed:

Particulars	Amount (₹)	workings
Cenvat credit taken on capital goods	52,000	20 nos. x ₹ 2,600
Less: Reduction: Up to 50% (credit taken 1-7-2010) 26,000 x 10% x 4 quarters = ₹ 10,400 26,000 x 8% x 4 quarters = ₹ 8,320 Balance 50% (credit taken on 1-4-2011) 26,000 x 10% x 4 quarters = 10,400 26,000 x 8% x 1 quarter = 2,080	(31,200)	
Amount to be paid	20,800	
Or		
Excise duty on transaction value	4,944	2,000 x 20 x12.36%
Amount payable or credit to be reversed under Rule 3(5A) of Cenvat Credit Rules, 2004.	20,800	Whichever is higher is required to pay as an 'AMOUNT'

Dutiable and non Dutiable Goods Manufactured

Example 17: Mr. A is manufacturing goods with other's brand name. Mr. A has manufactured goods of ₹ 90,00,000 in the FY 201 2-1 3. Out of this, ₹ 70,00,000 are taxable final products and ₹ 20,00,000 are exempt final products.

Excise duty paid on his inputs (excluding education cess and SAH education cess) is ₹ 10,00,000.

Rate of basic excise duty on final products is 14%. Ignore education cess and SAH education cess.

Discuss the options available to Mr. A for availment of CENVAT credit, if he is not able to bifurcate inputs between those used for exempt goods and taxable final products. Calculate CENVAT credit available to him under different options and explain which option is beneficial to him.

Answer :

Option 1:

Maintain separate records for taxable and exempted goods and accordingly take the credit attributable for taxable final goods.

Option 2:

Excise duty on taxable goods	=	₹ 9,80,000	(i.e. ₹ 70,00,000 x 14%)
Less: CENVAT credit allowed	=	₹ (10,00,000)	
Excess Credit	=	₹ (20,000)	
Add: 6% amount payable on exempted goods	=	₹ 1,00,000	(i.e. ₹ 20,00,000 x 6%)
Net amount payable by GAR -7 challan	=	₹ 80,000	

Option 3:

Excise duty payable on taxable goods	=	₹ 9,80,000	
Less: proportionate credit allowed			
(₹ 10,00,000 x ₹ 70 lacs /₹ 90 lacs)		=	₹ 7,77,778
Net Excise Duty payable by GAR -7 Challan	=	₹ 2,02,222	

Option 2 is beneficial.

Example 18: Maharaja, a manufacturer of dutiable as well as exempted goods, furnishes the following information for the month of May 2012:

(i) Assessable value of dutiable goods ₹ 250 lakh (rate of duty 16%);

(ii) Price of exempted goods cleared from the factory ₹ 200 lakh;

(iii) CENVAT credit of input X (used only in the manufacture of exempted goods) ₹ 10 lakh;

(iv) CENVAT credit of input Y (used only in the manufacture of dutiable goods) ₹ 15 lakh;

(v) CENVAT credit of input Z (used commonly in manufacture of exempted as well as dutiable goods but no separate accounts are maintained in respect of such input Z) ₹ 20 lakh; and

(vi) CENVAT credit of capital goods (used partly for manufacture of exempted goods also) ₹ 25 lakh (total amount of duty).

Compute the amount of excise duty and any other amount payable by Maharaja for the month of May 2012.

Answer:

Excise Duty payable on finished goods	=	₹ 40.00 lakhs	(i.e. ₹ 250 lakh x 16 %)
Add: 6% amount on exempted goods	=	₹ 10.00 lakhs	(i.e. ₹ 200 lakhs x 5%)
Total liability	=	₹ 50.00 lakhs	
Less:			
CENVAT credit of input 'Y'	=	₹ 15.00 lakhs	
CENVAT credit of input 'Z'	=	₹ 20.00 lakhs	
CENVAT credit of capital goods	=	₹ 12.50 lakhs	(i.e. ₹ 25 lakhs x 50%)
Net liability for the month of Jan 2011	**=**	**₹ 2.50 lakhs**	

Notes:

(i) CENVAT credit of input 'X' (used only in the manufacture of exempted goods): ₹ 10 lakh not allowed as CENVAT credit.

(ii) CENVAT credit of input 'Y' (used only in the manufacture of dutiable goods) ₹ 15 lakh is allowed fully.

(iii) As per Rule 6(3A) of the CENVAT Credit Rules, 2004, at the option of the manufacturer can pay an amount 6% on the value of exempted final goods. Hence, CENVAT credit of common input 'Z' (used in the manufacture of exempted as well as dutiable goods but no separate accounts are maintained in respect of such input 'Z') : ₹ 20 lakh can be claim fully.

(iv) CENVAT credit of capital goods (used partly for manufacture of exempted goods also) ₹ 25 lakh (total amount of duty) is also allowed fully against duty payable on finished goods. It means to say that, upto 50% in the year of receipt of goods and the balance in subsequent year or year.

(v) The excise duty 16% is subject to education cess and SAH education cess.

(vi) It is assumed that CENVAT credit is exclusive of 2% education cess as well as 1% SAH Education cess.

Study Note - 4

CUSTOMS LAW

This Study Note includes

SECTION A

4.1 Introduction
4.2 Type of Custom Duties
4.3 Valuation in Customs
4.4 Methods of Valuation
4.5 Export Goods- Valuation for Assessment
4.6 Self assessment on basis of 'Risk Management System' (RMS)
4.7 Procedures for Import
4.8 Procedures for Export
4.9 Transit and Transhipment of Goods
4.10 Exemptions and Remission
4.11 Refund of Customs Duty
4.12 Appointment of Officers of Customs
4.13 Appointment of Customs Station, Warehousing Stations etc.
4.14 Central Government Power of Prohibition, Detection of Illegally Imported and Export Goods
4.15 Warehousing in Customs
4.16 Provisional Assessment of Duty [Section 18]
4.17 Baggage, Courier and Import and Export through Post
4.18 Drawback
4.19 Other provisions in Customs
4.20 Project Imports
4.21 Offences, Power and Penalties under Customs

SECTION B

4.22 Anti-Dumping Duty-An Overview

4.1 INTRODUCTIO

4.1.1 Customs duty is on imports into India and export out of India. The power to levy customs duty is derived from Entry 83 of Union List of the Seventh Schedule to the Constitution of India, which reads as, "Duty of Customs including export duties".

Thus, the power to make laws in respect of Customs duty vests with the Central Government. The tax receipts on account of customs duty-are solely enjoyed by the Union.

Section 12 of Customs Act, often called charging section, provides that duties of customs shall be levied at such rates as may be specified under 'The Customs Tariff Act, 1975', or any other law for the time being in force, on goods imported into, or exported from, India.

The body of the Customs Law comprises of -

(1) The Customs Act, 1962	This is a consolidating enactment providing levy of import and export duties of customs on goods imported into or exported from India through sea, air or land. It provides for the provisions of levy and collection of duty, importation or exportation, transit and transhipment, prohibition on importation or exportation of goods, warehousing, duty drawback, appeals, settlement commission, advance rulings, offences and penalties etc.
(2) The Customs Tariff Act, 1975	The Act contains various types of custom duties to be levied on the importation and exportation of the articles. It contains two Schedules - Schedule I known as, 'Import Tariff and Schedule II known as, 'Export Tariff.' 'Import Tariff consists of 98 Chapters grouped under 21 Sections. This Schedule refers to goods liable to import duty of customs. 'Export Tariff refers to goods liable to export duty of customs.
(3) Rules	Section 156 of the Customs Act, 1962 empowers the Central Government to make rules consistent with this Act. Such rules may provide for matters relating to the manner of determining the price of imported goods, duty drawback, baggage, detention and confiscation of goods etc.
(4) Regulations	Section 157 of the customs Act, 1962 empowers the Central Board of Excise and Customs to make regulations consistent with the Act and the rules, generally to carry out the purposes of the Act. For example, Import Manifest Vessels Regulation, Boat Note Regulations, Export Manifest Vessel Regulations have been framed in this regard.
(5) Notification under Customs Act	Notification, as per Article 13(3)(a) of the Constitution of India, means 'a written or printed matter that give notice'. Central Government has been empowered to issue notifications under various sections of the Customs act, 1962.

i. There are many common provisions in Central Excise and Customs Law.

ii. In case of imports, taxable event occurs when goods mix with landmass of India - *Kiran Spinning Mills* v. *CC* 1999(113) ELT 753 = AIR 2000 SC 3448 = 2000 AIR SCW 2090 (SC 3 member bench).

iii. In case of warehoused goods, the goods continue to be in customs bond. Hence, ' import' takes place only when goods are cleared from the warehouse - confirmed in *UOI* v. *Apar P Ltd.* 1999 AIR SCW 2676 = 112 ELT3 = 1999(6) SCC 118 = AIR 1999 SC 2515 (SC 3 member bench).-followed in *Kiran Spinning Mills* v. *CC* 1999(113) ELT 753 = AIR 2000 SC 3448 = 2000 AIR SCW 2090 (SC 3 member bench).

iv. In case of exports, taxable event occurs when goods cross territorial waters of India –*UOI* v. *Rajindra Dyeing and Printing Mills* 2005 (180) ELT 433 (SC)

v. Territorial waters of India extend upto 12 nautical miles inside sea from baseline on coast of India and include any bay, gulf, harbour, creek or tidal river.

(1 nautical mile = 1.1515 miles = 1.853 Kms).

Sovereignty of India extends to the territorial waters and to the seabed and subsoil underlying and the air space over the waters.

vi. Indian Customs waters extend upto 12 nautical miles beyond territorial waters. Powers of customs officers extend upto 12 nautical miles beyond territorial waters.

vii. '*Exclusive economic zone*' extends to 200 nautical miles from the base-line.

4.1.2 Common Aspects of Customs and Central Excise

i. There are many common links between Customs and Central Excise.

ii. Both are Central Acts and derive power of levy from list I - Union List - of the Seventh Schedule to Constitution.

iii. Both are under administrative control of one Board (Central Board of Excise and Customs) under Ministry of Finance.

iv. Organizational hierarchy is same from top upto Assistant Commissioner level. Transfers from customs to excise and *vice versa* are not uncommon.

v. Chief Commissioner in charge of each Zone is same for excise and customs at many places.

vi. In the interior areas, Excise officers also work as customs officers.

vii. Classification Tariffs of both acts are based on HSN and principles of classification are identical.

viii. Principles of deciding 'Assessable Value' have some similarities i.e. both are principally based on 'transaction value'. Concept of 'Related Person' appears in Customs as well as Excise valuation.

ix. Provisions of refund, including principle of 'Unjust Enrichment' are similar. Provisions for interest for delayed payment are also identical.

x. Provisions of raising demand for short levy, non-levy or erroneous refund are similar. Provisions in respect of recovery, mandatory penalties etc. are also similar.

xi. Provisions for granting exemptions from duty - partial or full, conditional or unconditional are identical.

xii. Powers of search, confiscations etc. are quite similar in many respects. In fact, some of provisions of Customs Act have been made applicable to Central Excise with suitable modifications.

xiii. Provisions in respect of Settlement Commission and Authority for Advance Ruling are identical.

xiv. Appeal provisions are identical.

xv. Appellate Tribunal (CESTAT) is same. Hence, procedures of appeal to Tribunal are identical.

4.1.3 Definitions Under Customs Act, 1962

1) **Adjudicating Authority [Section 2(1)]:** Adjudicating authority means any authority competent to pass any order or decision under this Act, but does not include:
   - The Central Board of Excise and Customs (CBE&C),
   - Commissioner of Customs (Appeals) or
   - Customs, Excise and Service Tax Appellate Tribunal (CESTAT)

2) **Assessment [Section 2(2)]:** Assessment means process of determining the tax liability in accordance with the provisions of the Act, which includes provisional assessment, self assessment, reassessment and any assessment in which the duty assessed is nil.

3) **Appellate Tribunal [Section 2(1B)]:** Appellate Tribunal means the Customs, Excise and Service Tax Appellate Tribunal constitute under section 129.

4) **Baggage [Section 2(3)]:** Baggage includes unaccompanied baggage but does not include motor vehicles.

5) **Bill of Entry [Section 2(4)]:** Bill of Entry means a bill of entry referred to in section 46. Bill of entry is the basic document for assessment of custom duty. The importer has to present bill of entry for clearance of imported goods.

6) **Board [Section 2(6)]:** Board means the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963.

7) **Bill of Export [Section 2(5)]:** The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported by land, a bill of export in the prescribed form.

8) **Customs Airport [Section 2(10)]:** Customs airport means,-

   Any airport appointed under section 7(a) to be a customs airport, and

   Includes a place appointed u/s 7(aa) to be an air freight station.

9) **Conveyance [Section 2(9)]:** 'Conveyance includes a Vessel, an Aircraft and a Vehicle'. The specific terms are vessel (by sea), aircraft (by air) and vehicle (by land).

10) **Coastal Goods [Section 2(7)]:** The term coastal goods means goods, other than imported goods, transported in a vessel from one port in India to another.

    Under section 7(1)(d) of the Customs Act, 1962, the Central Board of Excise and Customs (CBE&C), may by notification in the Official Gazette, appoint the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.

11) **Customs Area [Section 2(11)]:** Customs area means the area of a customs station and includes any area in which imported goods or exported goods are ordinarily kept before clearance by Customs Authorities.

12) **Customs Port [Section 2(12)]:** Customs port means any port appointed under section 7(a) of the Customs Act, to be a customs port and includes a place appointed under section 7(aa) of the Customs Act, to be an inland container depot (ICD).

13) **Customs Station [Section 2(13)]:** Customs station means any customs port, customs airport or land customs station.

    As per Section 8 of the Customs Act, 1962, the Commissioner of Customs may (i) approve proper places in any customs port or customs airport or coastal port for the unloading of goods or for any class of goods; (ii) specify the limits of any customs area.

    As per Section 141 of the Customs Act, 1962, all conveyances and goods in customs area are subject to control of officers of customs for enforcing the provisions of the Customs Act, 1962. The receipt/storage/delivery/dispatch/any other handling of goods (import/export) in the Customs area shall be in the prescribed manner and the responsibility thereon lies on the persons engaged in such activities (i.e. Custodian of the said goods).

14) **Customs Act,** 1962 and Customs Tariff Act, 1975 have been extended to whole of Exclusive Economic Zone (EEZ) and Continental Shelf of India for the purpose of (i) processing for extraction or production of mineral oils and (ii) Supply of any goods in connection with processing for extraction or production of mineral oils.

    Say for example, Goods imported by the assessee for consumption on oil rigs which are situated in Continental Shelf/Exclusive Economic Zones of India, are deemed to be a part of Indian Territory. Therefore, the supply of imported spares or goods or equipments to the rigs by a ship will attract import duty *[Aban Lloyd Chilies Offshore Ltd.* v *UOI* (2008) 227 ELT24 (SC)].

15) **Dutiable Goods [Section 2(14)]:** The term is defined to mean any goods which are chargeable to duty and on which duty has not been paid. It means to say that the name of the product or goods should find a mention in the Customs Tariff Act.

16) **Domestic Tariff Area** means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones (Section 2(i) of Special Economic Zones Act, 2005), 100% Export Oriented Units (EOUs)/Electronic Hardware Technology Park (EHTP)/ Software Technology Park (STP)/ Bio Technology Park (BTP).

17) **Exclusive Economic Zone:** Exclusive Economic Zone extends to 200 nautical miles from the base line. In this zone, the coastal State has exclusive rights to exploit it for economic purpose like constructing artificial islands for oil exploration, power generation and so on.

(Note: one nautical mile = 1.151 5miles or 1.853kms.)

18) **Examination [Section 2(17)]:** "Examination" in relation to any goods, includes measurement and weighment thereof.

19) **Exporter [Section 2(20)]:** Exporter in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner or any person holding himself out to be the exporter.

20) **Entry As per section 2(16)]:** Entry in relation to goods means an entry made in bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in section 82 or the entry made under the regulations made under section 84 of the Customs Act.

21) **Export [Section 2(18)]:** The term export means taking out of India to a place outside India.

22) **Exported Goods [Section 2(19)]:** The term exported goods means any goods, which are to be taken out of India to a place outside India.

Example: The vessel sunk within territorial waters of India and therefore there is no export. Accordingly, no duty drawback shall be available in this case. *[Union of India v Rajindra Dyeing & Printing Mills Ltd. 2005 (180) ELT 433 (SC)]*. The territorial waters extend to 12 nautical miles into the sea from the base line.

23) **Fund [Section 2(21A)]:** Fund means the Consumer Welfare Fund established under section 12C of the Central Excise Act, 1944.

24) **Foreign going Vessel or Aircraft [Section 2(21)]:** The foreign going vessel or aircraft means any vessel or aircraft for the time being in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not. The following are also included in the definition:

- A foreign naval vessel doing naval exercises in Indian waters
- A vessel engaged in fishing or any other operation (like oil drilling by domestic vessel or foreign vessel) outside territorial waters
- A vessel going to a place outside India for any purpose whatsoever.

Example 1: A ONGC vessel and a vessel owned by A Ltd. of USA are drilling oil beyond 12 nautical miles in the sea. Hence, both the vessels are called as foreign going vessels.

25) **Goods [Section 2(22)]:** The term goods includes–

(a) Vessels, aircrafts and vehicles

(b) stores

(c) baggage

(d) currency and negotiable instruments and

(e) any other kind of movable property.

26) **High Seas:** An area beyond 200 nautical miles from the base line is called High Seas. All countries have equal rights in this area.

27) **Import [Section 2(23)]:** The term import means bringing into India from a place outside India.

28) **Imported Goods [Section 2(25)]:** The term imported goods means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

29) **Importer [Section 2(26)]:** The term importer means in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.

30) **India (i.e. Territorial Waters) [Section 2(27)]:** The term India is an inclusive definition and includes not only the land mass of India but also Territorial Waters of India. The territorial waters extend to 12 nautical miles into the sea from the base line. Therefore, a vessel not intended to deliver goods should not enter these waters.

31) **Indian Customs Waters [Section 2(28)]:** The term Indian Customs Waters means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 and includes any bay, gulf, harbour, creek or tidal river.

Continental Shelf means the area of relatively shallow seabed between the shore of a continent and deeper ocean

Indian Customs Waters extend up to 24 nautical miles from the base line. Thereby, Indian Customs Waters cover both the Indian Territorial Waters and Contiguous Zone as well. Indian Territorial Waters extend up to 12 nautical miles from the base line whereas Contiguous Zone extended to a further 12 nautical miles from the outer limit of territorial waters.

Example 2: The proper officer of customs has reason to believe that any vessel in Indian Customs waters is being used in the smuggling of any goods, he may at any time stop any such vessel and examine and search any goods in the vessel (Section 106(1)(b) of the Customs Act, 1962).

32) **Import Report [Section 2(24)]:** The person-in-charge of a vehicle carrying imported goods or any other person as may be notified by the Central Government shall, in the case of a vehicle, deliver to the proper officer an import report within twelve hours after its arrival in the customs station, in the prescribed form.

33) **Import General Manifest (IGM) [Section 2(24)]:** IGM is a document to be filed in prescribed form with the customs by the carriers of the goods i.e. the steamer Agent or airlines in terms of Sec 30 of Customs Act, 1962. This document indicates the details of all the goods to be transshipped, private property of the crew and arms and ammunitions, gold and silver should also be cleared separately irrespective of whether for landing, for transshipment or for being carried as same bottom cargo. The IGM has to be filed within 24 hours after arrival of the ship/ aircraft. However, in the case of vessel (ship) the manifest maybe delivered even before the arrival of the vessel. This is known as 'prior entry import general manifest'. This system enables the importer to file Bills of Entry and get them assessed and pay duty so that the goods can be taken delivery soon after the unloading.

Section 30 in being provide for electronic filing of import manifest and also provide that the commission of customs may, in cases where it is not feasible to deliver the import manifest by presenting electronically, all the same to be delivered in any other manner.

34) **Market Price [Section 2(30)]:** Market price in relation to any goods means the wholesale price of the goods in the ordinary course of trade in India.

35) **Person-in-Charge [Section 2(31)]:** means

1)	Vessel	Master
2)	Aircraft	Commander or Pilot in Charge
3)	Train	Conductor or Guard
4)	Vehicle	Driver
5)	Other Conveyance	Person in Charge

36) **Prohibited goods [Section 2(33)]:** Means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such

goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

Say for example, Pornographic and obscene materials, Maps and literature where Indian external boundaries have been shown incorrectly, Narcotic Drugs and Psychotropic Substances, Counterfeit goods and goods violating any of the legally enforceable intellectual property right, Chemicals mentioned in Schedule 1 to the Chemical Weapons Convention of U.N. 1993, Wild life products, Specified Live birds and animals, Wild animals, their parts and products, Exotic birds except a few specified ones, Beef, tallow, fat/oil of animal origin, Specified Sea-shells, Human skeleton.

37) **Shipping Bill [Section 2(39)]:** Shipping bills means a shipping bill referred to in section 50. Shipping bill is the basic document for assessment of export duty. The exporter has to present shipping bill for clearance of export goods through vessel or aircraft.

38) **Smuggling [Section 2(39)]:** "Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 (improper importation) or section 113 (improper exportation).

39) **Stores [Section 2(38)]:** Stores means goods for use in a vessel or aircraft and includes fuel and spare parts and other articles of equipment, whether or not for immediate fitting.

40) **Tariff Value [Section 2(40)]:** The CBEC has the power to fix tariff values for any class of imported goods or exported goods. Fixing the tariff value for any class of imported goods or exported goods means the duty shall be chargeable with reference to such tariff value. (For example, please refer the duty based on the % of tariff value under Central Excise).

41) **Tariff value [Section 2(40)]:** Tariff value in relation to any goods, means the tariff value fixed in respect thereof under section 14(2) of the Act.

42) **Value [Section 2(41)]:** "Value" in relation to any goods, means the value thereof determined in accordance with the provisions of Section 14(1)(2) of the Act.

43) **Vehicle [Section 2(42)]:** Vehicle means conveyance of any kind used on land and includes a railway vehicle.

44) **Warehoused [Section 2(43)]:** "Warehouse" means a public warehouse appointed under section 57 or a private warehouse licensed under section 58.

45) **Warehouse Goods [Section 2(44)]:** "Warehouse Goods" means goods deposited in a warehouse.

46) **Warehouse Station [Section 2(45)]:** "Warehouse Station" means a place declared as a warehousing station under section 9.

Significance of Indian Customs Water under Custom Act, 1962

The significance of Indian Customs Waters is as under-

(i) Any person who has landed from/ about to board/ is on board any vessel within Indian Customs water and who has secreted about his person, any goods liable to confiscation or any documents relating thereto may be searched [Section 100];

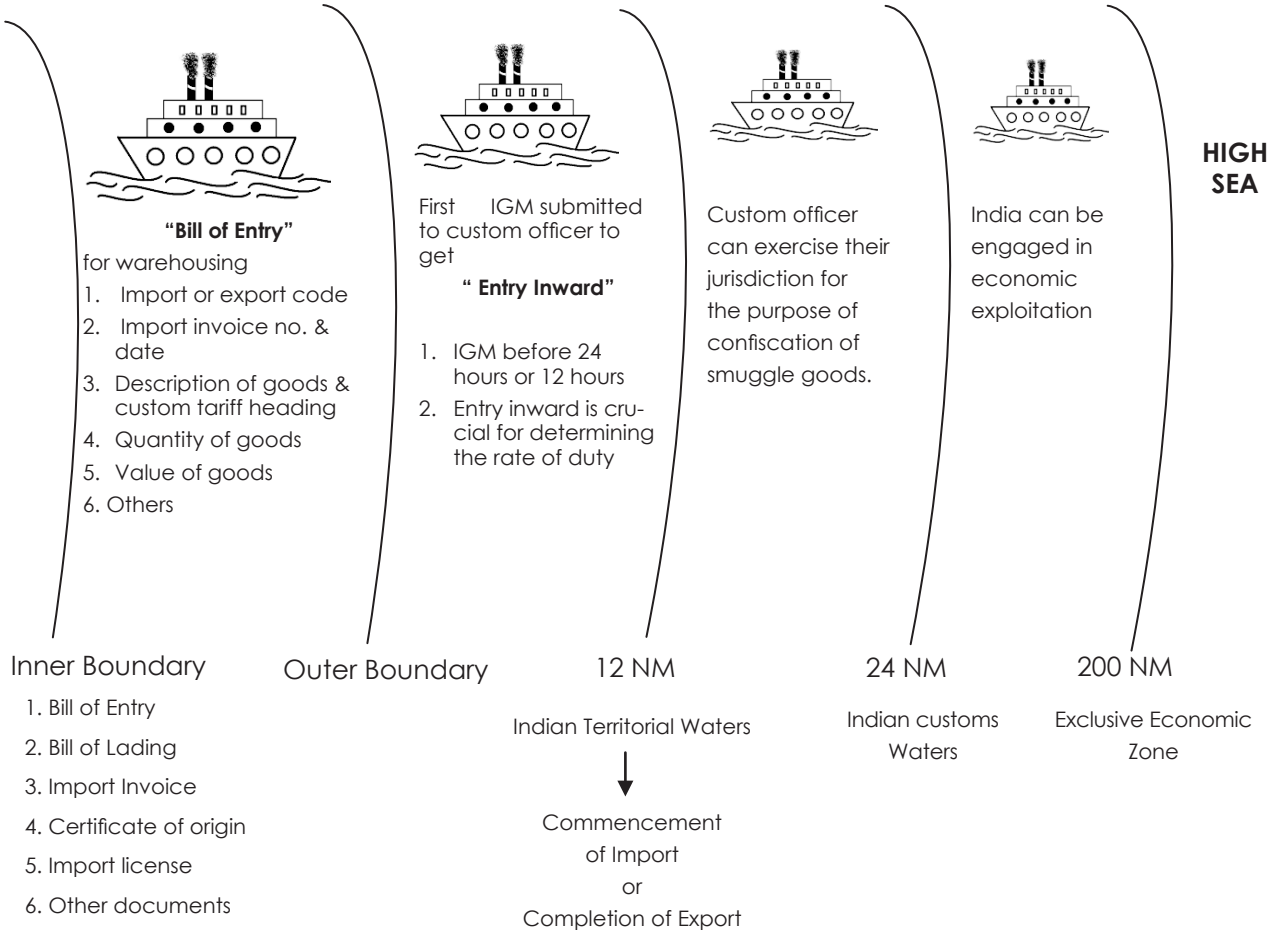
(ii) Any person within Indian Customs waters, who has committed an offence punishable under section 132 or 133 or 135 or 135A or 136, may be arrested [Section 104];

(iii) Any vessel within Indian custom water, which has been, is being, or is about to be, used in the smuggling of any goods or in carriage of any smuggling goods, may be stopped [Section 106];

(iv) Any goods which are brought within the Indian customs waters for the purpose of being imported from a place outside India, contrary to any prohibition imposed by or under this Act or any other law for the time being in force, shall be liable to confiscation [Section 111(d)]; and

(v) Any vessel which is or has been within Indian customs waters is constructed, adapted, altered or fitted in any manner for concealing for concealing goods shall be liable to confiscation [Section 115(1)(a)].

The primary concept has been explained in the following diagram



4.1.4 Circumstances of Levy

Section 12: Imported or Exported goods into or out of India is the taxable event for payment of the duty of customs. Lot of problems was faced in determining the point at which the importation or exportation takes place. The root cause of the problem was the definition of India.

The Supreme Court of India has given the landmark judgments in cases of *Union of India* v *Apar Industries Ltd* (1999) and further in the case of *Garden Silk Mills Ltd* v *Union of India* (1999). The import of goods will commence when they cross the territorial waters but continues and is completed when they become part of the mass of goods within the country, and the taxable event being reached at the time when goods reach the Customs barriers and Bill of Entry for home consumption is filed.

(A) Taxable event for Imported Goods

In the case of Kiran Spinning Mills (1999) the Hon'ble Supreme Court of India held that import is completed only when goods cross the customs barrier. The taxable event is the day of crossing of customs barrier and not on the date when goods landed in India or had entered territorial waters of India. Crossing customs barrier:

when goods are imported into India even after the goods are unloaded from the ship, and even after the goods are assessed to duty subsequent to the filing of a bill of entry, the goods cannot be regarded as having crossed the customs barrier until the duty is paid and the goods are brought out of the limits of the customs station.

Hence, taxable event in case of imported goods can be summed up in the following lines:

The taxable event occur in the course of imports under the customs law with reference to the principles laid down by the Supreme Court in the cases of *Garden Silk Mills Ltd.* **v** *Union of India;* and *Kiran Spinning Mills* v *CC:*

i. Unloading of imported goods at the Customs Port– is not a taxable event

ii. Date of entry into Indian Territorial Waters–is not a taxable event

iii. Date on which the goods cross the customs barrier - is a taxable event

iv. Date of presentation of bill of entry–is not a taxable event

No time limit for submission of bill of entry after the delivery of Import General Manifest (IGM):

As per Section 46(3) of the Customs Act, 1962 a bill of entry may be presented at any time after the delivery of import manifest or import report. Therefore, no time limit has been fixed for submission of bill of entry. Hence, no penalty can be imposed if there is delay in submission of Bill of Entry. However, cargo should be cleared from the wharf within 30 days of unloading.

Note: Bill of Entry can also be filed up to 30 days before the arrival of the goods in India. The classification, valuation and duty can be checked and verified beforehand so that when the consignment arrives it can be cleared immediately.

(B) Taxable event for Warehoused Goods

The taxable event in case of warehoused goods is when goods are cleared from customs bonded warehouse, by submitting EX-bond bill of entry. As per Section 1 5(1)(b) of the Customs Act, 1962, when goods have been deposited into a warehouse, and they are removed there from for home consumption, the relevant date for determination of rate of duty is the date of presentation of ex-bond bill of entry (i.e. Sub-bill of Entry) for home consumption.

(C) Taxable event for Exported Goods

As per section 16(1) of the Customs Act, 1962, taxable event arises only when proper officer makes an order permitting clearance (i.e. entry outwards) granted —*Esajee Tayabally Kapasi* (1995)(SC) and loading of the goods for exportation took place under Section 51 of the Customs Act, 1962. In the case of any other goods, on the date of payment of duty.

Therefore, export duty rate prevailing as on the date of entry outwards granted to the vessel by the Customs Officer is relevant.

Example 3: An assessee submitted the shipping bill on 1st January 2010. At that time the export duty was nil (i.e. duty free). Let export order (i.e. entry outwards) was granted on 5th January 2010. However, due to some problems goods could not be loaded into ship. On 25th March 2010, the shipping bills were voluntarily resubmitted by the assessee with the request to permit the shipment by a different vessel. Subsequently, on 27th March 2010, let export order was granted. However, in the mean time the duty at the rate of 10% ad valorem was levied with effect from 1st March 2010. Examine, whether exporter is liable to pay duty?

Answer:

In the given case actual export took place only after revised shipping bill was submitted on 25th March 2010, for which entry outwards granted on 27th March, 2010. Hence, the rate prevalent as on the date of entry outwards granted to the vessel is relevant for determination of rate of duty. Therefore, assessee is liable to pay exportduty@10%.

Note: Export duties do not carry any cess. Entry Inwards to the vessel

The Master of the vessel is not to permit the unloading of any imported goods until an order has been

given by the proper officer granting Entry Inwards of such vessel. Normally, Entry Inwards is granted only after the import manifest has been delivered. This entry inward date is crucial for determining the rate of duty, as provided in section 15 of the Customs Act, 1962. Unloading of certain items like accompanied baggage, mail bags, animals, perishables and hazardous goods are exempted from this stipulation.

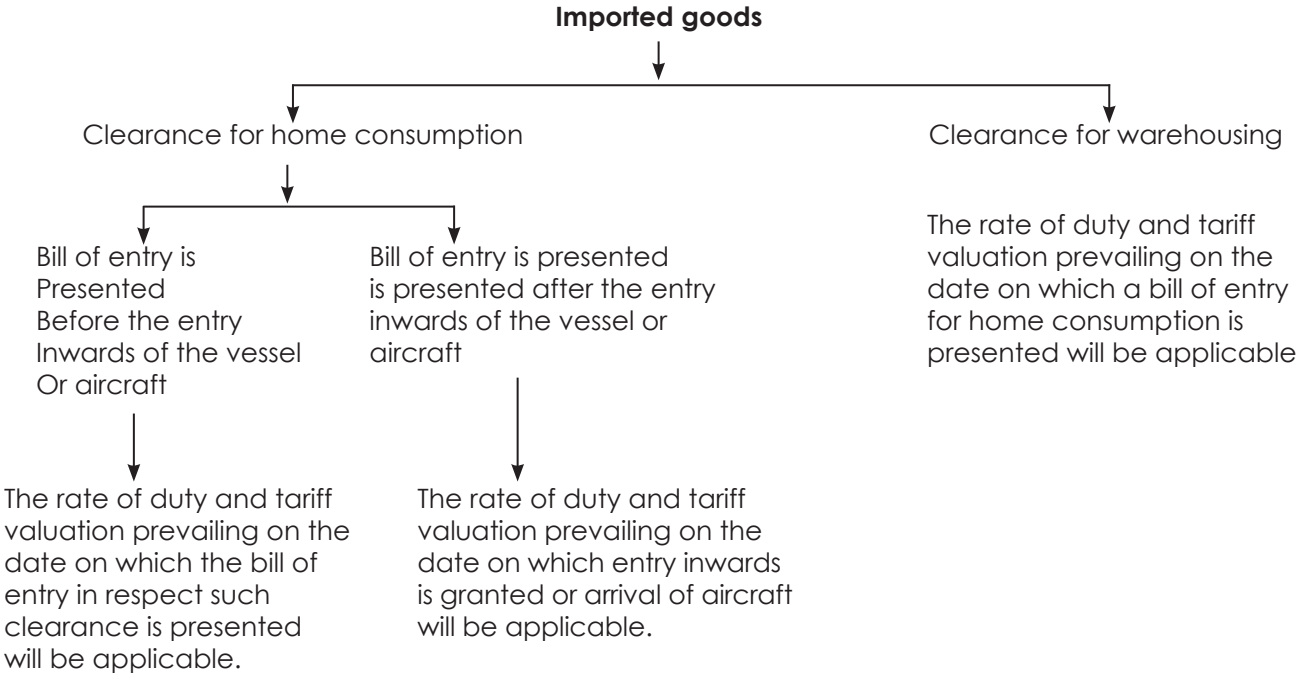
(D) Entry outwards to the vessel

The vessel should be granted 'Entry Outward' . Loading can start only after entry outward is granted under section 39 of Customs Act, 1962. Steamer Agents can file 'application for entry outwards' 14 days in advance so that intending exporters can start submitting 'Shipping Bills'. This ensures that formalities are completed as quickly as possible and loading in ship starts quickly.

If the shipping bill has been presented before the date of entry outwards of the vessel by which the goods are to be exported, the shipping bill shall be deemed to have been presented on the date of such entry outwards. The provisions of this section shall not apply to baggage and goods exported by post.

(E) Date of determination of Rate of duty and tariff valuation for Imported Goods

Date for determining the rate of duty and tariff valuation of imported goods will depend upon the imported goods cleared for home consumption and cleared for warehousing. The determination of appropriate rate of duty can be explained with the help of the following example:



Note: The applicable exchange rate is the rate declared by the CBEC on the date of submission of Bill of Entry. If more than one exchange of CEBC is available then consider the exchange rate which was prevailed as on the date of submission of Bill of Entry.

(F) Date of for determination of rate of duty and tariff valuation of export goods [Section 16]: According to section 16 of the Customs Act, 1962, the provision relating to date for determination of rate of duty and tariff valuation of export goods are as under –

(a) in the case of goods entered for export under section 50, the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51.

(b) in the case of any other goods, the date of payment of duty.

The provision of section 16 shall not apply to baggage and goods exported by post.

(G) Clearance of goods from DTA to SEZ

In the case of **Advait steel Rolling Mills Pvt. Ltd. vs. UOI [2012] 286 ELT 535(Mad)**, it is held that the clearance of goods from DTA to Special Economic Zone are not chargeable to export duty either under the SEZ Act, 2005 or under the Customs Act, 1962 on the basis of the following observations –

- The charging section needs to be construed strictly. If a person is not expressly brought within the scope of the charging section, he cannot be taxed at all.
- SEZ Act does not contain any provision for levy and collection of export duty on goods supplied by a DTA unit to a unit in a Special Economic Zone for its authorized operations. Since there is no 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.
- Reading section 12(1) of the Customs Act, 1962 makes it apparent that Customs duty can be levied only on goods imported into or exported beyond the territorial water of India.

Since both the SEZ unit and the DTA unit are located within the territorial waters of India, supplies from DTA to SEZ would not attract Section 12(1).

(H) Determination of duty where goods consist of articles liable to different rates of duty [Section 19] : Except as otherwise provided in any law for the time being in force, where goods consist of a set of articles, duty shall be calculated as follows,-

(a) articles liable to duty with reference to quantity shall be chargeable to that duty;

(b) articles liable to duty with reference to value shall be chargeable to duty as under,-

- if such articles are liable with the same rate of duty then duty shall be levied at that rate;
- if the articles in the set are liable to duty at different rates then duty shall be calculated at the highest of those rates.

(c) articles not liable to duty, then they shall also be chargeable to duty at the highest of the rates specified in (b) above.

Duty where evidence of separate value of articles is available : If the importer produces evidence to the satisfaction of the proper officer[7] or the evidence is available regarding the value of any of the articles liable to different rates of duty, such article shall be chargeable to duty separately at the rate applicable to it.

(I) Rate of Duty applicable to accessories, etc. supplied with imported article [Accessories (Condition) Rules, 1963] : Certain accessories are sometimes compulsorily supplied with the main equipment. It may be difficult to value such accessories and to assess them separately or to charge duty on them when no additional consideration is involved in normal course. In such case, if any accessories of, spare parts and maintenance implements for, any article are imported along with that article, then such accessories/ spare parts and maintenance implements shall be chargeable at the same rate of duty as that article, if the proper officer is satisfied that in the ordinary course of trade,-

(a) such accessories, parts and implements are compulsorily supplied with that article; and

(b) no separate charge is made for such supply, their price being included in the price of that article.

(j) Circumstance under which no duty will be levied

i) No duty will be levied on pilfered goods under section 13 of the Customs Act. If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a ware house, then the importer shall not be liable to pay the duty leviable on such goods.

ii) No duty will be levied when the goods are damaged or deteriorated before or during the course of their unloading, where it is shown to the satisfaction of the Assistant or Deputy Commissioner of Customs (Section 22).

iii) No duty will be levied in case of warehoused goods, when the goods are damaged before their actual clearance from such warehouse, where it is shown to the satisfaction of the Assistant or Deputy Commissioner of Customs (Section 22).

iv) No duty will be levied in case of goods lost or destroyed due to natural causes like fire, flood, etc. such loss may take place at any time before the clearance of goods for home consumption. The loss may be at the warehouse (Section 22).

v) No duty will be levied in case of goods abandoned by importers. Sometimes it may so happen that importer is unwilling or unable to take delivery of the imported goods due to the following reasons:

- the said goods may not be according to the specification,
- the goods may have been damaged during voyage,
- there might have been breach of contract.

In all the above cases the importer has to relinquish his title to the goods unconditionally and abandon them. The relinquishment is done by endorsing the document of title to the goods in favour of the Commissioner of Customs along with invoice.

vi) No duty will be levied, if the Central Government is satisfied that it is necessary in the public interest not to levy import duty by issuing the notification in the Official Gazette.

(k) Self-assessment of Customs Duty (Section 17 of the Customs Act, 1962, w.e.f. 8-4-2011)

The importer or exporter shall self-assess the duty leviable on imported or exported goods respectively (except where goods are to be cleared as 'stores' for supply to vessels or aircrafts without payment of duty and without assessment under section 85 of Customs Act, 1962) as per section 17(1) of the Customs Act, 1962. The procedure of self assessment is same for imports and exports. Importer importing goods is required to submit Bill of Entry under section 46 of Customs Act, 1962. Exporter is required to submit shipping bill at the time of export under section 50 of Customs Act, 1962. Bill of Entry and Shipping Bill must be submitted electronically, unless manual submission is specifically permitted by Commissioner of Customs.

Verification by proper officer

The self assessment may be verified by 'proper officer' by examining or testing the goods [section 17(2) of Customs Act 1962, w.e.f. 8-4-2011]. For verification of self assessment, 'Proper Officer' may ask importer, exporter or any other person (i.e. Customs House Agent or person who has purchased goods on high seas sale basis) to produce any contract, broker's note, insurance policy, catalogue or other documents whereby duty payable can be ascertained and to furnish further information for ascertainment.

Re-assessment

The proper officer can ask for only those documents which are within the powers of importer or exporter or other person to furnish [section 17(3) of Customs Act 1962, w.e.f. 8-4-2011]. On Such verification, 'proper officer' may re-assess the Bill of entry. Such re-assessment would be without prejudice to any

other action which may be taken under Customs Act [section 17(4) of Customs Act, 1962, w.e.f. 8-4-2011]. If the importer or exporter accepts in writing the reassessment made by proper officer about classification or valuation or exemption or concession, then no question of issuing any formal order arises.

Speaking order

Where the importer or exporter does not accept the re-assessment in writing, the proper officer shall pass a speaking order within 15 days from the date of re-assessment of 'Bill of Entry' [section 17(5) of Customs Act, 1962 w.e.f. 8-4-2011].

Audit by proper officer at his office or premises of importer or exporter

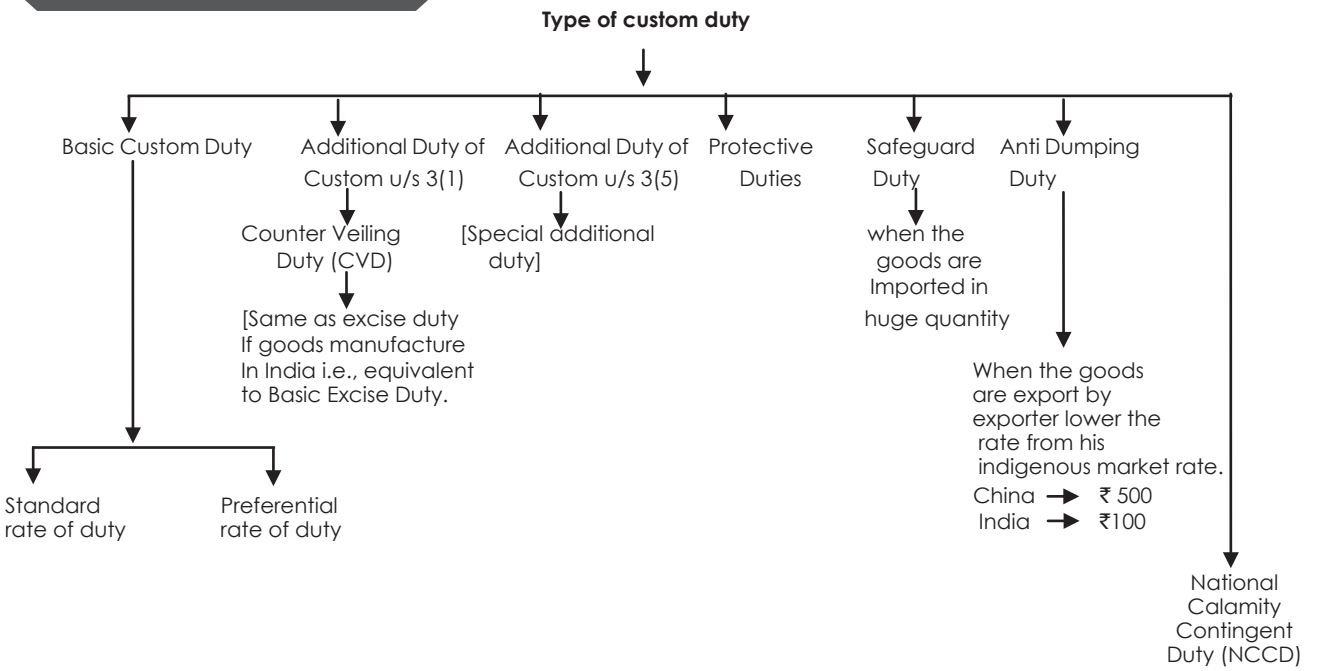
If the goods are not taken for verification of self assessment, the goods will be allowed to be cleared from customs. However, later, proper officer may audit the assessment of duty. Such audit can be done either in the office of proper officer or at the premises of importer, as may be expedient [section 17(6) of Customs Act, 1962 w.e.f. 8-4-2011]. Subsequent to such audit, demand for differential duty and interest can be made under section 28 of Custom Act 1962. This section also makes provisions in respect of penalty for such short payment.

General provisions

Assessment includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is Nil [section 2(2) of Customs Act, 1962 as substituted w.e.f. 8-4-2011].

As per section 2(34) of Customs Act, 'proper officer' in relation to any function under Customs Act, mi the officer of customs who is assigned those functions by Board (CBE & C) or Commissioner of Customs.

4.2 TYPE OF CUSTOM DUTIES



4.2.1 Basic customs duty is levied under section 12 of Customs Act. Normally, it is levied as a percentage of value as determined under section 14(1). The rates vary for different items, but general rate on non-agricultural goods at present is 10% w.e.f. 1.3.2007 and Ad valorem component of customs duty on textile fabrics and garments has been reduced from 12.5% to 10%.

Duty on liquor (including wine) is also high i.e. 150%. CVD and education cess on liquor and wine has been exempted w.e.f. 3.7.2007 as per WTO agreement.

Assessable Value = CIF value of imported goods converted into Rupees at exchange rate specified in notification issued by CBE&C plus landing charges 1% (plus some additions often arbitrarily and whimsically made by customs).

Section 2 of the Customs Tariff Act, 1975 provides the rate of duty to be applied on the value of goods. Basically section 2 of the Customs Tariff Act, 1975 provides following

- First Schedule - Goods liable for import duty
- Second Schedule - Goods liable for export duty

Basic Customs Duty levied u/s 12 of Customs Act.

i. The rate of basic customs duty is specified in Customs Tariff Act, read with relevant exemption notification. Generally, Basic Customs Duty is 10% of Non-Agricultural Goods.

ii. CVD equal to excise duty is payable on imported goods u/s 3(1) of Customs Tariff Act. General excise duty rate is 12%. Consider only basic excise duty as CVD. It means CVD is equal to Basic Excise Duty(w.e.f 17-3-2012).

iii. Special CVD (SAD) is payable @4% on imported goods u/s 3(5) of Customs Tariff Act. This is in lieu of Vat/Sales tax to provide level playing field to Indian goods.

iv. Education Cess of customs @ 2% and SAH Education Cess of 1% is payable.

v. Total import duty considering all duties plus education Cess on non-agricultural goods is generally 26.85% w.e.f 27-2-2010.

vi. NCCD has been imposed on a few articles. In addition, on certain goods, Anti-Dumping Duty, Safeguard Duty, Potective Duty etc. can be imposed.

Calculated of customs duty payable is as follows, w.e.f. 17.3.2012

Seq.	Duty Description	Duty %	Amount	Total Duty
(A)	Assessment Value ₹		20,000.00	
(B)	Basic Customs Duty	10	2,000.00	2,000.00
(C)	Sub-Total for calculating CVD '(A+B)'		22,000.00	
(D)	CVD 'C' x excise duty rate	12	2,640.00	2,640.00
(E)	Sub-total for edu cess on customs 'B+D'		4,640.00	
(F)	Edu Cess of Customs – 2% of 'E'	2	92.80	92.80
(G)	SAH Education Cess of Customs – 1% of 'E'	1	46.40	46.40
(H)	Sub-total for Spl CVD 'C+D+F+G'		24,779.20	
(I)	Special CVD u/s 3(5) – 4% of 'H'	4	991.16	991.16
(J)	**Total Duty**			**5,770.36**
(K)	Total duty rounded to	₹		5,770.00

Notes- Buyer, who is manufacturer, is eligible to avail Cenvat Credit of D and I above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'I' above

4.2.2 Additional Customs Duty U/S 3(1) (CVD)

i. CVD (Countervailing Duty) is payable on imported goods u/s 3(1) of Customs Tariff Act to counter balance impact of excise duty on indigenous manufactures, to ensure level paying field.

ii. CVD is payable equal to Excise Duty payable on like articles if produced in India. It is payable at effective rate of Excise Duty, which is generally 12%. It means CVD is equal to Basic Excise Duty (w.e.f 17-3-2012).

iii. CVD is payable on assessable value plus basic customs duty. In case of products covered under MRP provisions, CV duty is payable on MRP basis as per section 4A of Central Excise.

iv. CVD can be levied only if there is 'manufacture'.

v. CVD is neither Excise Duty nor Basic Customs Duty levied under Customs Act. However, all provisions of Customs Act apply to CVD. Calculation of duty payable is as follows -

Example 4: An importer imported some goods for subsequent sale in India at $12,000 on CIF basis. Relevant exchange rate as notified by the Central Government and RBI was ₹ 45 and ₹ 45.50 respectively. The item imported attracts basic duty at 10% and education Cess as applicable. If similar goods were manufactured in India, Excise Duty payable as per Tariff is 14% plus education Cess of 2% and SAH 1%. Arrive at the Assessable value and the total duty payable thereon. State eligibility of CENVAT credit to buyer.

Answer:

Assessable Value	= ₹ 5,45,400
Add: Basic Customs Duty 10% x 5,45,400	= ₹ 54,540
Balance	= ₹ 5,99,940
Add: CVD 14% on ₹ 5,99,940	= ₹ 83,992
Add: Education Cess 2% on 54,540 + 83,992	= ₹ 2,771
Add: SAH 1% on 54,540 + 83,992	= ₹ 1,385
Total value of imported goods	= ₹ 6,88,088

Working Note:	
CIF Value	= 12,000 US$
Total CIF in₹ @ 45.00 per US $	= ₹ 5,40,000
Add: Landing Charges @1% of CIF	= ₹ 5,400
Assessable value	= ₹ 5,45,400

4.2.3 Additional Duty Under Section 3(5) (Special CVD - SAD)

Section 3(5) of Customs Tariff Act empowers Central Government to impose additional duty. This is in addition to Additional Duty leviable u/ss 3(1) and 3(5) of Customs Tariff Act. Provision for this duty has been made w.e.f. 1-3-2005. Purpose of the Additional Duty is to counter balance Sales Tax, VAT, Local Tax or Other charges leviable on articles on its sale, purchase or transaction in India.

The obvious intention is to provide level playing field to manufacturers in India who are manufacturing similar goods. Hence, it is termed as 'Special CVD "or 'SAD'(Special Additional Duty).

Exemption from SAD - Some categories of imports have been exempted from this special CVD (SAD), vide customs notification No. 20/2006-Custom dated 1-3-2006. The main among these are: Articles of jewellery attracts a lower rate of special CVD at 1%.

Departmental clarifications - Department has clarified as follows, vide MF (DR) circular No. 1 8/2006-Cus dated 5-6-2006 –

i. Special CVD of 4% is not leviable in case of imports under advance authorisation, EOU, EPCZ and SEZ schemes

ii. In case of Export Promotion Schemes like DEPB, target plus, service from India, DFCE and Vishesh Krishi and Gram Udyog Yojana, 4% Special CVD is required to be debited to the duty scrip/entitlement certificate.

iii. In case of DFRC scheme, 4% special CVD is payable.

iv. Duty debited through DEPB, DFCE, target plus scheme etc. will be eligible for Cenvat Credit or duty drawback.

4.2.4 Safeguard Duty under the Custom Tariff Act, 1975

In order to ensure that goods imported in increased quantity do not cause or threaten to cause serious injury to domestic industry, there are provisions for levy of safeguard duty on import of such articles into India. It can provide adequate protection to the indigenous industry against competition from the world players. The safeguard duty on imported goods is leviable under Section 8B of the Customs Tariff Act, 1975 read with the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997.

(i) Imposition: Safeguard Duty can be imposed if the Central Government on enquiry finds that the imports in increased quantity - (a) have caused serious injury to Domestic Industry or, (b) is threatening to cause serious injury to Domestic industry. It can be imposed irrespective of origin of imported goods.

Serious injury means an injury causing significant overall impairment in the position of a domestic industry.

Threat of serious injury means a clear and imminent danger of serious injury.

(ii) No Safeguard Duty on Articles Originating from Developing Countries: In case of articles originating from a Developing Country (i.e. a country notified by the Government of India for purpose of levy of such duty), this duty cannot be imposed under following circumstances -

(a) If the imports of such article from that developing country does not exceed three percent of the total imports of that article into India.

(b) Where the article is originating from more than one developing countries (each with less than three percent import share), then the aggregate of imports from all such countries taken together does not exceed nine percent of the total imports of that article into India.

(iii) Provisional Safeguard Duty Pending Enquiry: Section 8B(2) enables the Central Government to impose a provisional Safeguard Duty in appropriate cases, pending the determination of the issues as to whether the import of the concerned article to India would cause or threaten to cause serious injury to the domestic industry. The duty so collected, shall be refunded if, on a final determination, the Central Government is of the opinion that neither any injury has been caused to the Domestic Industry, nor there is any such threat to cause serious injury.

The Provisional safeguard Duty cannot remain in force for more than *200* days from the date when it was first imposed.

(iv) Duration: The Safeguard Duty shall, unless it is revoked earlier, be in force till the expiry of 4 years from the date of its imposition. However, the Central Government reserves the right for its extension but total period of imposition cannot be beyond 10 years from the date of its imposition.

(v) No Safeguard Duty in certain cases: Unless specifically provided, the safeguard duty shall not be imposed on goods imported by a 100% EOU or unit located in Free Trade Zone/ Special Economic Zone.

(vi) Provision of custom Act, 1962 to apply: The provision of custom Act, 1962 and the rules and regulations made there under, 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 duty leviable under that act.

4.2.5 Refund of Special CVD of Customs to Traders

Traders selling imported goods in India after charging sales tax/Vat can claim refund of special CVD of 4% from Customs Department – Notification No. 1 02/2007-Cus dated 14-9-2007. The dealer (trader) (if he is registered with Central Excise and is issuing Cenvatable Invoice) selling such imported goods must mention in his invoice that the buyer will not be able to avail Cenvat credit of such duty. This is required if he is claiming refund of the special CVD. If he is not claiming refund, obviously, such remark is not required. A manufacturer using these goods in his manufacture can avail Cenvat credit of this duty. Thus, he gets credit through central excise route.

Example 5: An importer imported some goods for subsequent sale in India at $ 20,000 on CIF basis. Relevant exchange rate as notified by the Central Government₹ 45. The item imported attracts basic duty at 10% and education Cess as applicable. If similar goods were manufactured in India, Excise Duty payable as per Tariff is 14% plus education Cess of 2% and SAH 1%. Special Additional Customs Duty is 4%. Find the total duty payable.

Answer:		(₹)
CIF value USD 20,000 X 45	=	9,00,000
Add: Loading and unloading @1%	=	9,000
Assessable Value	=	9,09,000
Add: Basic Customs Duty @10% on ₹9,09,000	=	90,900
	=	9,99,900
Add: Additional Customs Duty [@14% x ₹9,99,900]	=	1,39,986
		11,39,886
Add: Education Cess 2% on (₹90,900 + ₹1,39,986)	=	4,618
Add: SAH @1% on (₹90,900 + ₹1,39,986)	=	2,309
	=	11,46,813
Add: Special Additional Customs Duty [@4% x ₹11,46,813]	=	45,873
Total value of imported goods	=	11,92,686

Therefore total duty payable is ₹ 2,83,686.

Valid points:

(i) While calculating CVD we should not take into account NCCD of excise.

(ii) CVD can also be imposed even if there is exemption from Basic Customs Duty.

(iii) Imported goods contain more than one classification and the importer is unable to give the breakup of each item with value then the highest rate of duty among them will be considered.

(iv) CVD can be levied only when the importer imported manufactured goods. It means CVD can be levied only if goods are obtained by a process of manufacture *Hyderabad Industries Ltd* v *Union of India* (1995) (SC).

Example 6: Mr. X imported the coal from USA. Exporter in USA exported the coal after washing coal to reduce its ash content. Hence, no CVD on coal, because the imported product was not manufactured and the same imported into India.

(v) If the importer is the manufacturer, he can claim the CENVAT credit of CVD.

(iv) No CVD on Anti Dumping Duty, Safeguard Duty, Protective Duty or Countervailing Duty on Subsidized articles.

If the importer is the manufacturer availing the benefit of SSI Exemption benefit under Notification No.8/2003 under Central Excise. Thereby he is not paying excise duty on his final product manufactured by him in India. Such a manufacturer is not liable to pay CVD (equivalent of Excise Duty) on his imports, even if he is not liable to pay any duty under Central Excise Act, 1944.

4.2.6 Anti-Dumping Duty

i. Anti dumping duty is leviable u/s 9A of Customs Tariff Act when foreign exporter exports his goods at low prices compared to prices normally prevalent in the exporting country.

ii. Dumping is unfair trade practice and the anti-dumping duty is levied to protect Indian manufacturers from unfair competition.

iii. Margin of dumping is the difference between normal value (i.e. his sale price in his country) and export price (price at which he is exporting the goods).

iv. Price of similar products in India is not relevant to determine 'margin of dumping'.

v. 'Injury Margin' means difference between fair selling price of domestic industry and landed cost of imported products. Dumping duty will be lower of dumping margin or injury margin.

vi. Benefits accruing to local industry due to availability of cheap foreign inputs are not considered. This is a drawback.

vii. CVD is not payable on anti-dumping duty. Education Cess and SAH education Cess is not payable on anti-dumping duty ·In case of imports from WTO countries, anti-dumping duty can be imposed only if it causes material injury to domestic industry in India.

viii. Dumping duty is decided by Designated Authority after enquiry and imposed by Central Government by notification. Provisional antidumping duty can be imposed.

ix. Appeal against antidumping duty can be made to CESTAT.

Example 7: Mr. X an importer imported certain goods CIF value was US $20,000 and quantity 1,000 Kgs. Exchange rate was 1 US $ = ₹ 50 on date of presentation of Bill of Entry. Customs Duty rates are— (i) Basic Customs Duty 10%, (ii) Education Cess 2%, (iii) SAH Education Cess – 1%. There is no excise duty payable on these goods if manufactured in India. As per Notification issued by the Government of India, anti-dumping duty has been imposed on these goods. The anti-dumping duty will be equal to difference between amount calculated @ US $30 per kg and 'landed value' of goods. Compute Customs Duty liability and anti-dumping liability.

Answer:

Part I	**Amount in ₹**
Total CIF Price US $ 20,000 x ₹ 50	10,00,000
Add: Landing charges @ 1% x ₹10,00,000	10,000
Assessable Value	10,10,000
Basic duty @ 10%	1,01,000
Sub total	11,11,000
Add: Education cess 2% on ₹ 1, 01,000	2,020
Add: Secondary and Higher Education Cess [@1% on ₹ 1,01,000]	1,010

Value of imported goods	11,14,030
Total Customs Duty payable is ₹ 1,04,030.	
Part II	
Rate as per Anti Dumping Notification is ₹ 15,00,000 [US $ 30 per kg x 1,000 Kgs x ₹ 50]	
Part III	
Computation of anti-dumping duty	
Rate as per Anti Dumping Notification	15,00,000
Less: Value of imported goods as computed above	(11,14,030)
Anti Dumping Duty payable	3,85,970

(i) Anti Dumping Duty on Dumped Articles

Often, large manufacturer from abroad may export goods at very low prices compared to prices normally prevalent in export market. Such dumping may be with intention to cripple domestic industry *or* to dispose of their excess stock. This is called 'Dumping' and is an unfair trade practice. In order to avoid such dumping and to protect domestic industry, Central Government can impose, under section 9A of Customs Tariff Act, anti-dumping duty, if the goods are being sold at less than its normal value. Levy of such anti-dumping duty is permissible as per WTO agreement. Anti dumping action can be taken only when there is an Indian industry producing 'like articles'. In *Shenyang Mastusushita* v. *Exide Batteries* 2005 (181) ELT 320 (SC 3 member bench), it was observed, ' Principle behind anti-dumping laws is to protect the domestic industry from being adversely affected by import of goods at export prices which are below the normal value of the goods in the domestic market of the exporter. The duty is calculated on the margin of dumping which is the difference between the export price and the normal value'.

In *SS Enterprise* v. *Designated Authority* AIR 2005 SC 1527 = 181 ELT 375 (SC 3 member bench), it was held that purpose being imposition of anti-dumping duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries, so as to cause or be likely to cause injury to the domestic market. The levy of dumping duty is a method recognized by GATT *(should be WTO)* which seeks to remedy the injury and at the same time balances the rights of exporters from other countries to sell their products within the country with the interest of domestic markets. Thus the factors to constitute ' dumping' is (i) an import at prices which are lower than the normal value of goods in exporting country, (ii) the exports must be sufficient to cause injury to domestic industry.

However, negligible quantity of imports would not be sufficient to cause such injury.

Presently, countries like China, Taiwan are said to be involved in dumping. Even Indian steel exporters are facing charges of dumping goods in USA.

(ii) Provisional Anti-Dumping Duty

Pending determination of margin of dumping, duty can be imposed on provisional basis. After dumping duty is finally determined, Central Government can reduce such duty and refund duty extra collected than that finally calculated. Such duty can be imposed upto 90 days prior to date of notification, if there is history of dumping which importer was aware or where serious injury is caused due to dumping.

(iii) No CVD on Anti-Dumping Duty

Anti Dumping Duty and Safeguard Duty is not required to be considered while calculating CVD – view confirmed in *Tonira Pharma* v. *CCE* (2007) 208 ELT 38(CESTAT 2 v. 1 order).

(iv) No Education Cess and SAHE Cess on Anti-Dumping Duty – Education Cess and SAH Education Cess is not payable on anti-dumping duty.

(v) No Anti-Dumping Duty in Case of Imports by EOU and SEZ – Anti-dumping duty is not applicable for imports by EOU or SEZ units, unless it is specifically made applicable in the notification imposing anti-dumping duty. [section 9A(2A) of Customs Tariff Act]

(vi) Margin of Dumping

'Margin of dumping' means the difference between normal value and export price (i.e. the price at which these goods are exported). [Section 9A(1)(a)].

'Normal Value' means comparable price in ordinary course in trade, for like article, when destined for consumption in the exporting country or territory. If such price is not available or not comparable (a) comparable representative price of like article exported from exporting country or territory to appropriate third country or (b) cost of production plus reasonable profit, can be considered [section 9A(1)(c) of Customs Tariff Act]. The 'normal value' is to be determined as per rules.

In *Reliance Industries Ltd. v. Designated Authority* 2006 (202) ELT 23 (SC), it was held that 'normal value' a are not exporter specific but exporting country specific. Once dumping of specific goods from country is established, dumping duty can be imposed on all exports of those goods from that country in India, irrespective of the exporter. Rate of duty may vary from exporter to exporter depending upon the export price.

'Export Price' means the price at which goods are exported. If the export price is unreliable due to association or compensatory arrangement between exporter and importer or a third party, export price can be constructed (revised) on the basis of price at which the imported articles are first sold to independent buyer or according to rules made for determining margin of dumping. [Section 9A(1)(b)].

Margin of dumping is determined on basis of weighted average of 'normal value' and the 'export price' of product under consideration.

(vii) Quantum of Dumping Duty

The anti-dumping duty will be dumping margin or injury margin, *whichever is lower.* 'Injury margin' means difference between fair selling price of domestic industry and landed cost of imported product. The landed cost will include landing charges of 1% and basic customs duty. Thus, only anti-dumping duty enough to remove injury to domestic industry can be levied.

For example, if normal value in exporting country is ₹ 11 and export price is ₹ 8, dumping margin is ₹ 3. If landed cost is ₹ 9 and fair selling price of domestic industry is ₹ 10, then injury margin is ₹ 1. Hence, anti-dumping duty of only Re 1 can be imposed.

In *Reliance Industries Ltd. v. Designated Authority* 2006 (202) ELT 23 (SC), it was held that non-injurious price (NIP) has to be calculated for domestic industry as a whole and not in respect of any particular company or enterprise. [Hence, even if product is captively consumed by Indian manufacturer, transfer price (market value) of inputs is to be considered and not actual cost of captive consumption]. It was observed that there has to be a single NIP for a product and not several NIP for the same product. NIP is not exporter specific.

In Alkali Manufacturers Association of India v. Designated Authority 2006 (194) ELT 161 (CESTAT). Designated Authority had calculated domestic price on basis of profit of 22% of investment. It was held that this is reasonable.

(viii) Dumping Duty for WTO Countries

Section 9B of Customs Tariff Act provides restrictions on imposing dumping duties in case of imports from WTO countries or countries given 'Most Favored Nation' by an agreement. Dumping duty can be levied on import from such countries, only if Central Government declares that import of such articles in India causes material injury to industry established in India or materially retards establishment of industry in India.

[WTO agreement permits levy of anti-dumping duty when it causes injury to domestic industry as a result of specific unfair trade practice by foreign producer, by selling below normal value].

'Injury to domestic industry' will be considered on basis of volume effect and price effect on Indian industry. There must be a 'casual link' between material injury being suffered by dumped articles and the dumped imports.

(ix) Rules for Deciding Subsidy or Dumping Margin

Central Government has been empowered to make rules for determining *(a)* subsidy or bounty in case of bounty fed goods *(b)* the normal value and export price to determine margin of dumping in case of dumping. Accordingly, Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty

on Dumped Articles and for determination of Injury) Rules, 1995 *[Customs Notification No. 2/95 (N.T.) dated 1-1-95]* provide detailed procedure for determining the injury in case of dumped articles.

(x) Procedure for Fixing Anti Dumping Duty

After the 'designated authority' is satisfied about *prima facie* case, he will give notice to Governments of exporting countries. Opportunity to inspection of documents and making representations will be given to interested parties who are likely to be affected. Designated Authority will first give preliminary finding and then final finding within one year. Provisional duty can be imposed on basis of preliminary finding which can continue upto 6 months, extendable to 9 months. Additional duty may be imposed on basis of the final finding.

As per rule 18 of Anti-Dumping Duty Rules, Central Government has to issue a notification fixing anti-dumping duty within three months from date of notification issued by designated authority.

(xi) Appeal Against Order Determining Dumping Duty

Appeal against the order determining the duty can be made to CESTAT. The appeal will be heard by at least three members bench consisting of President, one judicial member and one technical member [section 9C of Customs Tariff Act].

(xii) No Appeal against Order of Tribunal

Section 9C does not provide for statutory appeal against order of Tribunal. Hence, only remedy is either writ in High Court or SLP in Supreme Court.

(xiii) High Court should not Exercise Writ Jurisdiction

In view of appeal provisions, High Court should not entertain writ petitions and grant interim relief. Otherwise, the provisions of appeal would be rendered otiose –*Association of Synthetic Fibre Industry* v. *J K Industries 2006* (199) ELT 196 (SC) * Nitco Tiles v. Gujarat Ceramic Floor Tiles Mfg Association 2006 (199) ELT 198 (SC).

(xiv) Mid-Term Review

Mid-term review of Anti-Dumping Duty is permissible under rule 23 of Anti-Dumping Duty Rules. In *Rishiroop Polymers* v. *Designated Authority 2006* (196) ELT 385 (SC), it was held that scope of review enquiry by Designated Authority is limited to the satisfaction as to whether there is justification for continuing imposition of Anti-Dumping Duty. The inquiry is limited to change in various parameters like normal value, export value, dumping margin, fixation of non-injury price and injury to domestic industry. Only changed parameters should be considered.

(xv) New Shipper Review

After imposing of Anti-Dumping Duty, a new exporter may want to export same goods to India. As per rule 22, if he had not exported earlier, he can ask for review of Anti-Dumping Duty. During

the period of review, Government may resort to provisional assessment and may allow imports on submission of guarantee, pending review. If anti-dumping duty is determined, it will be payable retrospectively from date of initiation of review. Such review is termed as 'new Shipper Review'.

(xvi) Discontinuation of Anti-Dumping Duty i.e. Sunset Review

Anti dumping duty ceases on the expiry of five years from date of imposition. However, Central Government can extend the anti-dumping duty, if it is of the opinion that cessation is likely to lead to continuation or recurrence of dumping and injury.

Example 8: An importer imported Description of goods: Mulberry Raw Silk (not thrown) (HS Code 5002 00) from People's Republic of China. CIF value was US $ 20,000 and quantity 1,000 Kgs. Exchange rate was US $ =₹ 44 on date of presentation of Bill of Entry. Customs Duty rates are – (i) Basic Customs Duty 10%, (ii) Education Cess 2%, (iii) SAH Education Cess - 1%. There is no excise duty payable on these goods if manufactured in India. As per Notification No. 106/2003-Cus dated 10-7-2003, anti-dumping duty has been imposed on these goods imported from China, manufactured by any producer in People' s Republic of China. The anti-dumping duty will be equal to difference between amount calculated @ US $31.69 per Kg and 'Landed value' of goods. Compute Customs Duty liability & anti-dumping liability.

Answer:

(a)	Computation of Customs Duty :	
	Total CIF Price	US $ 20,000
	CIF @ Rs 44 per 1 US $	₹ 8,80,000.00
	Add – Landing charges @ 1%	₹ 8,800.00
	Assessable Value	₹ 8,88,800.00
	Basic duty @ 10%	₹ 88,880.00
	Education Cess @ 2% on 88,880.00	₹ 1,777.60
	SAH education Cess 1%	₹ 888.80
	Total Customs Duty payable (Basic + Education Cess)	₹ 91,546.40
	Rounded off	₹ 91,546.00
(b)	Computation of landed value	
	Assessable Value Under Customs Act	₹ 8,88,800.00
	Add: All Duties of Customs	₹ 91,546.40
	Landed Value as per Anti-Dumping Notification	₹ 9,80,346.00
(c)	Computation of anti-dumping duty	
	Rate of Silk Yarn as per Anti-Dumping Notification	
	(US $ 31.69 per kg) × 1000 kgs =	US $ 31,690
	Value @ ₹ 44 per US $ = (31,690$ x ₹ 44)	₹ 13,94,360
	Less : Landed value as per Anti-Dumping =	₹ 9,80,346
	Anti-Dumping Duty Payable	₹ 4,14,014

4.3 VALUATION IN CUSTOMS

4.3.1 Customs duty is payable as a percentage of 'Value' often called '*Assessable Value'* or '*Customs Value'*. The Value may be either *(a)* 'Value' as defined in section 14(1) of Customs Act or *(b)* Tariff value prescribed under section 14(2) of Customs Act. The provisions relating to customs valuation have been completely revamped by introducing new section 14 w.e.f. 10-10-2007.

4.3.2 Tariff Value -

i. Tariff Value can be fixed by CBE&C (Board) for any class of imported goods or export goods. CBE&C should consider trend of value of such or like goods while fixing tariff value. Once so fixed, duty is payable as percentage of this value. (The percentage applicable is as prescribed in Customs Tariff Act). Fixing tariff value is not permitted under GATT convention. However, the provision of fixing tariff values has been retained.

ii. Tariff value for crude palm oil, RBD Palmolein, palm oil, crude soya-bean oil and brass scrap has been fixed by notification No. 36/200 1 -Cus (NT) dated 3-8-2001.

iii. Transaction value at the time and place of importation or exportation, when price is sole consideration and buyer and sellers are unrelated is the basic criteria for 'value' u/s 14(1) of Customs Act. Thus, CIF value in case of imports and FOB value in case of exports is relevant.

iv. In case of high sea sale, price charged by importer to assessee would form the assessable value and not the invoice issued to the importer by foreign supplier. –*National Wire* v. *CC* 2000(122) ELT 810 (CEGAT) * *Godavari Fertilizers* v. *CC* (1996) 81 ELT 535 (CEGAT).

v. Rate of exchange will be as determined by CBE&C or ascertained in manner determined by CBE&C.

vi. Valuation for customs is required to be done as per provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

vii. CIF value of goods plus 1% landing charges is the basis for deciding 'Assessable Value'.

viii. Commission to local agents, packing cost, value of goods and tooling supplied by buyer, royalty relating to imported goods are addible.

ix. Interest on deferred payment, demurrage and value of computer software loaded is not to be added.

x. Old machinery and old cars are often valued on basis of depreciated value, though such method has no sanction of law.

4.3.3 Additions To 'Customs Value'

Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Rule 9 upto 10-10-2007] provide that following cost and services are to be added, *if these are not already included in the invoice price*. –

i. Commission and brokerage, except buying Commission, if not already included in the invoice price [rule 10(1)(a)(i)].

ii. Cost of container which are treated as being one with the goods for customs purposes, if not already included in the invoice price [rule 10(1)(a)(ii)]. Cost of packing whether labour or materials, if not already included in the invoice price [rule 10(1)(a)(iii)].

iii. Materials, components, tools, dies, moulds, and consumables used in production of imported goods, supplied by buyer directly or indirectly, free of charge or at reduced cost, to the extent not already included in price [rule 10(1)(b)(i), (ii) and (iii)]

iv. Engineering, development, art work, design work, plans and sketches undertaken elsewhere than in India and necessary for production of imported goods, to the extent not already included in price [rule 10(1)(b)(iv)].

v. Royalties and license fees relating to imported goods that buyer is required to pay, directly or indirectly, as a condition of sale of goods being valued [rule 10(1)(c)]

vi. Value of proceeds of subsequent resale, disposal or use of goods that accrues directly or indirectly to seller (i.e. to foreign exporter) [rule 10(1)(d)]

vii. All other payments made as condition of sale of goods being valued made directly or to third party to satisfy obligation of seller, to the extent not included in the price [rule 10(1)(e)]

viii. Cost of transport upto place of importation [rule 10(2)(a)]

ix. Loading, unloading and handling charges associated with delivery of imported goods at place of importation [These are termed as landing charges and are to be taken as 1%] [ru le 10(2)(b)]

x. Cost of insurance [rule 10(2) (c)]

The additions should be on the basis of objective and quantifiable data [rule 10(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier rule 9(3)].

4.3.4 Services / Documents / Technical Know-How Supplied by Buyer

Cost of engineering, development, art work, design work and plans and sketches undertaken by buyer which is necessary for production of imported goods is includible, only if such work is undertaken *outside India.* [Rule 10(1)(b)(iv) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier rule 9)] The addition should be done on objective and quantifiable data. Data available with importer should be used as far as possible. If the services are purchased or leased by importer, such purchase/lease cost should be added. If the importer has himself done the work abroad, its cost should be added on basis of structure and management practices of importer and his accounting methods (in other words, if development work, plans, sketches etc. is done by importer himself *outside India,* its cost should be calculated based on normal accounting practices - like apportionment of overheads, apportionment over various jobs if the same development work, design work etc. is used for more than one jobs etc.) [Interpretative Note to rule 10(1)(b)(iv) of Customs Valuation Rules].

4.3.5 Technical Know How Related to Imported Machinery

In *CC* v. *Essar Gujarat Ltd.* (1997) 9 SCC 738 = 88 ELT 609 = 17 RLT 588 (SC 3 member bench), it was held that payment of license fee and transfer of technology, without which the imported plant could not function, will have to be added to the value of imported plant. However, training charges cannot be included. —wrongly followed in *CC* v. *Himson Textile Engg. Ltd.* 1997(93) ELT 301 (CEGAT).

4.3.6 Royalties and License Fee

Royalties and license fees related to imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable, are required to be added in assessable value. [Rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier rule 9)].

4.3.7 Royalty Payment Un-connected with Imported Goods not to be Added

Often, a lump-sum payment of royalty is made to foreign collaborators for technical know-how. In addition, components / parts/ CKD packs are procured from foreign collaborators. Customs department normally holds that the price of parts/CKD packs should be loaded, on assumption that the part of price of component parts/CKD packs has been paid as 'royalty payment'.

4.3.8 Charges for Reproduction of Goods in India not to be Added

Interpretative Note to rule 10(1)(c) of Customs Valuation Rules makes it clear that charges for right to reproduce the imported goods in India shall not be added.

4.3.9 Barge/ Lighterage Charges includible

In some cases, the ship is not brought upto jetty. Goods are discharged at outer anchorage. This may be for various reasons, e.g. (a) deep draught at port, (b) Ports are busy, (c) Odd dimensional or heavy lifts or hazardous cargo discharged at anchorage. Charges for brining the goods from outer anchorage are known as 'barging/ lighterage charges'.

As per *explanation* to rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [inserted w.e.f. 10-10-2007], ship demurrage charges on chartered vessels, lighterage or barge charges are includible. Mode of computation of freight of time chartered/daughter vessel has been specified in MF(DR) circular No. 4/2006-Cus dated 12-1-2006.

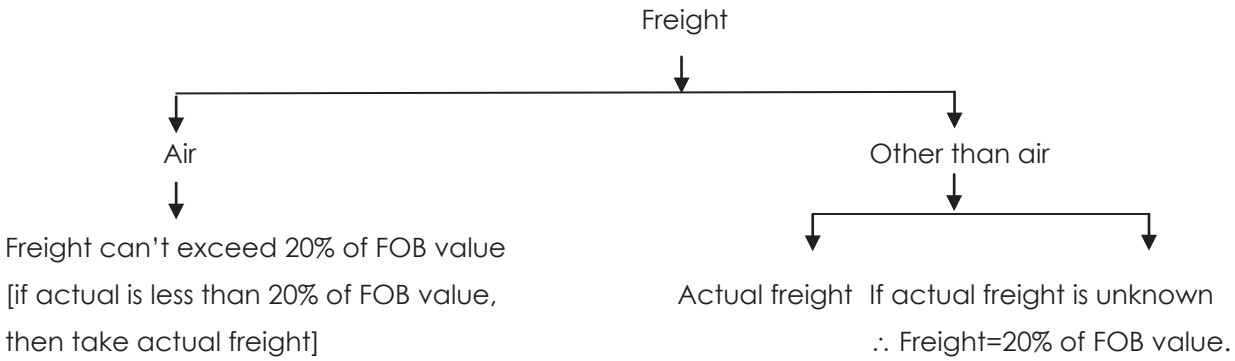
4.3.10 Landing Charges to be added

Cost of unloading and handling associated with delivery of imported goods in port(*called landing charges)* shall be added. These will be calculated @ 1% of CIF value, i.e. FOB price plus freight plus insurance. [Rule 10(2)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 –earlier rule 9].

4.3.11 Cost of Transport upto Port should be added

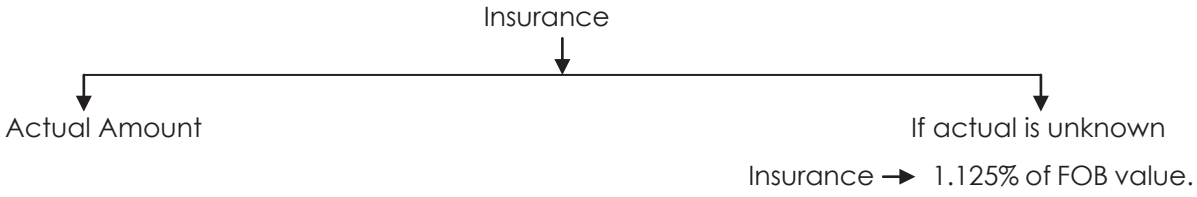
Cost of transport from exporting country to India is to be added in 'Assessable Value'. [Rule 10(2)(a) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier rule 9).] In other words, CIF value is the basis for valuation. If the goods are imported by air, the air freight will be very high. Hence, in case air freight is higher than 20% of FOB price of goods, only 20% of FOB price will be added for Customs Valuation purposes.

If cost of transport is not ascertainable, it will be taken as 20% of FOB value of goods. However, cost of transport within India is not to be considered.



4.3.12 Insurance Cost should be added

Insurance charges on goods are to be added. [Rule 10(2)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]. If these are not ascertainable, these will be calculated @ 1.125% of FOB Value of goods.



4.3.13 Exclusions from Assessable Value

Interpretative Note to rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007provide that following charges shall be excluded:

a) Charges for construction, erection, assembly, maintenance or technical assistance undertaken *after* importation of plant, machinery or equipment

b) Cost of transport *after* importation

c) Duties and taxes in India

Other payments from buyer to seller *that do not relate* to imported goods are not part of the customs value. Demurrage charges payable to port trust authorities for delay in clearing goods are not to be added. - *Dee pak Fertilisers* v. *CC* 1989(41) ELT 550 (CEGAT) * *Hindustan Lever* v. *UOI* 2002(142) ELT 33 (Cal HC). [However, ship demurrage is includible w.e.f. 10-10-2007].

Ship demurrage includible w.e.f. 10-10-2007 - explanation to rule 10(2)

4.3.14 Essential Ingredients of Valuation (section 14)

The essential ingredients of section 14 may be analyzed as under:

a) Section 14 would be applicable only when customs duty is chargeable on goods based on their value either under the Customs Tariff Act, 1975 or under any other law for the time being in force.

b) The value of goods under section 14(1) is deemed value.

c) The assessable value will be price at which like goods are ordinarily sold.

d) Where there is no sale price, the value shall be the price at which such or like goods are ordinarily offered for sale.

e) The terms of the price should be for delivery at the time and place of importation or exportation, as the case may be.

f) The sale or offer for sale should be in the course of international trade.

g) There should be no mutuality of interest between the seller and the buyer.

h) Price should be the sole consideration for sale or offer for sale.

Analysis in the Light of Judicial Decisions

The above ingredients may be further explained with the help of judicial rulings as under:

(a) Assessable Value is Deemed Value

Section 14(1)(a) brings about the concept of deemed value, which is a fictional value that relates to the concept of intrinsic value of goods, which it may fetch in the international market.

In the case of *Union of India v Glaxo Laboratories Ltd.,* the Court observed that the assessable value as per section 14(1), need not as a matter of fact, be the invoice price or the price that is agreed between the parties. It may be deemed value.

(b) Price

In N *Gulabair D Parekh v Union of India,* it was observed that the invoice price based on the prevailing price list, should be accepted in terms of section 14(1) (a) of the Customs Act.

A declared price list can be used for the purpose or arriving at the value but there is no hard and fast rule and the invoice may supersede the price list as held by the Supreme Courtin *Mirah Exprots Pvt. Ltd. v CC*.

In *Rajkumar Knitting Mills P Ltd. v CC,* a three member bench of Supreme Court held that for valuation purposes, ' ordinary' price at the time of importation is relevant and *not* the price prevalent on the date of contract.

(c) At which such or like goods Are Ordinarily Sold

In *Chander Prakash & Co v Collector of Customs,* it was held that when the invoice price was very low and when the prices of comparable goods were available, it would not be appropriate to adopt the invoice price.

(d) Where there is no sale price, the 'Offer for Sale' price will be applicable

In case a sale price is not available, the offer for sale price may be construed as the basis determining the assessable value. For example, in case a price list is available, such price list is the quotation as well.

(e) Ordinarily Sold

In *Collector of Customs, Bombay v Maruti Udyog Limited* (1987), Maruti Udyog Limited, which had collaboration with Suzuke Motor Co. Limited, was the only buyer of Suzuki SKD/CKD packs and complete vehicles. A controversy arose so to whether the price charges by Suzuki could be considered as one at which goods were ordinarily sold or offered for sale. In this case, the court held that the price charged by the Suzuki was a commercial price. Also, it was held that there was nothing to prove that the transaction between the two companies were not at arm's length.

(f) In the course of International Trade

In *Satellite Engineering Limited v Union of India* (1983), the assessee, who was manufacturers of fluorescent starter switches imported lead glass tubing at rate of 0.15 pounds per kg. However, the customs department which was of the opinion that the value was low obtained two more quotations which were 0.430 pounds per kg. And 0.429 pounds per kg. respectively. It was held that the prices indicated in the two quotations were in the course of international trade and hence that rate will form the basis for determining the assessable value.

(g) Price being the Sole Consideration

In *Sanjay Chandiram v Collector of Customs,* the court held that as there is no proof of comparable goods being imported at a higher rate and as it cannot be shown that the importer had paid to the supplier, an amount more than that required to be paid, there is no ground for rejection of the transaction value.

4.3.15 Relevant Date for Rate and Valuation of Import Duty

Section 15 of Customs Act prescribes that rate of duty and tariff valuation applicable to imported goods shall be the rate and valuation in force at one of the following dates *(a)* if the goods are entered for home consumption, the date on which bill of entry is presented *(b)* in case of warehoused goods, when Bill of Entry for home consumption is presented u/s 68 for clearance from warehouse and *(c)* in other cases, date of payment of duty.

4.4 METHODS OF VALUATION

The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, based on WTO Valuation Agreement (earlier GATT Valuation Code), consist of rules providing six methods of valuation.

i. The methods of valuation for customs methods are as follows —

ii. Transaction Value of Imported goods [Section 14(1) and Rule 3(1)]

iii. Transaction Value of Identical Goods [Rule 4]

iv. Transaction Value of Similar Goods [Rule 5]

v. Deductive Value which is based on identical or similar imported goods sold in India [Rule 7]

vi. Computed value which is based on cost of manufacture of goods plus profits [Rule 8]

vii. Residual method based on reasonable means and data available [Rule 9]

4.4.1 Methods to be applied Sequentially

These methods are to be applied in sequential order, i.e. if method one cannot be applied, then method two comes into force and when method two also cannot be applied, method three should be used

and so on. The only exception is that the 'Computed value' method may be used before 'deductive value 'method, if the importer requests and Assessing Officer permits.

4.4.2 Rejection of 'Value'

Importer has to declare 'value' of goods. If the assessing officer has reason to doubt about truth or accuracy of the value declared by the importer, he can ask the importer to submit further information and evidence. If the customs officer still has *reasonable doubt,* he can reject the 'value' as declared by the importer. [Rule 12(1) w.e.f. 10-10-2007 – earlier rule 10A(1) of Customs Valuation Rules added w.e.f. 19-2-1 998]. If the importer requests, the assessing officer has to give reasons for doubting the truth or accuracy of value declared by importer [Rule 12(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 –earlier rule 10A(2) of Customs Valuation Rules upto 10-10-2007].

4.4.3 Rule 12 is only Mechanism to Reject the Declared Value

As per *explanation (1)(i)* to Rule 12, the Rule 12 does not provide any method for determination of value. It only provides mechanism to reject declared value, where there is reasonable doubt. If transaction value is rejected, valuation has to be done as per Rule 4 to 9 *[Explanation* (1)(i) to Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

4.4.4 Transaction Value of Imported Goods [Section 14(1) and Rule 3(1)]

As per rule 3(1), value of imported goods shall be transaction value adjusted in accordance with provisions of rule 10 [Rules effective from 10.10.2007].

As per rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, various additions like sales commission, cost of containers, cost of packing; cost of materials, components etc. or services supplied by buyer; royalties payable, transport charges, insurance etc. are includible, *if these do not already form part of transaction value (as mentioned above)*.

Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is subject to rule 12, which means that provisions of rule 12 overrides provisions of rule 3. As per rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value as declared by importer can be rejected by Assessing Officer, if he has doubts about truth or accuracy of the value as declared. However, the Assessing Officer has to give reasons for his doubts in writing and provide opportunity of personal hearing. Thus, it is not obligatory on customs officer to accept the transaction value if he has reasons to doubt the truth or accuracy of the same.

Transaction value can be rejected either for special circumstances as per section 14(1) or conditions as specified in rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

(A) Special circumstances as per Section 14(1) - *The 'special circumstances' in section 14(1) are (a) Buyer and seller should not be related and (b) Price should be the sole consideration for the sale. If these 'special circumstances' are not satisfied, transaction value can be rejected. Any other 'special circumstances' cannot be considered.*

(B) Conditions as per Rule 3(2) - *As per rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Earlier rule 4(2) of Customs Valuation Rules], transaction value can be accepted only if following requirements are satisfied –*

(C) No restriction on Buyer for Disposal of Goods - There are no restriction on buyer on disposition or use of goods *except* the following: *(a)* restrictions prescribed by public authorities in India *(b)* restriction on geographical area within which goods may be resold e.g. goods should not be sold outside particular State or outside India *or (c)* restriction that does not materially affect value of goods - e.g. exporter puts a condition to importer of automobile that car should not be exhibited before a particular date – illustration given in Interpretative Note to rule 3(2) (a) (iii). [rule 3(2) (a)].

(D) Sale not subject to conditions of which value cannot be determined - *The sale or price should not* be subject to a condition or consideration for which value cannot be determined. Examples given in interpretative note to rule 3(2) (b) are – (a) Price is subject to condition that buyer buys some other goods in specified quantities from seller (b) price is dependent on price at which buyer of imported goods sells other goods to seller (c) Price is based on form of payment extraneous the imported goods. However, (i) buyer furnishing engineering and plans undertaken in India to seller (ii) Buyer undertaking activities of marketing of imported goods in India will not form part of value of imported goods [rule 3(2) (b)].

(E) No further consideration to Seller of which adjustment cannot be made - *Seller should not be entitled* to further consideration like part of subsequent resale, disposal or use of goods by the buyer will accrue directly or indirectly to seller, unless proper adjustment in value terms can be made as per rule 10 e.g. if the importer is a trader and the condition is that after he sells the goods in India, the foreign exporter will get a fixed amount after the sale, that extra amount can be added for Customs Valuation [rule 3(2) (c)].

(F) Unrelated Buyer and Seller, Except when price acceptable under Rule 3(3) - *Buyer and seller are not* be related, unless the transaction value is acceptable under rule 3(3) [rule 3(2)(d)] [earlier ru le 4(2)(h) upto 10-10-2007]. *If any of the aforesaid requirements is not satisfied, 'transaction value' cannot be accepted for valuation purposes.*

Related person under Customs Valuations Provisions

Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Rule 2(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007 define that persons shall be deemed to be 'related' only if one of the conditions is satisfied:

- they are officers or directors of one other's businesses [Rule 2(2)(i)]
- they are legally recognised partners in business [Rule 2(2)(ii)]
- they are employer and employee [Rule 2(2)(iii)]
- any person directly or indirectly owns, controls or holds 5% or more of shares of both of them [Rule 2(2)(iv)]
- one of them controls other directly or indirectly [Rule 2(2)(v)]
- both of them are controlled - directly or indirectly - by third person [Rule 2(2)(vi)]
- together they control a third person - directly or indirectly [Rule 2(2)(vii)]
- they are members of same family [Rule 2(2)(viii)]. (what is **"family"** is not defined).

Person includes legal person i.e. Company, partnership firm, trust etc. [Explanation I to Rule 2(2)].

If a person is sold agent or sole distributor or sole concessionaire of other, he will be deemed to be 'related', if he falls within the criteria of rule 2(2) [Explanation II to Rule 2(2)]. Thus, sole selling agent or sole distributor or sole concessionaire will be 'related person' only if he falls within the criteria as specified in rule 2(2). A sole selling agent or sole distributor or sole concessionaire is not automatically deemed as 'related person' in all the cases.

Interpretative Note to rule 2 clarify that for purpose of rule 2(2)(v), one person is deemed to control other if he is legally or operationally in a position to exercise restraint or direction over the other. Thus, control need not be only legal - even operational control is enough.

In CC v. East African Traders 2000(115) ELT 613 (SC), it was held that authorities can pierce the corporate veil to ascertain whether the buyer and seller are indeed related persons within the meaning of the rule. [Piercing corporate veil means looking behind the facade to see the persons who are in real control]. [The Tribunal had held that even if MD of supplier company is brother of importing firm, supplier and importer cannot be treated as related person. However, Supreme Court has said that they can be treated so by piercing the corporate veil].

However, merely because two parties are related to each other will not amount to under valuation per se. It will depend on facts and circumstances of each individual case - CC v. Variant (India) Ltd. (2007) 210 ELT 481 (SC).

In Siemens Ltd v. CC2000(126) ELT 1134 (CEGAT), it was held that even if buyer is a subsidiary company, invoice price should be accepted if the relationship has not affected the invoice price and price is same as the price sold to other independent buyers.

4.4.5 Transaction Value of Identical Goods

Rule 4(I) (a) of Customs Valuation (Determination of Value of Imported Goods) Rules 2007 of Customs Valuation Rules provide that if valuation on the basis of ' transaction value' is not possible, the 'Assessable value' will be decided on basis of transaction value of identical goods sold for export to India and imported at or about the same time.

Rule 4(1)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provides that transaction value of identical goods at the same commercial level and in substantially same quantity as the goods being valued shall be used to determine value of imported goods.

If transaction value at different commercial level or in different quantities *or both* is available, suitable adjustments can be made to take into account the difference.

Identical goods' are defined under Rule 2(1)(d) of Custom Valuation (Determination of value of Imported Goods) Rules, 2007 as those goods which fulfill all following conditions i.e. *(i)* the goods should be same in all respects, including physical characteristics, quality and reputation; except for minor differences in appearance that do not affect value of goods, *(ii)* the goods should have been produced in the same country in which the goods being valued were produced, *(iii)* they should be produced by same manufacturer who has manufactured goods under valuation - if price of such goods are *not* available, price of goods produced by another manufacturer in the same country. However, if engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, these will not be 'identical goods'.

Summary of valuation of 'Identical Goods'

i. Contemporaneous imported goods,

ii. Same in all respect,

iii. Minor difference in appearance like Nokia 6265 (steel gray) & Nokia 6265 (Black colour),

iv. Produced in same country at same commercial level, substantially same quantity – Lowest value to be taken,

v. 1st preference – same manufacturer,

vi. 2nd preference – only if same manufacturer not available them different manufacturer,

Adjustments to be made

Price of identical goods should be compared at same commercial level and in substantially same quantity of goods [rule 4(1)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] - noted in Elite Packaging Industries v. CC-1992 (60) ELT 311 (SC).

If transaction value at different commercial level or in different quantities or both is available, suitable adjustments can be made to take into account the difference. It should be on demonstrated evidence which clearly establishes reasonableness and accuracy of adjustments [rule 4(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

As per interpretative note to rule 4 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, if price of identical goods at same commercial level and in substantially the same quantities

as the goods being valued is not available, customs officer can use any of the following price of identical goods - (a) sale at same commercial level but in different quantities (b) sale at different commercial levels but in substantially the same quantities or (c) sale at different commercial level and in different quantities. Such price can be only 'transaction value' which has already been accepted under rule 3. After such sale is found, adjustment will be made for (a) quantity factor only (b) commercial level factors only or (c) both commercial level and quantity factors.

Such adjustment can be only on basis of demonstrative evidence e.g. valid price lists containing prices referring to different levels or different quantities. For example, assume that import is for 10 units, while transaction value of identical goods is available for 500 units. If the seller is known to be giving quantity discounts and if seller's price list for 10 units and 500 units is available, adjustment can be made based on seller's price list. In such case, price of identical goods made in 10 units need not be available. Such adjustment can be only on objective measure on bona fide evidence and not arbitrary.

Adjustment for distances and transport costs - If valuation of identical goods was made after adding costs and services as per rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, differences arising due to differences in distances and means of transport should be considered, while arriving at 'Assessable Value' of goods under valuation. This will be required if value of identical goods manufactured by different manufacturer and/or at different place is being taken as basis for valuation [Rule 4(2).

4.4.6 Transaction Value of Similar Goods

If first method of transaction value of the goods or second method of transaction value of identical goods cannot be used, rule 5 (earlier rule 6) provide for valuation on basis of 'Transaction value of similar goods imported at or about the same time'.

What are Similar goods - Rule 2(1)(f) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier rule 2(1)(e) upto 10-10-2007] define 'similar goods' as *(a)* alike in all respects, have like characteristics and like components and perform same functions. These should be commercially inter-changeable with goods being valued as regards quality, reputation and trade mark. *(b)* the goods should have been produced in the same country in which the goods being valued were produced. *(c)* they should be produced by same manufacturer who has manufactured goods undervaluation - if price of such goods are not available, price of goods produced by another manufacturer in the same country can be considered. . However, if engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, these will not be 'similar goods'.

As per rule 5(2) and interpretative note to rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the adjustments that can be made are same as can be done in respect of identical goods under rule 4 i.e. (a) Adjustments for commercial level and/or quantity can be made (b) if valuation of similar goods is made after adding costs and services as per rule 10, differences arising due to differences in distances and means of transport should be considered, (c) if more than one value is available, lowest of such values should be taken.

Distinction between identical goods and similar goods

The major distinction between 'identical goods' and 'similar goods' is that the 'identical goods' should be same in all respects, except for minor differences in appearance, while in case of 'similar goods', it is enough if they have like characteristics and like components and perform same functions. In both the cases, (a) quality and reputation (including trade mark reputation) should be same (b) Goods should be from same country, (c) Goods produced by another manufacturer can be considered if price of goods produced by same manufacturer are not available. However, brand reputation and quality of other manufacturer should be comparable (d) If engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported

goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, the price cannot be considered.

'Similar' does not mean identical but means corresponding to or resembling to in many respects. - Vishrut Industries v. CCE 2001(130) ELT 225 (CEGAT).

Goods produced in Japan and goods produced in France cannot be termed as 'similar goods' for purpose of these rules - Nitisodya Diamond Tools v. CC - 1994 (74) ELT 49 (CEGAT)

Summary of valuation of 'Similar Goods'

i. Contemporaneous imported goods,
ii. Not like in all respect,
iii. Like characteristics and component materials,
iv. Perform same functions,
v. Commercially inter changeable w.r.t. quality, reputation & trademark,
vi. Produced in same country,
vii. 1st preference – same manufacturer,
viii. 2nd preference – only if same manufacturer not available then different manufacturer.

4.4.7 Deductive Value Method

Rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provide for the next i.e. fourth alternative method, which is called 'deductive method'.

If the importer requests and the Customs Officer approves, 'computed value' method as given in rule 8 can be used before the method of 'deductive value' [proviso to Rule 6 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

This method should be applied if transaction value of identical goods or similar goods is not available; but these products are sold in India. The assumption made in this method is that identical or similar imported goods are sold in India and its selling price in India is available. The sale should be in the same condition as they are imported. Assessable Value is calculated by reducing post-importation costs and expenses from this selling price. This is called 'deductive value' because assessable value has to be arrived at by method of deduction (deduction means arrive at by inference i.e. by making suitable additions/subtractions from a known price to arrive at required 'Customs Value').

Price at or about the time of valuation - Price at or about the time at which goods in question are being valued should be considered. However, rule 7(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provide that if such price is not available, price at the date after importation but within 90 days can be considered. Thus, if price prevalent prior to date of import of goods under-valuation is not available, even price subsequent to import of the goods can be considered under this rule.

Such sale should be in sufficient quantity to establish unit price.

Price after processing - If price of identical or similar goods in India is not available, but price in India is available after the imported goods are processed, such price can be considered after deducting processing cost. Such deduction should be on objective and quantifiable data. This method is not normally applicable if the imported goods lose identity after processing, unless value of imported component can be determined accurately without difficulty even after such conversion. This method also should not be applied if after processing, imported goods form a minor part of the processed goods. In such cases, reducing costs of other materials and processing costs from selling price of processed goods may not give reliable results [rule 7(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

The method may be used when goods are extracted on High Seas (e.g. minerals, crude oil etc.) and brought into India for sale. It will be 'import' and dutiable. In other cases, chances of using this method of valuation are indeed very rare.

Subtractions from selling price in India - Following subtractions should be made from selling price of imported goods in India, (a) Selling commission, general (selling) expenses and selling profits made in connection with sale of imported goods in India. General expenses includes direct and indirect cost of marketing the goods in question in India, (b) transport, insurance and associated costs within India (c) customs duties, sales tax and other taxes levied in India.

Seller in India of imported goods will incur all these expenses and hence, if is clear that 'CIF Value' can be arrived at i.e. 'deduced only after all these expenses are reduced from selling price of identical or similar goods sold in India. In other words, all (estimated) expenses incurred after importation of goods should be subtracted from selling price in India to arrive at 'CIF Price' of goods.

Unit price sold in greatest numbers - Rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 specify that while considering selling price of imported goods in India, unit price at which greatest aggregate quantity of identical or similar goods are sold to unrelated persons in India should be the basis. Interpretative Note to rule 7 of Customs Valuation Rules gives some illustrations - e.g. if 65 units are sold @ ₹100, 55 units are sold @ ₹95 and 80 units are sold @ ₹90; then greatest aggregate quantity is 80 which is sold @ ₹90 per unit, which will be the basis for valuation. Another example given in the Interpretative Note is that if 500 units are sold at price of ₹95 and 400 units are sold at ₹90, then greatest quantity is 500 and hence price of ₹95 should be considered.

Summary of valuation of 'Deductive value method'

i. Transaction value of imported goods or identical or similar goods is not ascertainable,
ii. Goods one sold in India after importation,
iii. Sale in India in same condition,
iv. Goods sold after further processing shall be considered,
v. Sale to unrelated person,
vi. Sales are made at or about the time (within a maximum 90 days after import),
vii. Unit price at which greatest number of unit it sold at the first commercial level after importation,

4.4.8 Computed Value Method

If valuation is not possible by deductive method, the same can be done by computing the value under rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier rule 7A upto 10-10-2007], which is the fifth method. If the importer requests and the Customs Officer approves, this 'computed value' method can be used before the method of 'deductive value' [proviso to Rule 6 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

In this method, value is the sum of (a) Cost of value of materials and fabrication or other processing employed in producing the imported goods (b) an amount for profit and general expenses equal to that usually reflected in sale of goods of the same class or kind, which are made in the country of exportation for export to India, (c) The cost or value of all other expenses under rule 10(2) i.e. transport, insurance, loading, unloading and handling charges.

Method suitable when producer prepared to give costing - Generally, valuation should be done on basis of information available in India. Thus, this method is normally possible when the importer in India and foreign exporter are closely associated and the foreign exporter is willing to give necessary costing and to provide for subsequent verification, which may be necessary.

In Rabindra Chandra Paul v. CC(2007) 209 ELT 326 (SC), it was observed that this rule may be involved in agro processing, processing of seeds, refined oil from crude oil etc, where raw material has a crucial role to play in the method of costing.

How to calculate cost and profit - Interpretative Note to rule 8 [earlier rule 7A upto 10-10-2007] of Customs Valuation Rules explains how cost or value and profit should be calculated.

The Cost and Value should be on the basis of information supplied by or on behalf of the producer. The information should be on basis of commercial accounts based on generally accepted accounting practices. Cost of commission and brokerage and packing cost has to be added. Similarly, cost of material supplied free, tooling cost, development and engineering charges, design work cost etc. have also to be added. No cost should be counted twice.

How to calculate profit - The amount of profit and general expenses should be taken as a whole. A low profit and higher general expenses may occur in cases where for valid commercial reasons, the prices have been kept low e.g. (a) producers have to sale at lower profit due to unforeseen drop in demand (b) Goods are sold to complement a range of goods produced in India and low price is accepted to maintain competitiveness. However, if the data of producer is not consistent with those generally reflected in sale of goods of same class sold in India, amount of profit and general expenses may be based on other relevant information.

What are General Expenses - General Expenses means direct and indirect cost of producing and selling goods for export, other than those already covered above. [In costing terminology, these are termed as 'overheads'.]

Same class or kind of goods - If data of profit and general expenses of another producer is considered, the goods should be of same class or kind. This should be within very narrow range of group of goods. It must be from same country and not from another country.

Summary of valuation of 'Computed Value Method'

i. When the producer is willing to give necessary costing data and subsequent clarification,

ii. Sum total of the production / processing cost of imported goods and,

iii. Add the usual profit and general expenses and,

iv. Add costs and charges as per Rule 10(2).

4.4.9 Residual Method

The sixth and the last method is called "residual method". It is also often termed as 'fallback method'. This is similar to 'best judgment method' of the Central Excise, Income Tax and Sales Tax. This method is used in cases where 'Assessable Value' cannot be determined by any of the preceding methods. While deciding Assessable Value under this method, reasonable means consistent with general provisions of these rules should be the basis and valuation should be on basis of data available in India. [Rule 9(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

The value cannot exceed normal price - The value so determined cannot be more than the 'normal price' i.e. price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in course of International Trade, when seller and buyer have no interest in the business of each other or one of them has no interest in the other and price should be sole consideration for sale or offer for sale [proviso to rule 9(1). There was no parallel proviso in earlier rule 8(1)].

Summary of valuation of 'Residual Value Method'

i. Value to be determined,

ii. Using reasonable means and section 14 & data available,

iii. Value so determined shall not exceeds the price at which such or like goods are ordinary sold at the time and place of importation in the course of international trade,

iv. Buyer or seller are not interest in business of other,

v. Selling price in India of goods produced in India can't take.

4.4.10 Inclusions/Exclusions in Customs Value

i. Valuation for customs is required to be done as per provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

ii. CIF value of goods plus 1% landing charges is the basis for deciding 'Assessable Value'.

iii. Commission to local agents, packing cost, value of goods and tooling supplied by user, royalty relating to imported goods are to be added.

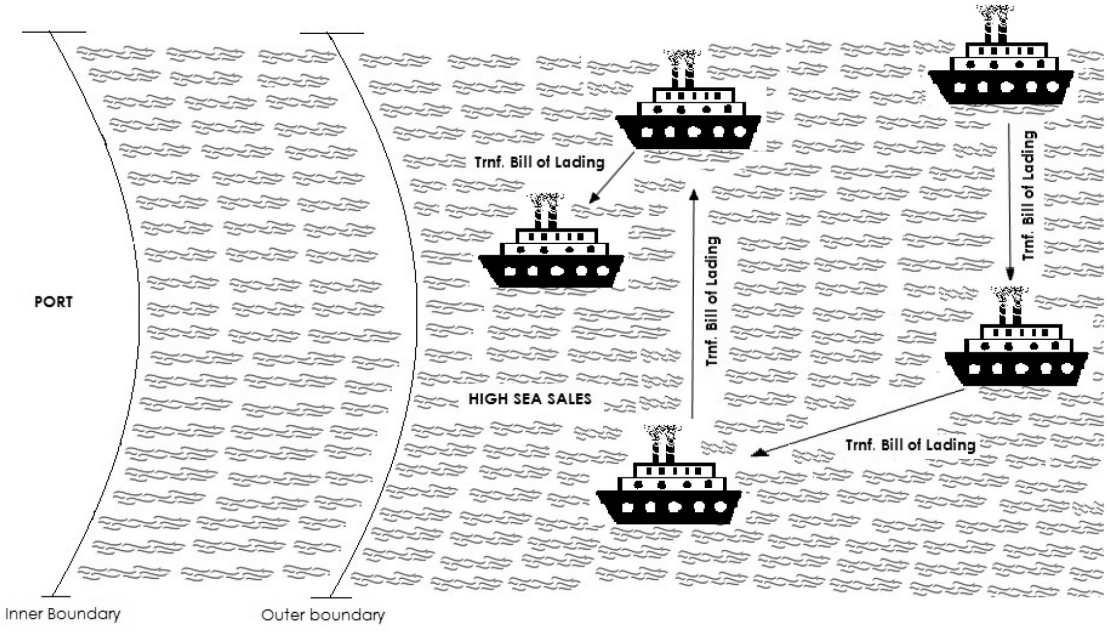
iv. Interest on deferred payment, demurrage at port is not required to be added.

v. Value of computer software loaded on machine is to be added to value of machinery.

vi. Old machinery and old cars are valued on basis of depreciated value, though such method has no sanction of law.

No other additions - No other addition shall be made to price paid or payable, except as provided for in rule 10 [rule 10(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier rule 9(4)]. Interpretative Note to rule 3 (earlier rule 4) also clarifies that activities undertaken by buyer other than those for which adjustments are provided in rule 10 are not to be added, even though it may be regarded as benefit to the seller.

4.4.11 High Sea Sales



It is the responsibility of the importer to prove that the high seas sales transactions constituted transfer of goods. He has to establish a link between the first International transfer of goods to the last transaction.

Custom Valuation Rules, 1988, determination of assessable value for goods sold on high seas- In case the actual high sea sale contract price is more than ''the CIF value plus 2%'', then the ''actual contract price'' paid by the last buyer is being taken as the value for the purpose of assessment. In some of the custom Houses, however, audit has raised objection stating that if, in a particular transaction, there were about three/ four high-sea-sales, then high-sea-sales service charges @ 2% has to be added to the CIF value, for each such transaction.

4.4.12 "Green Channel Procedure" for Clearance of Imported Goods

Green Channel procedure has been introduced in major Custom Houses on experimental basis to expedite clearance of imported goods. This procedure is applied only in respect of certain specified imports.

Some of such imports identified are:-

a) Goods imported by Government departments and public sector undertakings, which do not require physical identification for the purpose of either ITC classification/ restrictions or Customs classification.

b) Imports under project Import Regulations.

c) Bulk imports sourced directly from reputed suppliers.

d) Consignments, which consist of single product of a well- known brand or specification, tested earlier and, covered by valid test report of an earlier import.

e) Imports by importers with proven identity and unblemished record of past conduct.

The Bills of Entry under this procedure are processed and assessed to duty under the second appraisement system i.e., assessment and duty collection is done first and then consignment examined. In such cases the Assessing Officer indicates on the reverse of the duplicate Bill of Entry to the Appraiser in charge of examination to 'Inspect the lot and check marks and numbers on the packages'. After inspection of the lot and marks and numbers of the packages with reference to the declaration in the Bill of Entry and other connection documents, the Docks Appraiser gives 'passed Out of Customs' order. The Docks Appraiser, in the presence of Assistant Commissioner may examine the goods in exceptional cases.

4.4.13 Practical Problems of Computing Customs Value

BCD, CVD & Spl. CVD

Example 9: D Ltd., an actual user imports certain goods from USA, at Chennai port, at cost of $1,00,000 FOB. The other details are as follows:

(i) Packing charges: $22,000.

(ii) Sea freight to Indian port: $28,000.

(iii) Transit insurance: $10,000.

(iv) Design and development charges paid to a consultant in USA by importer: $9,000.

(v) Selling commission to be paid by the Indian importer:₹ 5,000.

(vi) Rate of exchange announced by RBI:₹ 40.60/$.

(vii) Rate of exchange notified by the Central Board of Excise and Customs:₹ 40.70/$.

Rate of basic custom duty: 15%.

Compute the assessable value of the imported goods and the basic customs duty payable.

Answer :

Statement showing Assessable value of the imported goods and customs duty payable

Particulars	Value (in US$)	Remarks	Workings
FOB	1,00,000		
Add: Packing charges	22,000	Included into the Assessable value	
Add: sea freight	28,000	-Do-	No restriction on sea freight.
Add: insurance	10,000	-do-	
Add: Design and development charges	9,000	-do-	
Add: Selling Commission	122.8501	-do-	₹ 5,000/₹ 40.70
CIF value	1,69,122.8501		
Add: 1% loading and unloading on CIF	1,691 .2285		$ 1,69,122.8501 x 1%
Assessable Value	1,70,814.0786		

Particulars	Value in ₹	Remarks	Workings
Assessable Value	69,52,133		USD 1,70,814.0786 x₹ 40.70
Add: Basic Customs Duty	10,42,820		₹ 69,52,133x 15%
Add: 2% Education cess	20,856		₹ 10,42,820 x 2%
Add: 1% SAH Education cess	10,428		₹10,42,820 x 1%
Landed value	80,26,237		

Example 10: The following information is furnished by Mr. K on 8th June 2013, 2 respect of articles of jewellery imported from USA in the month of April 2013.

FOB value	$20,000
Exchange rate	$1 =₹ 44
Air freight	$4,500
Insurance charges	Not known
Landing charges	₹ 1,000
Basic customs duty	10%
Excise duty chargeable on similar goods in India as per tariff rate	16%
Additional duty of customs u/s 3(5) of the Customs Tariff Act, 1975	As applicable.

Calculate the total customs duty payable by Mr.K.

Answer :

Statement showing customs duties payable by Mr. K.

Particulars	USD ($)	Remarks	Workings
FOB	20,000		
Add: Air freight	4,000	Air freight should not exceed 20% on FOB	20,000$ x 20%= 4,000
Add: Insurance	225		1.125% on FOB
CIF value	24,225		
Add: 1% loading and unloading	242.25		24,225x 1%
Assessable value	24,467.25		
	Value in ₹		
Assessable value	10,76,559		USD24,467.25 x₹ 44
Add: Basic Customs Duty	1,07,656		₹ 10,76,559 x 10%
Sub-total	11,84,215		
Add: CVD 16%	1,89,474		₹ 11,84,215 x 16%
Sub-total	13,73,689		
Add: 2% education cess	5,943	2% calculated on BCD plus CVD	₹ 2,97,130x 2%
Add:1% SAH education cess	2,971	1% calculated on. BCD plus CVD	₹ 2,97,130x 1%
Sub-total	13,82,603		
Add: Spl . CVD u/s 3(5) of the Customs Tariff Act, 1975	55,304	Spl . CVD is equal to 4%	₹ 13,82,603x4%
Value of imported goods	14,37,907		
Total Customs Duty	**₹ 3,61,348**		

Example 11: A consignment is imported by air. CIF price is 2,000 Euro. Air freight is 550 Euro and insurance cost is Euro 50. Exchange rate announced by CBE&C as per customs notification is 1 Euro = ₹ 54.15. Basic customs duty payable is 10%. Excise duty on similar goods produced in India is 12%. Education cess and special CVD as applicable. Find value for customs purpose and total customs duty payable. How much Cenvat can be availed by importer, if he is manufacturer?

Answer :

Particulars	**Value in EURO (€)**	**Remarks**	**Workings**
CIF price	2,000		
Less: Air freight	550		
Less: Insurance	50		
FOB price	1,400		
Add: Air freight	280	Restricted to 20% on FOB	EURO 1,400 × 20%
Add: Insurance	50		
CIF (corrected value)	1,730		
Add: 1% unloading on CIF value	17.30		EURO 1,730 × 1%
Assessable Value	1747.30		
	Value in ₹		
Assessable value	94,616	Relevant exchange rate is ₹ 54.15 per EURO	EURO 1,747.30 × 54.15
Add; Basic Customs Duty	9,462	Relevant rate 10%	₹ 94,616 × 10%
Sub-total	1,04,078		
Add: CVD	12,489	Relevant rate 16%	₹ 1,04,078 x 12%
Sub-total	1,16,567		
Add: 2% Education Cess	439		₹ 21,951 × 2%
Add: 1%SAH education cess	220		₹ 21,951 × 1%
Sub-total	1,17,226		
Add: Spl . CVD	4,689		₹ 1,17,226 × 4%
Total value of imported goods	1,21,915		
Total Customs Duty	**27,299**		

Importer, if he is manufacturer can avail the following duties as Cenvat credit under Cenvat Credit Rules, 2004 is as follows:

CVD= ₹ 16,652 & Spl. CVD = ₹ 4,861

Example 12: M/s. Premium Industries Ltd., has imported a machine from Japan at an F.O.B. cost of 1,00,000 yen (Japanese). The other expenses incurred were as follows: (i) Freight from Japan to Indian port 10,000 yen; (ii) insurance paid to insurer in India ₹ 5,000; (iii) Designing charges paid to consultancy ifrm in Japan 15,000 yen; (iv) M/s Premium Industries Ltd. spent ₹ 50,000 in India for development work connected with the machine; (v) Transportation cost from Indian port to factory ₹ 15,000; (vi) central government has announced exchange rate prevailing in the market was 1 yen = ₹ 0.40 by notification under section 14(3). However the exchange rate prevailing in the market was 1 yen = ₹ 0.4052 (vii) M/s Premium Industries Ltd. made payment to the bank based on exchange rate of 1 yen = ₹ 0.4150, (viii) The commission payable to the agent in India was @5% of F.O.B. price in Indian rupees. The rate is BCD @10%. Similar goods are subject to 12% excise in India. Education cess and special CVD is as applicable. Find the customs duty and other duties payable. How much CENVAT can be availed by importer, if he is manufacturer?

Answer :

Particulars	Japanese Yen
FOB	1,00,000
Add: Freight	10,000
Add: Designing charges	15,000
Sub-total	1,25,000

	Value in ₹
Sub- total (1,25,000 YEN x ₹0.40)	50,000
Add: Insurance	5,000
Add: Commission (1,00,000 YEN x 5% x ₹0.40)	2,000
CIF Value	57,000
Add: 1% unloading on CIF	570
Assessable Value	**57,570**

Calculate of Custom Duty payable:

@10%BCD is ₹ 5,757, CVD @12% is ₹ 7,599, Education Cess is ₹ 267, SAH Education Cess is ₹ 134 and Special CVD @4% is ₹ 2,853. Total Customs Duty payable is ₹ 16,610.

Cenvat credit of ₹ 7,599 (CVD) can be availed up to 50% in the first year and balance in the subsequent years. However, with regard to Special CVD is ₹ 2,853 can be availed fully in the first year itself.

Example 13: Compute the Customs duty from the following data— (i) Machinery imported from USA by Air (FOB) 8,000 US $, (ii) Accessories were compulsorily supplied with Machine (Electric Motor & others) (FOB) 2,000 US $, (iii) Air freight 3,000 US$ (iv) Insurance 100 US $, (v) Local agents commission to be paid in Indian Rupees is ₹ 4,500 (say equivalent to US $ Dollars 100), (vi) The exchange rate is 1 US Dollars = Indian Rupees is ₹ 45, (vii) Customs duty on Machinery –10% ad valorem, (viii) Customs Duty on Accessory –normal rate 20% *ad valorem,* (ix) CVD – 24% (Effective Rate is 16% by a notification), (x) Education Cess and special CVD is as applicable. How much Cenvat can be availed by importer, if he is manufacturer?

Answer :

	US $
FOB value of Machinery	8,000
FOB value of Accessories compulsorily supplied with machine	2,000
Total FOB value	10,000
Add: Air freight 20% on FOB is US$ 2,000 or US $ 3,000	2,000
(WHICHEVER IS LOWER) Add: Insurance	100
Add: Commission	100
CIF Value	12,200
Add: 1% unloading charges on CIF value	122
Assessable Value	12,322
	=======
Assessable value (i.e. US $ 12,322 x₹ 45)	Value in ₹ 5,54,490

Calculation Custom duties: BCD ₹ 55,449, CVD ₹ 97,590 and SPL. CVD ₹ 28,485

CENVAT credit available to the importer being a manufacturer is ₹ 97,590 (CVD) and Special CVD is ₹ 28,485.

Cenvat Credit	Amount in ₹
CVD (₹ 97,590 × 50%)	48,795
SPL. CVD (100% allowed as Cenvat Credit)	28,485
TOTAL	77,280

Note: CENVAT credit on CVD can be availed up to 50% in the 1st year and balance in the subsequent years.

Example 14: 'A' import by air from USA a gear cutting machine complete with accessories and spares. Its HS classification is 8461 40 10 and value US $ F.O.B. 20,000 other relevant date/ information: (1) At the request of the importer, US $ 1,000 have been incurred for improving the design, etc. of machine, but is not reflected in the invoice, but will be paid by the party, (2) Freight – US $ 6,000, (3) Goods are insured but premium is not shown/ available in invoice, (4) Commission to be paid to local agent in India ₹ 4,500, (5) Freight and insurance from airport to factory is ₹ 4,500, (6) Exchange rate is US $ 1 = ₹ 45, (7) Duties of customs: basic – 10%, CVD – 12% Education Cess on duty as applicable. Compute (i) Assessable value (ii) customs duty. How much CENVAT can be availed by importer, if he is manufacturer?

Answer:

Assessable Value ₹ 11,51,021, BCD is ₹ 1,15,102, CVD @12% is ₹ 1,51,935, Education Cess is ₹ 5,341 and S&H Education Cess is ₹ 2,670. Total Customs duty is ₹ 2,75,048.

Note: CENVAT credit is ₹ 1,51,935 (CVD). Up to 50% of CVD can be avail in the 1st year and the balance in the subsequent years.

Example 15: Compute the duty payable under the Customs Act, 1962 for an imported equipment based on the following information:

Assessable value of the imported equipment US $10,100.

Date of Bill of Entry 25.4.2013 basic customs duty on this date 20% and exchange rate notiifed by the Central Board of Excise and Customs US $ 1 = ₹ 65.

Date of Entry inwards 21.4.2013 Basic customs duty on this date 12% and exchange rate notiifed by the Central Board of Excise and Customs US $ 1 =₹ 50.

Additional duty payable under section 3(1) and (2) of the Customs Tariff Act, 1975: 15%.

Additional duty under section 3(5) of the Customs Tariff Act, 1975: 4%.

Educational cess @2% in terms of the Finance Act (No. 2), 2004 and secondary and higher educational Cess @ 1% in terms of the Finance Act, 2007.

Make suitable assumptions where required and show the relevant workings and round off your answer to the nearest Rupee.

Answer :

	Value in ₹
A.V	6,56,500 (10,100 x 65)
ADD: BCD 20% ON ₹6,56,500	1,31,300
Balance	7,87,800
ADD: CVD 12% ON ₹7,87,800	94,536
Balance	8,82,336
ADD: 2% EDU. CESS	4,517 (2,25,836 x 2%)
ADD: 1% SAH EDU. CESS	2,258 (2,25,836 x 1%)

Balance	8,89,111
ADD: SPL. CVD (4% ON ₹ 8,89,111)	35,564
Value of Imported Goods	9,24,675
Customs Duty	2,68,175

BCD, CVD & Spl. CVD and CENVAT CREDIT:

Example 16: CIF value of imported goods is ₹ 10,00,000. Basic Customs duty payable is 10%. If the goods were produced in India, excise duty payable would have been 8%. Education Cess is 2% and SAH Education Cess is 1 %. Special CVD is payable at appropriate rates. Find the Customs duty payable. What are the duty refunds /benefits available if the importer is (a) manufacturer or, (b) service provider or, (c) trader?

Answer :

Statement showing assessable value and customs duties

Particulars	**Value in ₹**	**Workings**
CIF value	10,00,000	
Add: 1% unloading charges	10,000	₹ 10,00,000 x 1%
Assessable value	10,10,000	
Add: Basic Customs Duty	1,01,000	₹ 10,10,000 x 10%
Sub-total	11,11,000	
Add:CVD	88,880	₹ 11,11,000x8%
Sub-total	11,99,880	
Add: 2% Education cess	3,798	₹ 1,89,880 x 2%
Add: 1% SAH Education cess	1,899	₹ 1,89,880x 1%
Sub-total	12,05,577	
Add: Spl. CVD	48,223	₹ 12,05,577x 4%
Value of imported goods	12,53,800	

The following import duties are allowed as CENVAT credit:

If the importer	**BCD**	**CVD ₹**	**SPL.CVD ₹**	**Edu. CESS**
Manufacturer	CENVAT credit not allowed	88,880	48,223	CENVAT credit not allowed
Service provider	CENVAT credit not allowed	88,880	CENVAT credit not allowed	CENVAT credit not allowed
Dealer	CENVAT credit not allowed	CENVAT credit not allowed	CENVAT credit not allowed. However refund is allowed if VAT paid.	CENVAT credit not allowed

Revised CIF Value:

Example 17: Robotics Private Limited imported some goods by air from ABC Inc. of US. Compute the value of the goods for the purpose of levying the duty:-

Particulars	**Dollars($)**
CIF value	5,000
Freight paid	1,500
Insurance cost	500

The banker realized the payment from importer at the exchange rate of ₹ 45 per US $.

Central Board of Excise and Customs notified the exchange rate as ₹ 44.50 per US $.

Basic Customs Duty @10% advalorem. There is no CVD and Special CVD. Find the total import duty.

Answer:

Particulars	**US $**
CIF value	5,000
Less: Air Freight	1,500
Less: Insurance	500
FOB value	3,000
Add: Insurance	500
Add: Air Freight 20% on FOB	600
CIF value	4,100
Add: 1% unloading charges on CIF value	41
Assessable value	4,141
Assessable value in ₹ 1,84,275 (i.e.₹ 44.50 x US $ 4,141) Total customs duty =₹ 18,980 (i.e.₹ 1,84,275 x 10.30%) **Import of MRP Products and Cenvat Credit**	

Example 18. Assessable value of certain goods imported from USA in ₹ 10,00,000. The packet contains 10,000 pieces with maximum retail price ₹ 200 each. The goods are assessable under Section 4A of the Central Excise Act, 1944, after allowing an abatement of 40%. The excise duty rate is 8% advalorem. Calculate the amount of Additional duty of Customs under Section 3(1) of the Customs Tariff Act, 1975; assuming basic customs duty@10% advalorem.

Answer :

MRP of imported goods = ₹ 20,00,000 (i.e. ₹ 200 x 10,000 pieces)

Less: abatement @ 40% = ₹ 8,00,000 (i.e. ₹ 20 lakhs x 40%)

Assessable for CVD purpose = ₹ 12,00,000

Additional Duty of Customs under Section 3(1) of the Customs Tariff Act, 1975 is ₹ 96,000. (i.e. ₹ 12 lakhs x 8%)

Valuation of Imported Goods (Rule 4)

Example 19: A consignment of 8,000 units of product X was imported from USA by a charitable organization in India for free distribution to below poverty line citizens in a backward area. This being a special transaction, a nominal price of US$ 50 per product was charged for the consignment to cover the freight and insurance charges. The Customs House found out that at or about the time of import of this gift consignment, there were following imports of product X from USA:

S. No.	Quantity imported in metric tonnes	Unit price in US $ (CIF)
1.	200	260
2.	1,000	220
3.	5,000	200
4.	9,000	175
5.	4,000	180
6.	7,800	160

The rate of exchange on the relevant date was 1 US $ = ₹ 50.00 and the rate of basic customs duty was 10% ad valorem. There is no countervailing duty or special additional duty. Calculate the amount

of duty leviable on the consignment under the Customs Act, 1962 with appropriate assumptions and explanations where required.

Answer :

		US$
CIF value	=	160.00
Add: 1% unloading charges on CIF value	=	1.60
Assessable value per unit	=	161.60

		Value in ₹
Assessable value for total import	=	6,46,40,000 (i.e. 161.60 x 8,000 units x ₹50)
Add: Customs Duty	=	66,57,920 (i.e. 6,46,40,000 x 10.30%)
Total value of imports	=	7,12,97,920

Anti-Dumping Duty

Example 20: A commodity is imported into India from a country covered by a notification issued by the Central Government under section 9A of the Customs Tariff Act, 1975. Following particulars are made available:

CIF value of the consignment: US$25,000

Quantity imported: 500 kgs.

Exchange rate applicable:₹ 50= US$1

Basic customs duty: 20%

Education and secondary and higher Education Cess as applicable as per the Finance Act, 2008.

As per the notification, the anti-dumping duty will be equal to the difference between the costs of commodity calculated @US$70 per kg. and the landed value of the commodity as imported.

Appraise the liability on account of normal duties, Cess and the anti-dumping duty.

Assume that only 'Basic Customs Duty' (BCD) and Education and Secondary and Higher Education Cess are payable.

Answer : Statement showing land value of imported goods and anti-dumping duty:

Particulars	**US $**
CIF value	25,000
Add: 1% unloading charges on CIF	250
Assessable value	25,250
	Value in ₹
Assessable value (i.e. 25,250 x ₹ 50)	12,62,500
Add: Customs duty 20.60% on Assessable value	2,60,075
Landed value (or value of imported goods)	15,22,575
Market value of imported goods (500 kgs x ₹ 50 x US$70)	17,50,000
Anti-dumping duty (₹ 17,50,000 – ₹ 15,22,575)	2,27,425
Total customs duty payable	**₹ 4,87,500**

4.5 EXPORT GOODS - VALUATION FOR ASSESSMENT

Customs value of export goods is to be determined under section 14 of Customs Act, read with Customs Valuation (Determination of Value of Export Goods), Rules, 2007. Transaction value at the time and place of exportation, when price is sole consideration and buyer and sellers are unrelated is the basic criteria If there is no sale or buyer or seller are related or price is not the sole consideration, value of the goods will be determined as per Valuation Rules [Clause (ii) of second proviso to section 14(1)].

4.5.1 Valuation when buyer and seller are related

Definition of related person as per rule 2(2) of Customs Valuation (Determination of Value of Export

Goods) Rules, 2007 is same as per definition of rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

As per rule 3(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the transaction value, the transaction value will be accepted as 'value' even if buyer and seller are 'related', if the relationship has not influenced price.

4.5.2 Valuation if value cannot be determined on basis of transaction value

If valuation is not possible on basis of transaction value, valuation will be done by proceeding sequentially through rules 4 to 6 [Rule 3(3) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007].

The methods are - Export value by comparison on the basis of transaction value of 'goods of like kind and quality' exported at or about the same time to other buyers in same destination country [Rule 4}, Computed value on basis of cost of production plus profit [Rule 5] and Residual method using reasonable means consistent with principles and general provisions of rules [Rule 6].

4.5.3 Rejection of Value as Declared by Exporter

As per rule 7 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the exporter has to file declaration about full 'value' of goods. If the assessing officer has doubts about the truth and accuracy of 'value' as declared, he can ask exporter to submit further information, details and documents. If the doubt persists, the assessing officer can reject the value declared by importer. [rule 8(1) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007]. If the exporter requests, the assessing officer has to give reasons for doubting the value declared by exporter [rule 8(2)].

4.5.4 Rule 8 is only Mechanism to Reject the Declared Value

As per *explanation (1)(i)* to rule 8, the Rule 8 does not provide any method for determination of value. It only provides mechanism to reject declared value, where there is reasonable doubt.

Declared value shall be accepted if assessing officer is satisfied about truth and accuracy of the declared value [Explanation (1)(ii) to rule 8 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007].

4.6 SELF ASSESSMENT ON BASIS OF 'RISK MANAGEMENT SYSTEM'(RMS)

One major step is being taken to move in the direction of implementing international best practices in customs clearance. A 'Risk Management System' for customs clearance of import and export cargo has been introduced. The details of scheme are contained in MF (DR) circular No. 43/2005-Cus dated 24-11-2005– see also CC, Bangalore-I PN 88/2006 dated 31-7-2006 (201 ELT T5). Initially, the scheme will be introduced in Air Cargo Complex, Sahar Mumbai and then it will be introduced in other customs houses in phases. Under Risk Management System (RMS), only high risk cargo is selected for examination. The system provides for special customs clearance for Accredited Clients having good track record and meet specified criteria.

The scheme proposes to do away with existing system of routine assessments and concurrent audit. Goods will be normally cleared on basis of self assessment of importer. Bill of Entry submitted electronically will be transmitted to RMS. The RMS will process the data and produce an electronic output. This output will determine whether the Bill of Entry will be taken up for appraisement/examination or be cleared after payment of duty without any assessment and examination. Any change is system will require prior approval of Commissioner of Customs and after recording reasons. Focus will be on quality assessment, examination and post clearance audit of Bills of Entry selected by the Risk Concurrent audit will be replaced by Post Clearance Audit on Bill of Entry selected by the Risk Management System. Subsequently, demand can be raised even if goods have been cleared from customs.

4.6.1 No change in Custom Act and Rules

The scheme is being introduced without making any change in Customs Act or Rules, the basic procedures of sanctions and approvals remain unaltered and hence is not similar to scheme of self-assessment under Central Excise, where clearances are affected by assessee without supervision or presence of excise inspectors. Scope of the scheme is also very limited.

4.6.2 Scheme open only to 'Accredited Clients'

The scheme is limited to only 'Accredited Clients' as defined in MF (DR) circular No. 42/2005-Cus dated 24-11-2005. They should have imported goods valued at ₹ 10 crores in previous financial year or paid duty more than ₹ 1 crore. In case of importers who are central excise, they should have paid at least ₹ 1 crore of duty through PLA in previous financial year. They should have filed at least 25 Bills of Entry in the previous financial year.

4.7 PROCEDURES FOR IMPORT

Import Procedure has been explained as follows

Goods should arrive at customs port

↓

Person in charge of conveyance is required to submit import general Manifest/import report

↓

Goods can be unloaded only after grant of entry inward

↓

Importer has to submit Bill of Entry

↓

Goods are assessed to duty

↓

Goods can be cleared from port after payment of Duty/cleared for warehousing

↓

Out of customs charge order is issued by customs officer after payment of duty.

4.7.1 Goods should arrive at Customs Port/Airport only

i. Person in charge of conveyance is required to submit Import Manifest or Export-Manifest,

ii. Goods can be unloaded only after grant of 'Entry Inwards',

iii. Importer has to submit Bill of Entry giving details of goods being imported, along with required documents. Electronic submission of documents is to be done in many ports,

iv. Goods are assessed to duty, examined and customs duty is paid. Bond is executed if required,

v. Goods can be cleared from port after 'Out of Customs Charge' order is issued by customs officer,

vi. Self Assessment on basis of 'Risk Management System' (RMS) has been introduced in some ports in respect of specified goods and importers,

vii. Demurrage is payable if goods are not cleared within three days from port. Goods can be disposed of if not cleared within 30 days.

4.7.2 Overview of Procedures for Import

The broad procedures to be followed for assessment and clearance of imported goods are as follows –

i. Importer to submit Bill of Entry giving details of goods to be cleared from customs,

ii. Bill of Entry can be for home consumption (i.e. clearance after payment of duty) (white colour) or for warehousing (keeping in warehouse without payment of duty and later clearing on payment of duty when required) (yellow colour),

iii. Importer to submit other documents like Invoices, contracts, product literature, packing lists, import license etc. So that customs officer can assess the imported goods under clearance,

iv. Noting of Bill of Entry by customs officer,

v. Examination of goods and assessment by customs officer (if first appraisement system) or assessment of goods on basis of documents (if second appraisement system),

vi. Pre-audit by customs department,

vii. Customs Officer to approve assessment (valuation of goods) on the Bill of Entry and return to importer,

viii. Importer to execute bond if clearance at concessional rate of duty subject to some conditions or clearance is under provisional assessment,

ix. Importer to pay duty, if clearance is for home consumption or execute bond, if clearance is for warehousing,

x. Inspection of goods (if assessment was under second appraisement system),

xi. Out of customs charge order by customs officer,

xii. Pay dues of port trust, pay demurrage (if applicable), pay other dues,

xiii. Transport the goods from customs.

These procedures are for import by ship/air/road. There is separate procedure for goods imported as a baggage or by post.

4.7.3 Submission of Bill of Entry

Bill of Entry is a very vital and important document which every importer has to submit to customs officer in respect of imported goods other than goods intended for transit or transhipment. Bill of Entry should be in prescribed form. It can be either for home consumption or for warehousing [section 46(1)]. It should include all goods mentioned in Bill of Lading or other receipt given by carrier to consignor [section 46(2)]. Importer has to declare that contents of Bill of Entry are true [section 46(4)]

i. White Bill of Entry is for home consumption. Imported goods are cleared on payment of customs duty.

ii. Yellow Bill of Entry is for warehousing. It is also termed as 'into bond Bill of Entry' as bond is executed. Duty is not paid and imported goods are transferred to warehouse where these are stored.

iii. Green Bill of Entry is for clearance from warehouse on payment of customs duty. It is for ex-bond clearance.

4.7.4 When should the Bill of Entry be filed ?

Bill of entry can normally be filed to clear the goods after the Import General Manifest (IGM) is presented to the Custom officers by the steamer Agents/Airlines as the case may be. In exceptional cases the customs authorities may note the Bill of Entry before the manifest is field. In addition of the goods entered in the vessels manifest Bills of Entry are also required for the clearance of –

(a) Ship's stores if in considerable quantities.

(b) Ship's Ballast such as stone, sand, Shingla etc.

(c) Salvaged goods

(d) "Sweepings" of import cargo.

4.7.5 Any imported goods should be cleared within 30 days from the date of unloading of goods at a customs station failing which the goods maybe disposed of by way of auction.

4.7.6 Time limit to pay Duty once a Bill of Entry has been assessed:

Duty has to be paid within two days from the date on which the Bill of Entry is returned after assessment to the importer / Agent for payment of duty. If duty is not paid within the stipulated time, simple interest @ 15% p.a presently on amount of duty is payable (Section 47 of the Customs Act, 1962).

4.7.7 Documents to be submitted by Importer to Clear the Imported Goods for Home Consumption

Documents required by customs authorities are required to be submitted to enable them to *(a)* check the goods *(b)* decide value and classification of goods and *(c)* to ensure that the import is legally permitted. *The documents that are essentially required are :*

i. Copy of order/ contract.

ii. Supplier's invoice in four copies.

iii. Copy of the Letter of Credit.

iv. Import licence.

v. Bill of Lading (original and non-negotiable).

vi. Packing List (2 copies).

vii. Weight specification.

viii. Freight insurance memo.

ix. Manufacturer's test certificate.

x. Exchange slip for purpose of exchange rate.

xi. Certificate of origin.

xii. Delivery order issued by Shipping company, its agent or carriers.

xiii. If spare parts are being imported, invoice should indicate unit price and extended total of each item.

xiv. If invoice is for FOB, freight charges and insurance premium amount certificate should be attached.

xv. OGL declaration.

xvi. No commission letter to be given by importer i.e., Agent's commission, if any, has not been paid in India.

xvii. Customs declaration (4 copies)

xviii. Catalogue/write-up/ drawing for machinery items.

xix. Importer-Exporter Code Number.

xx. If second-hand machinery is being imported then Chartered Engineer's certificate is necessary as per the Import Export Policy.

xxi. If steel is being imported then analysis certificate from manufacturers.

xxii. In the case of chemicals and allied products like synthetic resin wax, literature showing chemical composition.

xxiii. Textile commissioner's endorsement in respect of textile items.

4.7.8 Electronic Submission under EDI system

Customs work at many ports has been computerized. In that case, the Bill of Entry has to be filed electronically, i.e. through Customs EDI system through computerization of work. Procedure for the same has been prescribed vides Bill of Entry (Electronic Declaration) Regulations, 1995.

i. The broad procedures to be followed for exports are as follows –

ii. Submit Shipping Bill for export to customs authorities,

iii. Submit invoice, packing lists, contracts, export license (if applicable) and other related documents,

iv. Submit necessary declarations for export. Submit * GR/SDF/SOFTEX form as required under FEMA * Excise ARE-1form

v. Noting of Shipping Bill by customs officer

vi. Assessment i.e. valuation and classification of goods. Checking of Advance License, if applicable

vii. Custom check whether export is restricted/prohibited

viii. Examination of goods by customs officer

ix. Pay export duty, if applicable

x. Stuffing of container, if not already done

xi. 'Let export' Order by customs officer

xii. Obtain ARE-1 form duly signed by customs officer. Obtain Bill of Lading from shipping company. Submit proof of export to excise authorities.

Complete formalities relating to claim of duty drawback.

4.7.9 Prior Submission of Bill of Entry

After the goods are unloaded, these have to be cleared within stipulated time - usually three working days. If these are not so removed, demurrage is charged by port trust/airport authorities, which is very high. Hence, importer wants to complete as many formalities as possible before ship arrives. Proviso to section 46(3) of Customs Act allows importer to present bill of entry upto 30 days before expected date of arrival of vessel. In such case, duty will be payable at the rate applicable on the date on which ' Entry Inward' is granted to vessel and not the date of presentation of Bill of Entry, but rate of exchange will be as prevalent on date of submission of bill of entry. - confirmed in CC, New Delhi circular No 64/96 dated 10.12.1996 and CBE&C circular No. 22/97-Cus dated 4.7.1997.

Department has clarified that if vessel does not arrive within 30 days, filing of fresh bill of entry will be necessary and in such cases, date of filing fresh Bill of Entry will be considered for calculating rate of exchange.

4.7.10 Importer can Abandon the Imported Goods

He can abandon the imported goods at any time before the proper officer has given the order for clearance of the goods for home consumption or for warehousing. However if any offence has been committed in respect of the said goods, then the option to abandon the goods is not available.

4.7.11 Customs Recognized Brokers for the purposes of Customs Clearance who can be approved for clearance of Import

Every custom house has authorized Customs Brokers licensed by that particular custom house. Each Customs Brokers has a license / registration no. and identity cards which can be verified from the nearest Custom House / Custom Station.

An importer / exporter can file documents on his own account without the help of any Customs Brokers. But before this he must get an authority / permission from the proper officer for 'self – clearance'. It is not mandatory to take the help of the Customs Brokers in clearing consignment.

4.8 PROCEDURES FOR EXPORT

Export Procedure has been explained as follows

Submit shipping Bill for export to customs

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Submit invoice, packing lists, contracts etc.

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Submit Guarantee Receipt (GR), Statutory Declarations Form (SDF)

↓

Noting Shipping bill by customs office

↓

Valuation and classification of goods

↓

Customs check whether export is restricted or prohibited

↓

Examination of goods by customs officer

↓

Stuffing of container if not already done

↓

Let export order by customs officer

↓

Claim the duty drawback or export incentives.

The broad procedures to be followed for exports are as follows —

i. Submit Shipping Bill for export to customs authorities,

ii. Submit invoice, packing lists, contracts, exports authorization (if applicable) and other related documents,

iii. Submit necessary declarations for export. Submit* GG/SDF/SOFTEX form as required under FEMA* Excise ARE-1form,

iv. The 'Export Value Declaration' should be in form given in Annexure A to MF(DR) circular No. 37/2007-Cus dated 9-10-2007,

v. Noting of Shipping Bill by customs officer,

vi. Assessment i.e. valuation and classification of goods. Checking of Advance Authorization, if applicable,

vii. Custom check whether export is restricted/prohibited,

viii. Examination of goods by customs officer,

ix. Pay export duty, if applicable,

x. Stuffing of container, if not already done,

xi. 'Let export' Order by customs officer,

xii. Obtain ARE-1 form duly signed by customs officer. Obtain Bill of Landing from shipping company. Submit proof of export to excise authorities,

xiii. Complete formalities relating to claim of duty drawback.

4.8.1 Every Exporter should take following initial steps

Obtain BIN (Business Identification Number) from DGFT. It is a PAN based number

Open current account with designated bank for credit of duty drawback claims

Register licenses/advance license/DEPB etc. at the customs station, if exports are under Export Promotion Schemes.

4.8.2 RCMC Certificate from Export Promotion Council

Various Export Promotion Councils have been set up to promote and develop exports (e.g. Engineering Export Promotion Council, Apparel Export Promotion Council, etc.) Exporter has to become member of the concerned Export Promotion Council and obtain RCMC - Registration cum membership Certificate. Exporter should apply for registration with EPC that relates to his main line of business. However, exporter can take membership of any other EPC in addition –DGFT circular No. 2/2004-09 dated 6-10-2004.

4.8.3 Third Party Exports

Third party exports means exports made by an Exporter or Manufacturer on behalf of another exporter/s. The Shipping Bill shall indicate the names of both the exporter and/or manufacturer. The BRC, GR declaration, export order and the Invoice shall be in name of the third party exporter.

SEZ unit can export goods or software through a merchant exporter/status holder.

Merchant Exporter - Merchant Exporter means a person engaged in trading activity and exporting or intending to export goods.

4.9 TRANSIT AND TRANSHIPMENT OF GOODS

4.9.1 Transit of Goods (Section 53 of the Customs Act, 1962)

Any goods imported in any conveyance will be allowed to remain on the conveyance and to be transited without payment of duty, to any place out of India or any customs station.

Example 21: A vessel Bhishma, sailing from U.S.A. to Australia via India. Bhishma carries various types of goods namely ' A, B, C & D' . ' A & B' are destined to Mumbai Port and balance remains in the same vessel. Subsequently vessel chartered to Australia.

Find the imported goods and transit goods?

Answer:

Imported Goods are A & B

Transit goods are C & D

4.9.2 Transhipment of Goods (Section 54 of the Customs Act, 1962)

Transhipment means transfer from one conveyance to another with or without payment of duty. It means to say that goods originally imported from outside India into India, then transhipped to another vessel to a place within India or outside India.

4.9.3 Transhipment of goods without payment of duty under Section 54(3)

Transhipment of goods without payment of import duty is permissible only if the following conditions satisfy:

i. Transhipment of goods with foreign destination.

ii. The goods find place as Transhipment Goods in the Import of General Manifest (IGM) or Import Report in case of goods imported in a vehicle.

iii. Bill of Transhipment or Declaration of Transhipment filed.

iv. Goods must be transhipped to another vessel to place outside India.

Example 22: A vessel Bhishma, sailing from U.S.A to Australia via., India carries various types of products namely 'A, B, C & D'. 'A & B'are destined to Mumbai Port. On account of submission of **bill of transhipment** product 'A' transshipped to Chennai port as ultimate destination in India and product 'B' transhipped to Srilanka.

Find the imported goods, Transhipment goods and transit goods?

Answer :

Product 'A' is imported goods because its ultimate destination is in India.

Products ' A & B' are called as Transhipment goods, since these goods are transshipped to another vessel, Product ' A' transhipped to Chennai attracts import duty whereas product ' B' is destined to Srilanka without payment of duty.

Products C & D are transit goods since these goods remains in the same vessel Bhishma chartered to Australia.

4.10 EXEMPTIONS AND REMISSION

4.10.1 Basic conditions of Exemption and Remission

i. Exemption can be granted by Government by issuing a notification.

ii. Capital goods and spares can be imported under project imports at concessional rate of customs duty.

iii. Remission can be obtained on goods lost/pilfered in port.

iv. Title of imported goods can be relinquished and then no customs duty will be payable.

v. Goods exported can be re-imported. Concessional customs duty is payable in most of such re-imports.

4.10.2 Pilferage: Section 13 of the Customs Act, 1962

i. Pilferage means loss arising out of theft.

ii. No duty is payable at all under section 13, if the goods are pilfered.

iii. Importer does not have to prove pilferage, however, the pilferage is to find before the goods cleared from the customs.

iv. If the duty is paid before finding the pilferage, refund can be claimed if goods are found to be pilfered during examination but before order for clearance are made.

v. Section 13 does not apply for the warehoused goods.

4.10.3 Abatement of duty on damaged or deteriorated goods [Section 22]: Where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs,-

(a) that any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or

(b) that any imported goods, other than warehoused goods, had been damaged at any time after the unloading thereof in India but before their examination under section 17, on account of any accident not due to any wilful act, negligence or default of the importer, his employee or agent; or

(c) that any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner, his employee or agent,

then, such goods shall be chargeable to duty determined in the following manner –

$$\text{Duty leviable on such damaged or deteriorated goods} = \frac{\text{Duty chargeable on the goods before the damage or deterioration}}{\text{Value of the goods before damage or deterioration}} \times \text{Value of the damaged or deteriorated goods}$$

$$\text{Abatement of duty on damaged or deteriorated goods} = \text{Duty leviable on the goods before damage} - \text{Duty leviable on the goods after damage}$$

Valuation of damaged/deteriorated goods: The value of damaged or deteriorated goods may be ascertained by either of the following methods (at the option of the owner),-

(1) The value of such goods may be ascertained by the proper officer; or

(2) Such goods may be sold by proper officer by public auction or by tender or with consent of owner in any other manner and the gross sale proceeds shall be deemed to be the value of such goods.

4.10.4 Loss or destruction of goods: Section 23 of the Customs Act, 1962

i. Loss or destruction (including leakage if any) must be due to fire natural calamity (like earthquake or bad weather).

ii. Section 23 applies only when there is no pilferage under section 13.

iii. Burden of proof is on importer to prove loss or destruction under section 23.

iv. Initially is duty levied under section 23 but the same is remitted by Assistant Commissioner of Customs. Once the duty is paid the same can be claimed for refund only if the remission is granted by Customs Department.

v. Loss or destruction should be found before clearance of goods from the customs.

vi. Section 23 is applicable even for the goods warehoused.

4.10.5 Pilfered goods u/s 13 vs. Lost or destroyed goods u/s 23

Pilfered goods u/s 13	Lost or destroyed goods u/s 23
Pilferage refers to that in small quantities	Lost or destroyed postulates loss or destroyed by whatever reason whether theft, fire, accident etc.
In this case, the importer is not liable to pay duty leviable on such goods.	The duty payable on lost goods is remitted by Assistant/Deputy Commissioner.
In this case, if the pilfered goods are retrieved duty becomes payable.	In this case, restoration is impossible if the goods one destroyed.
The pilferage must have occurred after the unloading of the goods but before the proper officer has made an order for clearance for home consumption under section 47 or deposit on a warehouse under section 60.	In this case, the goods must have been lost or destroyed at any time before their clearance for home consumption. Thus, it also covers the cases where the goods are lost after the duty has been paid and order for clearance has been given but before the goods are actually cleared.
These provisions do not apply to warehoused goods.	Section 23(i) is applicable to warehoused goods also.
The importer does not have to prove pilferage, as it is obvious at the time of examination by the proper officer.	In this case, the burden is cast on the importer to satisfy the Assistant/Deputy Commissioner that the imported goods have been lost or destroyed at any time before the physical clearance of the goods for home consumption.

4.10.6 Goods derelict, wreck, etc. [Section 21]:

All goods derelict, jetsam, flotsam and wreck brought or coining into India, shall be dealt with as if they were imported into India, unless it is shown to the satisfaction of the proper officer that they are entitled to be admitted duty-free under this Act.

4.10.7 Power to make rules for denaturing or mutilation of goods [Section 24]:

Section 24 of Customs Act 1962, provides that an importer can request Central Government to denature or mutilate the imported goods, which are ordinarily used for more than one purpose, so as to render them unfit for one or more of such purpose. If the goods are denatured or mutilated, they are assessed as if the goods were imported in denatured or mutilated form. The Central Government has framed Denaturing of Spirit Rules, 1972 in this regard.

4.10.8 Duty Liability in Certain Special Circumstances

Goods are imported into India after exportation there from.

Imported goods have been originally exported to the overseas supplier for repairs.

Exported goods may come back for repairs and re-export.

Re-importation of goods [Section 20] : In case if any goods have been imported into India after exportation therefrom, such goods shall be liable to duty and subject to such restrictions and conditions, if any, to which the goods of like kind and value are liable or subject on the importation thereof.

Re-imports are entitled for following concessions as have been notified by the Government:

Condition -1:

Goods exported under claim of drawback or under bond without payment of duty or under claim for rebate and re-imported within 3 years (or extended period, if any) without being re-manufactured/re-processed.

Duty Liability: The amount of benefit availed on account of duty drawback and excise duty concessions/rebate when the goods were exported. [Notification No. 94/96-Cus., dated 16-12-1996).

Condition -2:

Goods exported for repairs abroad and reimported by the same person within 3 years (or extended period, if any) without being re-manufactured/ re-processed.

Duty leviable on a value = Fair cost of repairs carried out including cost of materials used in repairs (whether such costs are actually incurred or not) + Insurance and freight charges, both ways. [Notification No. 94/96-Cus., dated 16-12-1996).

Condition -3:

Goods manufactured in India and re-imported into India -

(a) for repairs or re-conditioning within 3 years from the date of exportation (in case of Nepal, such re-importation takes place within 10 years from date of exportation); or

(b) for reprocessing; or refining; or re-making; or other similar process within 1 year from the date of exportation.

Duty Liability: NIL, if -

(a) such goods are exported within 6 months from the date of their re-importation or such extended period not exceeding a further period of six months as the Commissioner of Customs may allow; and

(b) the Assistant Commissioner of Customs is satisfied as regards identify of the goods; [Notification No. 158/95-Cus., dated 1411-1995].

4.11 REFUND OF CUSTOMS DUTY

Importer or Exporter actually paid the duty on import or export, which is not required to pay alone allowed as refund.

4.11.1 Refund of Export Duty

As per Section 26 of the Customs Act, 1962, duty paid on exported goods can be claim for refund in the case of combined reading of the following if:

i. The goods are returned to such person otherwise than by way of re-sale;

ii. The goods are re-imported within ***One year*** from the date of exportation and

iii. An application for refund of such duty is made before the expiry of ***six months*** from the date on which the Customs officer makes an order for importation.

Example 23: X Ltd. exported product ' P ' to Y Ltd of USA on 1.1.2010. The duty paid on export of product 'P' for ₹ 1,00,000. Y Ltd. returned product ' P ' to X Ltd., on 1.8.2010. The return is otherwise than by way of sale (i.e. it may be sale return or rejected goods, goods sent on consignment returned by the overseas agent or goods sent for exhibition coming back etc.). It means to say that Y Ltd. should not be sold ' P '

to X Ltd. Moreover, exported goods are returned within One year from the date of exportation. Hence, X Ltd. can claim for refund of ₹ 1,00,000 within Six months from Customs clearances order for imported goods (i.e. 1.8.201 0).

4.11.2 Refund of Import Duty [Section 26A]

Duty paid on imported goods can be claim for refund on account of satisfying following conditions:

(a) Goods are found defective

The goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods:

Provided that the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(b) The goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(c) Goods are easily identifiable as imported goods

The goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;

(d) No drawback claim is made

The importer does not claim drawback under any other provisions of this Act; and

(e) Activities carried out after importation

- The goods are exported; or
- The importer relinquishes his title to the goods and abandons them to customs; or
- Such goods are destroyed or rendered commercially valueless in the presence of the proper officer, in such manner as may be prescribed and within a period not exceeding 30 days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47.

Note:

(i) However, the period of 30 days may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding three months.

(ii) No refund under section 26 is allowed in respect of perishable goods and goods which have exceeded their shelf life.

Moreover, nothing contained in this section (Sec. 26A of the Customs Act, 1962) shall apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

(f) Manner and time-limit of claiming refund

An application for refund of duty shall be made before the expiry of 6 months from the relevant date in prescribed form and manner.

Relevant date:

Relevant date in case of filing refund claim may be any one of the following:

- Let export order issued or
- Date of abandonment or
- Date of destruction of goods

(g) Exceptions to this Section

(i) Offending goods: This section shall not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

(ii) Perishable goods or Expired goods : No refund shall be allowed in under this Section in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period.

4.11.3 Claim for Refund of Duty (Section 27 of the Customs Act, 1962)

Section 27 of the Customs Act, 1962 deals with refund of duty paid on imported or exported goods in excess of what was actually payable. Sometimes, such excess payment of duty may be due to shortage/ short landing, pilferage of goods or even incorrect assessment of duty by Customs. In such cases, any excess interest has been paid by the importer or exporter can also be claimed for refund.

Provided that if the amount of refund claimed is less than rupees hundered, the same shall not be refunded.

A refund claim can be made u/s 27 if the payment of higher duty and interest in ignorance of a notification which allowed payment of duty at a concessional rate even if there was no assessment order and the payment u/s 27(i) has not been made pursuant to an assessment order. Section 27(ii) covers those classes of cases where the duty is paid by a person without an order of assessment. It means a refund claim can be filed under section 27 of the Customs Act, 1962 even if the payment of duty has not been made pursuant to an assessment order *[Aman Medical Products Ltd.* v *CCus., Delhi* 2010 (250) ELT30 (Del.)].

Attested Xerox copy of the GAR-7 Challan sufficient for claiming refund.

Refund claim *CAN NOT BE DENIED* purely on a technical contention that the assessee had produced the attested copy of GAR -7 (earlier TR-6) challan and not the original of the GAR-7 challan. Also as per clarification issued vide F.No. 275/37/2K-CX. 8A dated 2-1-2002, a simple letter from the person who made the deposit, requesting for return of the amount, along with the appellate order and attested Xerox copy of the Challan in Form GAR-7 would suffice for processing the refund application. [Narayan Nambiar Meloths v CCus. 2010 (251) ELT57 (Ker)]

4.11.4 Time Limit for claiming refund:

Person claiming refund	Time limit for claiming refund	Remarks
Individual– imported goods for his personnel use, Government or Any educational institutions or Any research institutions or Charitable institutions or hospitals	Application for refund can be made before the expiry of ONE year from the date of payment of duty and interest	The application for refund in duplicate has to be filed before the Assistant Commissioner or Dy. Commissioner of Customs.
Individual – for business use Companies or Firm etc.	Application for refund can be made before the expiry of ONE year (w.e.f. 8-4-2011) from the dateof payment of duty and interest	The application for refund in duplicate has to file before the Assistant Commissioner or Dy. Commissioner of Customs.

4.11.5 Interest on delayed refunds

As per section 27A of the Customs Act, 1962, if the refund ordered is not paid within 3 months from the date of receipt of refund application by the Assistant Commissioner or Deputy Commissioner of Customs, then the department is liable to pay interest at the rate of 6% p.a. (i.e. interest is liable to be paid after expiry of three months from the date of receipt of the application for refund).

4.11.6 Few differences between section 26 and section 27 of the Customs Act, 1962

Section 26 deals with refund of export duty whereas Section 27 deals with refund of any export duty, import duty interest paid thereon.

Refund of duty under section 26 is allowed on account of satisfying certain conditions whereas refund under section 27 is allowed only when duty paid in excess of normal duty.

Refund is payable to the exporter who paid the duty under section 26 whereas refund is payable to the importer who paid the duty or to the buyer by whom the duty was borne.

Chartered Accountant Certificate not sufficient to claim refund under section 27.

As per section 27 of the Customs Act, 1962 the importer to produce such documents or other evidence, while seeking refund, to establish that the amount of duty in relation to which such refund is claimed, has not been passed on by him to any other person.

However, if importer had not produced any document other than the certificate issued by the Chartered Accountant to substantiate its refund claim.

In the given case Madras High Court held that, the certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain facts. It would not automatically entitle a person to refund in the absence of any other evidence. Hence, the importer could not be granted refund merely on the basis of the said certificate *[CCus., Chennai v BPL Ltd. 2010 (259) ELT526 (Mad)]*.

The period of limitation of one year for the purpose of refund of duty under Sec. 27(1B) shall be computed in the following manner, namely:

(i) In the case of goods which are exempt from payment of duty by a special order issued under section 25(2) of the Custom Act, the limitation of one year shall be computed from the date of issue of such order;

(ii) Where the duty becomes refundable as a consequence of any judgment, the limitation of one year shall be computed from the date of such judgment.

(iii) Where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or incase of re-assessment, from the date of such re-assessment.

4.12 APPOINTMENT OF OFFICERS OF CUSTOMS

(1) Classes of officers of customs [Section 3]: The various classes of Officers of Customs, as given under section 3, are: -

(a) Chief Commissioners of Customs;

(b) Commissioners of Customs;

(c) Commissioners of Customs (Appeals);

(d) Joint Commissioners of Customs;

(e) Deputy Commissioners of Customs;

(f) Assistant Commissioners of Customs;

(g) Such other class of officers of customs as may be appointed for the purposes of this Act.

Among the other classes of officers of customs, the following officers have been appointed:

(i) Appraisers of Customs, who do the assessment work of import and export goods, including classification, valuation and examination of the goods; and

(ii) Preventive Officers of Customs, who do the executive duties like,

  (a) Boarding and checking ships and aircrafts;

  (b) Clearing passengers and crew and their baggage;

  (c) Supervision and control over loading and unloading of cargo;

(d) Preventing smuggling by checking suspect;

(e) Interrogating suspects/witnesses and investigation.

(iil) Ministerial Officers, who maintain records, keep accounts, etc.

(iv) Chemical Examiner, who tests samples of imported or export cargo for determination of true character of the goods for proper classification and value, necessary for determination of customs duty.

(2) Appointment of officers of Customs [Section 4]: The Board may appoint such persons as it thinks fit to be officers of customs. The Board may authorise a Chief Commissioner or Commissioner or joint or Assistant or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.

(3) Powers of officers of customs [Section 5]:

(a) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(b) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.

Powers of Commissioner (Appeals): Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and Section 108.

(4) Entrustment of functions of Board and customs officers on certain other officers [Section 6]: The Central Government may entrust either conditionally or unconditionally to any officer of Central or State Government or local authority any function of the Board or any officer of customs.

4.13 APPOINTMENT OF CUSTOMS STATION, WAREHOUSING STATIONS ETC.

(a) Power to approve landing places and specify limits of customs area [Section 8]: The Commissioner of Customs has the power to -

(i) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;

(ii) specify the limits of any customs area.

(B) Power to declare places to be warehousing stations [Section 9]: The CBEC has the power to declare places to be warehousing stations at which alone public warehouses may be appointed and private warehouses may be licensed.

(c) Appointment of boarding stations [Section 10]: The Commissioner of Customs has power to appoint, in or near any customs port, a boarding station for the purpose of boarding of, or disembarkation from, vessels by officers of customs.

Appointment of customs ports, airports, etc. [Section 7]: The CBEC may, by notification in the Official Gazette, appoint the following,

(a) ports and airports, which alone shall be customs ports or customs airport for the unloading of imported goods and the loading of export goods or any class of such goods.

(b) places, which alone shall be inland container depots or air freight stations for the unloading of imported goods and the loading of export goods or any class of such goods. [Bold portion amended by Finance Act, 2012 w.ef. 28-05-20121

(c) places, which alone shall be land customs station for the clearance of goods imported or to be exported by land or inland water or any class of such goods.

(d) routes by which alone goods or any class of goods specified in notification may pass by land or inland water into or out of India, or to or from any Land Customs Station, or from or to any land frontier.

(e) ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India.

4.14 CENTRAL GOVERNMENT POWER OF PROHIBITION, DETECTION OF ILLEGALLY IMPORTED AND EXPORT GOODS

Power to prohibit importation or exportation of goods [Section 11]: If the Central Government is satisfied that it is necessary so to do for any of the purposes as specified, it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

Purposes of prohibition: The importation or exportation of goods may be prohibited for following purposes,

(a) the maintenance of the security of India;

(b) the maintenance of public order and standards of decency or morality;

(c) the prevention of smuggling;

(d) the prevention of shortage of goods of any description;

(e) the conservation of foreign exchange and the safeguarding of balance of payments;

(f) the prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;

(g) the prevention of surplus of any agricultural product or the product of fisheries;

(h) the maintenance of standards for the classification, grading or marketing of goods in international trade;

(i) the establishment of any industry;

(j) the prevention of serious injury to domestic production of goods of any description;

(k) the protection of human, animal or plant life or health;

(l) the protection of national treasures of artistic, historic or archaeological value;

(m) the conservation of exhaustible natural resources;

(n) the protection of patents, trade marks and copyrights;

(o) the prevention of deceptive practices;

(p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;

(q) the fulfillment of obligations under the Charter of the United Nations for the maintenance of international peace and security;

(r) the implementation of any treaty, agreement or convention with any country;

(s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;

(t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any Foreign State or is derogatory to national prestige;

(u) the prevention of the contravention of any law for the time being in force; and

(v) any other purpose conducive to the interests of the general public.

(i) Detection of illegally imported goods and prevention of their disposal [Section 11A to 11G]:

"Illegal import" means the import of any goods in contravention of the provisions of this Act or any other law for the time being in force.

- **Power of Central Government to notify goods:** Goods of any class or description may be notified by Central Government for the purpose of checking the illegal import of such goods or facilitating the detection of such goods.
- **Persons possessing notified goods to intimate the place of storage, etc.:** Every person who owns, possesses or controls, any notified goods, shall, within seven days from the notified date, deliver to the proper officer a statement in relation to the notified goods specifying the place where such goods are to be kept.
- **Persons possessing notified goods to maintain accounts:** Such person shall maintain true and complete account of such goods and also state the particulars of the person from whom such goods have been acquired or sold. Such accounts shall be kept at the place where such specified goods are kept.
- **Precautions to be taken by persons acquiring notified goods:** No person shall acquire any notified goods except by way of gift or succession, from any individual in India, unless such goods are accompanied by voucher or memorandum as specified in rules,

  The restrictions as specified above does not apply to any notified goods which are:

  (a) in personal use of the person by whom they are owned, possessed or controlled, or

  (b) kept in the residential premises of a person for his personal use.

(ii) Prevention or detection of illegal export of goods [Section 11H to 11M]:

"Illegal export" means the export of any goods in contravention of the provisions of this Act or any other law for the time being in force.

- **Power of Central Government to specify goods:** Goods of any class or description may be specified by the Central Government for the purpose of checking the illegal export of such goods or facilitating the detection of goods which are likely to be illegally exported.
- **Persons possessing specified goods to intimate the place of storage, etc.:** Every person who owns, possesses or controls, any specified goods, the market price of which exceeds? 15,000 shall, within seven days from the specified date, deliver to the proper officer an intimation containing the particulars of the place where such goods are kept within the specified area.
- **Persons possessing specified goods to maintain accounts:** Such person shall maintain true and complete account of such goods and also state the particulars of the person from whom such goods have been acquired or sold. Such accounts shall be kept at the place where such specified goods are kept.

  When the specified goods are lesser in quantity than the stock shown in accounts, then it shall be presumed, unless the contrary is proved, that shortfall has been illegally exported.
- **Transport of specified goods to be covered by vouchers:** No specified goods shall be transported from, into or within any specified area or loaded on any animal or conveyance in such area, unless they are accompanied by a transport voucher (in such form and containing such particulars as may be specified by rules made in this behalf) prepared by the person owning, possessing, controlling or selling such goods
- **Steps to be taken by persons selling or transferring any specified goods:** Every person who sells or otherwise transfers within any specified area, any specified goods (except where he receives payment by cheque drawn by the purchaser), shall obtain, on his copy of the sale or transfer voucher, the signature and full postal address of the person to whom such sale or transfer is made

and take such other reasonable steps as specified by rules. If on inquiry made by a proper officer, it is found that the purchaser or the transferee, as the case may be, is not traceable or is a fictitious person, it shall be presumed, unless the contrary is proved, that such goods have been illegally exported.

The restrictions as specified above shall not apply to petty sales of any specified goods if the aggregate market price obtained by such petty sales, made in the course of a day, does not exceed ₹ 2,500.

Explanation: "Petty sale" means a sale at a price which does not exceed one thousand rupees.

Power to exempt [Section 11N]: If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally, either absolutely or subject to such conditions as may be specified in the notification, goods of any class or description from all or any of the provisions from Section 11A to 11.

4.15 WAREHOUSING IN CUSTOMS

(1) Need for warehousing

If the imported goods are not required immediately, importer may like to store the goods in a warehouse without payment of duty under a bond and then clear from warehouse when required on payment of duty. This will enable him to defer payment of customs duty till goods are actually required by him. In such case, importer can keep goods in warehouse without payment of customs duty. Goods are cleared from customs port under bond and kept in the warehouse. The importer can clear goods from customs warehouse on payment of duty when he requires the goods for use/consumption/sale.

This facility is available to traders as well as direct importers.

A trader can import goods and keep in warehouse. He can supply the goods to buyers from warehouse, after paying customs duty. Thus, small importers, duty free shops etc. can procure goods from bonded warehouse without actually importing the goods.

A manufacturer can import inputs without payment of customs duty for manufacture in bond. He will have to export final product which was manufactured using imported duty free material.

Even duty free clearances can be made from bonded warehouse, if buyer is otherwise eligible for obtaining goods duty free, as confirmed vide MF(DR) circular No. 79/2000- Cus dated 22-9-2000.

(a) Use of warehousing facility

The facility is useful to direct importers also, in following cases -

(a) Importer has to plan his purchases well in advance. He also has to maintain some stocks to ensure that there is no loss of production if a shipment of imported raw materials is delayed. Thus, when the goods arrive in the port, the importer may not immediately require the goods as he may be having stock.

(b) Importer would like to store the imported goods without payment of customs duty as far as possible and pay duty only when goods are required for his immediate use, so that his funds are not blocked.

(c) The importer may be intending to clear the goods without payment of duty under Advance Licence or DEPB scheme. However, the licence/DEPB may not be in hands when imported goods have arrived at the docks.

(d) The importer may not be having adequate ready funds to pay customs duty.

(e) Importer can avail facility of manufacture in bonded warehouse and then reexport the final products

Warehousing by traders - Foreign Trade Policy permits keeping imported goods in bonded warehouse without payment of duty. These can be cleared later on payment of duty. Even goods under negative list can be imported by traders and kept in warehouse. These can later be supplied on payment of duty against specific licence.

Sale/transfer of warehoused goods - Imported goods kept in warehouse can be transferred to another person as per section 50 of Customs Act. Sale of imported warehoused goods to Duty Exemption or duty concession licence holders is also allowed. In such case, transferee can clear the goods on payment of customs duty, if any, and fulfilling other licensing provisions - CBE&C Circular No. 473 /43/94-LCdated 22-9-1994. (The words 'if any', mean that if no duty is payable,

Warehousing pending registration of project under project import - In Bharat Earth Movers v. CC2006 (201) ELT 60 (CESTAT), goods were kept in warehouse as contract for project import was yet to be registered. Goods were cleared from warehouse after contract was registered.

Duty credit scrips can be used to clear goods from customs bonded warehouse -Duty Credit Scrips like SFIS, VKGUY, FMS, FS, SHIS schemes can be used to clear goods from Customs Bonded warehouse under same procedure as applicable for DEPB scrip, subject to conditions and limitations mentioned in FTP - MF(DR) circular No. 50/2011-Cus dated 9-11-2011.

Warehouse to store imported goods without payment of duty - Provision of warehousing has been made in Customs Act to enable importer to store goods in warehouse without payment of duty and clear goods from warehouse only when these are actually required by him. Importer only has to pay warehousing charges. Thus, he can delay payment of customs duty. Both public and private warehouses are available all over India where goods can be stored.

(b) Warehousing Bond

Since imported goods are kept in warehouse without payment of customs duty, importer has to execute a bond binding himself to (a) observe all provisions of Customs Act and rules/regulations in respect of the goods (b) pay on demand the (z) duties, interest (ii) warehousing rent and charges with interest (c) pay all penalties leviable for violations of provisions of Customs Act, rules and regulations. The bond amount is equal to twice the amount of duty assessed. Generally, part of bond amount is secured by way of a bank guarantee. Bond will continue to be valid even if goods are transferred to another person or removed to another warehouse **[section 59]**.

Bond is cancelled and returned only when duty and all other dues are paid on goods cleared and goods are duly accounted for **(section 73)**.

Bonded warehouse - Since goods are kept in warehouse under a 'bond', the warehouse is termed as 'bonded warehouse'. It does not necessarily mean that the warehouse is physically bonded. For example, in case of manufacture in warehouse, the manufacture is in 'bonded warehouse' but there is no physical supervision of customs officer. However, in case of goods stored in warehouse and cleared from warehouse on payment of duty, the warehouse is under physical control of customs officer and clearance can be only with his permission.

Warehousing of export goods

Goods removed for export can be kept in a warehouse pending export. These provisions are useful when exporter would like to store the goods and export them as soon as export order is received.

(2) Public/Private Bonded warehouses

As per section 2(43) of Customs Act, 'warehouse' means a public warehouse appointed u/s 57 or a private warehouse licensed under section 58 of Customs Act. As per section 2(44), 'warehoused goods' means goods deposited in a warehouse.

Sections 57 and 58 of Customs Act provide that 'warehouse' can be appointed or licensed only at a 'warehousing station'. As per section 2(45) of Customs Act, 'warehousing station' means a place declared as a warehousing station u/s 9 of Customs Act.

Warehouses can be public or private.

(a) Warehousing station - Section 9 of Customs Act authorises CBE&C (Board) to declare places as warehousing stations. Public and private warehouses can be situated only at such approved warehousing stations. Board has issued over 300 notifications prescribing various areas. Generally, cities and towns where imported goods are stored for use or where there is Industrial Estate where imported raw material is required are declared as 'Warehousing Stations'.

Power to declare a place as warehousing station under section 9 of Customs Act have been delegated to Chief Commissioner - Chapter 9 Para 32 of CBE&C's Customs Manual, 2011.

(b) Public or private Warehouses - Warehouses are of two types (a) Public warehouses appointed by Assistant Commissioner of Customs under section 57 of Customs Act. (b) Private warehouses licensed by Assistant/Deputy Commissioner of Customs. The licence can be cancelled by giving one month notice. Licence can be cancelled if licensee contravenes any provisions of Customs Act. In such cases, show cause notice has to be issued and pending enquiry, licence can be suspended.

As the name suggests, goods can be stored in Public Warehouse by any importer, while goods can be stored in private warehouse only by person who has been licensed.

Private warehouses are permitted quite liberally. Even private operators can be appointed as custodian for public warehouse. CBE&C has clarified that permission for public or private warehouse can be given by Commissioner without making any reference to Board. Permission for storage of any category of goods can be given if the applicant is financially sound, has good credibility and has not been involved in customs or excise duty evasion in last five years. Premises of storage should be suitable and adequately secured. Services of Customs Officer should be provided on cost recovery basis, or on payment of supervision charges - CBE&C Circular No. 68/95 dated J5-6-1995.

For keeping sensitive goods in private as well as public bonded warehouse, bank guarantee equal to 25% of duty in respect of sensitive goods should be taken - MF(DR) circular No. 18/2007-Cus dated 24-4-2007.

PSUs shall be exempt from furnishing bank guarantee or other form of security for storing sensitive goods in the duty free shop operated by them. However, double duty bond is required to be executed - MF(DR) circular No. 26/2012-Cus dated 10-9-2012.

It is not necessary to obtain 'No objection certificate' from public warehouse before granting license to private bonded warehouse - CBE&C circular No. 1 /96-Cus dated 1-1-1996.

License to EOU by AC/DC - The license to EOU for warehouse (section 58) and permission to manufacture in warehouse under bond (section 65) will be granted by Assistant/Deputy Commissioner - MF(DR) Circular No. 9/2008-Cus dated 25-6-2008.

Warehousing charges even if goods detained by customs - Warehousing charges are payable in case of public warehouse, even if goods are detained by customs - Monika Indiav. UOI(2010) 260 ELT 177 (P&H HC DB).

(c) Procedure for warehousing imported goods

Imported goods are cleared from seaport/airport on submission of Bill of Entry for warehousing. This Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. Bond is executed for transfer of goods from port to warehouse.

Space Availability Certificate - If the goods are to be despatched to public bonded warehouse, a 'Space Availability Certificate' is required, before movement of goods. However, in case of private warehouses, 100% EOU, STP, EHTP etc., such certificate is not necessary - CCCE Hyderabad PN 16/97 dated 12.2.1997.

Transit bond and insurance - The importer has to execute a bond for movement of goods from customs port to warehousing station. Bond should be with bank guarantee. He also has to take transit insurance to cover duty element while the goods are in transit. However, EOU, STP & EHTP units do not have to give bank guarantee. They have to give either bond or take transit insurance policy. - MF(DR) circular No. 41/97-Cus dated 19.9.1997, as amended vide circular No. 38/98-Cus dated 21.5.1998.

When the warehouse is within the City or within 50 Kms within the jurisdiction of Commissioner of Customs, goods can be sent under escort. If the goods are outside city limits, transit bond in form of cash security or bank guarantee should be taken. This should be 50% of duty involved for sensitive goods and 25% for non-sensitive goods. -CBE&C circular No. 99/95-Cus dated 20-9-1995 amended vide CBE&C No. 47/99-Cus dated 27-7-1999.

The importer should submit re-warehousing certificate within 30 days from date of despatch of goods from seaport/airport. Otherwise, duty is payable.

Waiver of warehousing at port of import - If goods are to be taken to a port in interior town, goods should be warehoused at the port of importation and then removed to another warehouse under bond u/s 67. Since this will involve double handling of goods, Assistant Commissioner of Customs can grant waiver of physical warehousing at the port of importation.

(3) Warehousing period under customs

Section 61 of Customs Act prescribes warehousing period. If goods are not removed within the prescribed period, Customs Officer can sell the goods after notice to owner as much quantity as he deems fit.

(a) Normal warehousing for one year, extension can be granted - Section 61(I)(b) of Customs Act provides warehousing period as one year from the date of issue of order by Customs Officer permitting deposit of goods in a warehouse. The period of one year can be reduced by Commissioner if goods are likely to deteriorate. This period can be increased by Commissioner upto 6 months and by Chief Commissioner of Customs without any limit of period.

In case of EOU, the normal warehousing period is three years for inputs, spares and consumables and five years for capital goods, [section 61(1)]. This warehousing period can be extended by Commissioner without any upper time limit.

(b) Policy for granting extension - While considering requests for extension of warehousing period, concerned authority should be satisfied about condition of goods and should ensure that the goods are not likely to deteriorate during the extended period of warehousing. Whenever necessary, goods should be tested for quality before granting extension of warehousing period. Interest accrued should be paid before granting extension. This interest caji be adjusted against final interest payable. A liberal approach may be adopted in following cases, if goods are in good condition - (i) Ship stores/aircraft spares (ii) Goods supplied to diplomats (iii) Goods warehoused and sold through duty free shops (iv) Goods imported by EOU (v) Goods used in units operating under manufacture-in-bond scheme (vi) Machinery, equipments and raw materials imported for building and fitment in ships. Trade should file application for extension 15 days prior to warehousing period. However, request for warehousing can be considered even after expiry of warehousing period, after taking into consideration exceptional circumstances of the case. Though powers for unlimited extension are with Chief Commissioner, the aforesaid guidelines should be kept in mind. - CBE&C circular No. 47/2002-Cus dated 29-7-2002. [Earlier CBE&C circular No. 12/98-Cus dated 5-3-1998 subsumed in this circular].

Commissioner can grant extension upto 6 months, Beyond 6 months, Chief Commissioner can grant extension. Such extension by Chief Commissioner will normally be 3 months at a time. However, in respect of goods falling under categories (v) and (vi) of para 5 of Circular No. 47/2002-Cus dated 29-7-2002, extension can be granted for a period even greater than 3 months if goods are not likely to deteriorate and interest is paid. The extension is subject to overall limit of warehousing permitted under section 61 of Customs Act for relevant category of goods - MF(DR) Instruction No. 473/2/ 2011-LC dated 1-6-2011.

(c) Interest not payable at the time of granting extension - Interest is not payable at the time of granting extension. Interest is payable only when it is due and if not waived - MF(DR) Instruction F No. 473/02/2011-LC dated 29-2-2012.

(d) If warehousing period reduced by law - If warehousing period is reduced by amendment to law, the reduced period will not apply to goods warehoused prior to such amendment - Bangalore Wire Rod Mills v. UOI 1992(61) ELT 37 (Kar) - approved by SC - 83 ELT 251 (SC) - accepted by CBE&C vide MF(DR) circular No. 12/2007-Cus dated 9-2-2007.

(e) EOU should consume inputs etc. within the warehousing period - In case of EOU units, the whole factory is treated as a bonded warehouse. Hence, bonding period of three years means inputs, consumables and spares should be consumed for manufacture of export product within that warehousing period. If not, application for extension should be made. - - However, interest will be payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused), [section 61(2)(i)].

(f) Five years warehousing for capital goods for EOU - The warehousing period can be upto five years in case of capital goods intended for use in EOU unit, as per section 61(I)(a) of Customs Act. This period can be reduced by Commissioner if goods are likely to deteriorate. The period can be extended without any upper limit.

However, if goods are stored beyond a period of five years, interest is payable for storing goods beyond the period of five years in the warehouse. The interest is payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused), [section 61(2)(i)].

Extension in respect of capital goods obtained by EOU units will be granted at the time of renewal of license of EOU, even if five years of those capital goods are not over -MF(DR) circular No. 7/2005-Cus dated 14-2-2005.

(g) Interest payable beyond prescribed period

In case of goods allowed to be warehoused, interest is payable at prescribed rate. In case of normal warehousing (other than EOU), interest is payable if goods are warehoused beyond 90 days, [section 61(2)(ii)].

Presently, the interest rate is 15% [Notification No. 18/2003-Customs (NT) dated 1-3-2003]. Earlier, the interest rate was 24%. In case of EOU, interest is payable if warehousing is beyond three years in case of inputs/ consumables/spares and five years in case of capital goods.

(h) Interest if goods cleared after warehousing period is over - Interest is payable even if goods are cleared after warehousing period is over, till date of clearance. Interest is payable even if notice demanding interest is not issued - Suresh Chand v. UOI (201 0)254 ELT (Bom HC DB).

(i) Interest for warehousing beyond 90 days - Even if goods are permitted to be stored for one year (plus extension if permitted), interest is payable for storing goods beyond a period of 90 days in the warehouse. The interest is payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused) [section 61(2)(ii)].

(j) Interest payable if goods cleared from warehouse through DEPB debit - Since debit under DEPB is treated as payment of duty, Cenvat credit or duty drawback is available. Hence, interest is payable if goods are cleared from warehouse by debit to DEPB -MF(DR) circular No. 26/2007-Cus dated 20-7-2007 - agreed and followed in Tanfac Industries v. CCE (2009) 235 ELT 103 (CESTAT) - view confirmed in Tanfac Industries v. CCE(2009) 240 ELT 341 (Mad HC DB), where it was observed that there is difference between DEPB and Advance Authorisation. Goods cleared under DEPB are not exempted. They are to be treated as duty paid.

(k) Interest if goods provisionally assessed were stored in warehouse - If goods provisionally assessed were stored in the warehouse, assessee cannot file Bill of Entry for ex-bond clearance. Hence, interest will be payable only after the provisional assessment is finalized by department. Importer cannot suffer for delay by department - Nirma Ltd. v. CC(2011) 263 ELT 261 (CESTAT)

(l) Policy for granting waiver of interest - In following cases, application for waiver of interest should be considered, as charging of interest would enhance costs unnecessarily - (i) Ship stores/aircraft spares (ii) Goods supplied to diplomats (iii) Goods warehoused and sold through duty free shops (iv) Goods imported by EOU (v) Goods used in units operating under manufacture-in-bond scheme (vi) Machinery, equipments and raw materials imported for building and fitment in ships (vii) Petroleum products (viii) Plant and machinery imported for projects (ix) Machinery, equipments and raw materials imported for manufacture and installation of power generation units (x) goods imported under OGL and warehoused for subsequent clearance under advance authorisation/ DEPB etc. (xi) Goods imported in bulk by canalising agencies (xii) Imports under EPCG scheme (xiii) Import of capital goods by PSU [MF(DR) circular No. 10/2006-Cus dated 14-2-2006]. It is also clarified that when no duty is payable, interest payment is not necessary.

Demand of interest should be raised when due, but it should not be enforced. On fulfilment of purpose of import, waiver of interest should be decided within 6 months - MF(DR) circular No. 10/2006-Cus dated 14-2-2006.

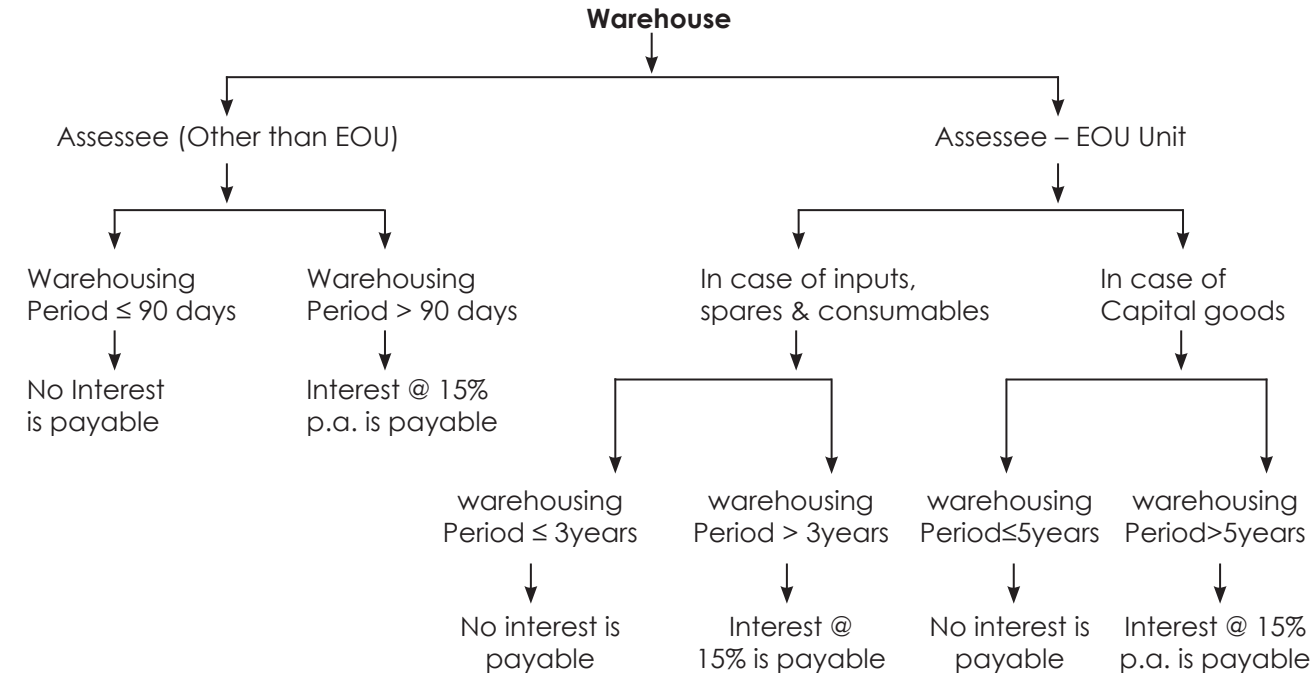
(m) Interest not payable when no customs duty payable - In some cases, no customs duty is payable on goods warehoused as they are exempt from duty on date of clearance. This may happen when goods are stored in warehouse as 'advance licence' is not available in hand. In such cases, goods are assessed at normal rates of customs duty and kept in warehouse. Subsequently, these are cleared after receipt of advance licence without payment of duty. In such cases, is interest payable beyond the period allowed for free warehousing? There were conflicting views. Finally, in Pratibha Processors v. UOI1996 AIR SCW 4299 = AIR 1997 SC 138 = 1996(11) SCC 101 = 88 ELT 12 (SC) it has been held that if no customs duty is payable at the time of clearance of goods from warehouse, no interest is payable. Interest is a mere 'accessory' to principal and if principal is not payable, interest is also not payable - view accepted by CBE&C vide circular No. 10/2006-Cus dated 14-2-2006 - reiterated in MF(DR) circular No. 26/2007-Cus dated 20-7-2007.

(n) Waiver of interest - Provision of interest @ 15% after just 90 days has made the provision of warehousing slightly unattractive. [Now, warehousing will be beneficial only when goods can be cleared later without payment of duty against advance license etc.]

Waiver of interest can be granted by Chief Commissioner upto ₹ two crores and by CBE&C above that.

(o) No interest if duty paid after warehousing period but before SCN? - In CC v. Stilbene Chemicals (2009) 236 ELT 78 (CESTAT), it was held that if duty is paid after warehousing period is over (but before issue of notice), interest is not payable - relying on Ghanshyam Das Suresh Chand v. UOI(2004) 165 ELT 514 (Del).

Summary of applicability of interest on warehouse goods



(4) Manufacture in customs bonded warehouse

Manufacturing or other operations can be carried out in the warehouse with sanction of Assistant Commissioner (section 65 of Customs Act). The facility is useful if final products are to be exported after manufacture (though final products can be cleared for home consumption too). After manufacture, the produced goods may either be exported without payment of customs duty or cleared for home consumption on payment of duty.

These provisions are applicable to EOU, STP, EHTP or BTP units who have to manufacture goods under customs bond. They have to obtain license from customs.

Facility for manufacture in warehouse under bond is also available for goods imported for repairs, re-conditioning, re-engineering etc. The goods can be imported without payment of customs duty and can be re-exported after repairs, reconditioning etc. Such re-export must be within three years from date of import. [Notification No. 134/94 - Cus dated 22-6-94]

Permission for in-bond manufacture facility can be given by Commissioner. Permission can be given after scrutinising credibility and financial soundness of applicant - CBE&C circular No. 132/95-Cus dated 22-12-1995.

Permission by AC/DC in case of EOU - The license to EOU for warehouse (section 58) and permission for manufacture in warehouse under bond (section 65) will be granted by Assistant/Deputy Commissioner - MF(DR) Circular No. 9/2008-Cus dated 25-6-2008.

(a) Removal of waste or refuse arising during manufacture - If waste or refuse is generated during manufacturing operations, the provisions are as follows - (a) If the final product is exported, import duty on quantity of warehoused goods contained in such waste or refuse will be remitted if such waste or refuse is either destroyed, or duty is paid on such waste or refuse as if it had been imported into India in the form of waste or scrap (b) If final product is cleared for home consumption, import duty will be payable on quantity of warehoused goods contained in such waste or refuse [section 65(2) of Customs Act].

In view of section 65(2)(b) of Customs Act, import duty is payable on the quantity of the imported goods contained in the waste and not only on scrap value - Cochin Shipyards v. CC (2011) 267 ELT 387 (CESTAT).

(b) Conditions for manufacture in bonded warehouse

Board has framed 'Manufacture and Other Operations in Warehouse Regulations, 1966' prescribing procedures. Procedures for manufacture under bond have now been considerably simplified. Physical control and supervision of customs officer on the bonded warehouse has been done away with, since July 1998. - MF(DR) circular No. 88/ 98-Cusdated2-12-1998.

Owner has to make application giving full details regarding process to be carried out, imported and other goods used, plan and description of warehouse and volume of manufacture anticipated. On obtaining permission, necessary bond has to be executed undertaking to observe all regulations and maintaining accounts etc. Manufacture will not be under supervision of Customs Officers. However, customs officers can visit warehouse and control and supervise manufacturing process or imported and other goods. Detailed accounts are required to be maintained of raw materials, stock, WIP and production. Input-output norms should be fixed wherever considered necessary.

Manufacturer can suspend or discontinue manufacture with one month notice. Sanction for manufacture in warehouse can be withdrawn if conditions of Act or regulations are violated.

Procedures have been prescribed under Central Excise Law for bringing goods manufactured in India without payment of excise duty.

Special audit of accounts of the warehouse can be ordered by Chief Commissioner of Customs. He can appoint a cost accountant to conduct audit of accounts of warehouse, office, stores, godowns, factory, depot of the manufacturer. This provision has been made in July 1998, as physical control of customs officer has been removed.

(c) Goods manufactured in bonded warehouse are not made in India and are liable to customs duty? - In Mustan Teherbhai v. CC2003 (154) ELT 472 (CEGAT), it has been held that customs duty is payable on goods manufactured in customs bonded warehouse. Thus, goods manufactured in customs bonded warehouse are not 'made in India'. The reason given is that section 66 of Customs Act makes mention of 'rate of duty leviable on goods manufactured'. Such duty can only be customs duty.

(5) Clearance from bonded warehouse

Section 71 allows clearance for (a) home consumption, (b) re-exportation or (c) removal to another warehouse.

(a) Removal for home consumption

Under section 68, goods stored in warehouse can be removed on payment of duty. Procedure is summarised in Chapter 9 Para 19 of Customs Manual, 2011.

(b) Procedure for removal of goods - Importer has to submit bill of entry in prescribed form for removal of goods from warehouse for home consumption, this Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. It is also called 'Into Bond Bill of Entry' as bond is executed for transfer of goods in warehouse without payment of duty. The Bill of Entry is assessed by customs officer in charge of warehouse. Duty, penalties, rent and interest is payable as per rules. Goods are then allowed to be cleared by Customs Officer.

(c) No interest if duty not paid within 2 days on return of Bill of Entry - The provision for payment of duty within 2 working days after return of Bill of entry, as provided in section 47(2) of Customs Act applies to clearance from customs port and not to clearance from customs warehouse. Thus, no interest is payable so long as clearance is made within period allowable for interest free warehousing - CC v. Acalmar Oils (2009) 240 ELT 440 (CESTAT).

(d) Rate of duty as applicable on date of removal - As per section 15(l)(fc), rate of duty as prevalent on date of presentation of Bill of Entry for home consumption for clearance from warehouse is applicable and not rate prevalent when goods were removed from customs port.

(e) Rate of exchange in case of warehoused goods - Relevant exchange rate for valuation is as in force on date on which bill of entry is presented u/s 46. Bill of Entry is presented u/s 46 of Customs Act either for home consumption or for warehousing. Hence, in case of warehoused goods, exchange rate prevailing on the date on which Bill of Entry is presented u/s 46 and not when Bill of Entry is presented u/s 68 for clearance from customs warehouse.

(f) No Anti dumping duty on goods warehoused prior to levy of anti-dumping duty - Antidumping duty is leviable on date of importation. Hence, if goods are already warehoused prior to imposition of anti-dumping duty, anti-dumping duty will not be leviable on warehoused goods, even if cleared subsequent to imposition of anti-dumping duty. Section 15(1)(b) of Customs Act does not apply to anti-dumping duty u/s 9A of Customs Tariff Act. - CCv. Suja Rubber Industries 2002(142) ELT 586 (CEGAT).

Same principle will apply to protective duty and safeguard duty also.

(g) Duty payable only on quantity cleared from warehouse - In Mangalore Refinery v. CCE 2002(141) ELT 247 (CEGAT), it was held that taxable event is when goods are cleared from warehouse. Hence, customs duty is payable only on the quantity which is cleared from warehouse and not the quantity which had entered the territorial waters.

(h) Duty payable if warehousing period is not extended - Goods which are not removed within the permissible period, are deemed to be improperly removed on the day it should have been removed. Thus, duty applicable on such date (i.e. last date on which the goods should have been removed) is applicable, and not the date on which goods were actually removed.

Sometimes, goods are not cleared even after warehousing period is over and extension has not been obtained or granted. In such cases, the relevant date for determination of rate of duty is as follows - (a) If importer does not remove the goods even after expiry of warehousing period, customs officer can issue notice u/s 72 demanding duty. In such case, the last date on which goods should have been removed is 'deemed date of removal' and duty applicable on that date is payable, (b) If importer submits bill of entry and obtains clearance u/s 68, the relevant date is the date on which Bill of Entry for home consumption is submitted u/s 68 (That time it was date of payment of duty) - Raymond Synthetics Ltd. v. CC 2000(119) ELT 205 (CEGAT 5 member bench). - civil appeal admitted by SC on 3.9.2001 - (2001) 134 ELT A166.

(i) Title can be relinquished even after warehousing period is over - In RPG Cables v. CC (2007) 212 ELT 538 (CESTAT), it was held that importer can relinquish title even after warehousing period is over, since title can be relinquished anytime before clearance for home consumption - same view in Macmillan Indiav. CC(2008) 223 ELT 449 (CESTAT) - same view in JK Cement Works v. CCE (2008) 223 ELT 138 (Raj HC DB), where it was also held that even after relinquishment, rent, interest etc. is required to be paid. It was also held that acceptance of option of relinquishment is not subject to discretion of proper officer, but only for fulfilment of conditions prescribed in proviso to section 68 of Customs Act.

(j) Interest if goods cleared after warehousing period is over - Interest is payable even if goods are cleared after warehousing period is over, till date of clearance. Interest is payable even if notice demanding interest is not issued - Suresh Chand v. t/O/(2010) 254 ELT (Bom HC DB).

(k) Re-export can be permitted even after bonding period has expired - Importer may be allowed to re-export goods even after the period of warehousing has expired and demand notice is issued. Before granting the permission, warehousing period should be extended, so that importer can re-export the goods within such extended warehousing period.

(l) Interest not payable even if duty paid after five days from return of ex-bond bill of entry -As per section 47(2) of Customs Act, if duty is not paid within five working days from date of return of Bill of Entry to importer. This section is applicable for clearance from port and not for clearance from warehouse,

for which separate provisions have been made under section 68 of Customs Act. This is self contained provision. Hence, in case of warehoused goods, interest is not payable even if duty is paid beyond period of five days from return of ex-bond bill of entry. However, interest as provided in section 61 (2) would be payable - MF(DR) Circular No. 15/2009-Cus dated 12-5-2009.

(m) Sales Tax and octroi/entry tax on warehoused goods - Sales tax is payable when goods are sold from bonded warehouse. State sales tax is also payable when goods are supplied to foreign going vessel. However, sales tax should not be payable in following - (a) Goods exported from bonded warehouse (b) Goods sold by transfer of documents when goods are within the bonded warehouse.

Octroi/Entry Tax can be levied on warehoused goods for which 'Value' can include customs duty payable on such goods, even if not paid at the time of warehousing. However, in case of EOU/SEZ, since they do not have to pay customs duty, the custom duty will not be includible in value for purpose of octroi payment.

(n) Sale of goods when goods are in bonded warehouse is 'sale in the course of import'

In Kiran Spinning Mills v. CC1999(U3)ELT753 =2000 AIRSCW2090 = AIR2000 SC 3448 (SC 3 member bench), it has been held that goods continue to be in customs barrier when they are in customs bonded warehouse. Import would be completed only when goods cross customs barrier and not when they land in India or enter territorial waters.

Thus, if documents are transferred when goods are in customs bonded warehouse, it will be treated as transfer of documents before goods cross customs barrier.

(o) Transfer to other bonded warehouse

Section 67 of Customs Act permit removal to other warehouse under bond. Transit bond for customs duty involved backed by bank guarantee/security should be furnished. In the case of EOU, bank guarantee for transfer of goods is not required -Chapter 9 Para 18 of CBE&C's Customs Manual, 2011.

In case of inter-city transfer of goods from one warehouse to another warehouse, bank guarantee is not required in case of Central and State Public Sector Undertakings (PSU). However, transit bond should be executed - MF(DR) circular No. 42/2007-Cus dated 30-11-2007.

(p) Clearance for export

Customs warehoused goods can be exported without payment of duty, vide section 69(1) of Customs Act. A shipping bill or bill of export or label or declaration (in case of export by post) has to be presented. Export duty, penalties, rent, interest etc. is payable as applicable and then goods are allowed to be exported.

If warehoused goods are re-exported without payment of duty, no interest is payable -MF(DR) circular No. 38/2005-Cus dated 28-9-2005.

(6) Other provisions of customs warehousing

Other provisions in respect of warehousing are as follows.

(a) Relinquishing of title after warehousing - The owner of warehoused goods can relinquish the title of goods any time before order for home clearance is made. He will be required to pay rent, interest, other charges and penalties that may be payable, but duty will not be payable [proviso to section 68 inserted w.e.f. 14-5-2003]. The word 'interest' is not clear and is likely to lead to litigation. It has been consistently held that when duty is not payable, question of payment of duty does not arise.

Relinquishment of title of goods will not be permissible if offence appears to have been committed in respect of such goods under Customs Act or any other law [second proviso to section 68 of Customs Act inserted w.e.f. 18-4-2006].

(b) Repurchase of goods after relinquishing - The goods relinquished are normally auctioned. In that case, the person who has relinquished the goods can repurchase the goods as the goods are no more 'imported goods' - Aabhas Spinners v. UOI(20\0) 260 ELT 554 **(P&H HC DB).**

(c) Remission of duty permissible - If goods are damaged in warehouse, the damage is covered u/s 23 and hence no duty is payable, since clearance from port to the warehouse is not 'clearance for home consumption'.

(d) Remission if Loss of inputs in stores or during process of EOU - If inputs are lost due to fire, after they are issued for production and are is in 'work in progress', no duty is payable on imported and indigenous inputs received duty free. Remission of duty is required to be granted - Sarni Labs v. CC(2007) 216 ELT 59 (CESTAT).

Remission can be obtained by EOU if goods deteriorated when in the factory (as it is a warehouse) - Sandoz P Ltd. v. CCE (2012) 278 ELT 259 (CESTAT) * CC v. Next Fashion Creators (2012) 280 ELT 374 (Karn HC DB).

(e) No remission after warehousing period is over - In CCE v. Decorative Laminates (2010) 257 ELT 61 (Kar HC DB), it was held that remission cannot be granted after expiry of warehousing period [reversing Decorative Laminates v. CC (2006) 195 ELT 175 (CESTAT), where it was held that application for remission can be made even after expiry of warehousing period but before clearance from warehouse for home consumption.

(f) Control over bonded warehouse - The warehouse is subject to control of Customs Officer, who has powers to enter warehouse and examine the goods.

(g) Transfer to another person - Goods in warehouse can be transferred to another person u/s 59(3). Sale of warehoused goods to holder of duty concession license is also permissible.

(h) Rent and warehouse charges - Rent and warehouse charges are payable by importer. If not paid, the warehouse keeper can sell the goods after giving notice to importer and with permission of Customs Officer (section 63).

(i) Owner's rights to deal in goods in warehouse - With the permission of Customs Officer and on payment of prescribed fees, owner can deal with warehoused goods as follows (a) inspect the goods (b) separate damaged or deteriorated goods (c) sort the goods or change containers for preservation, sale, export or disposal of goods (d) show the goods for sale (e) take samples of goods - the samples can be removed without payment of duty with permission of Customs Officer, but if these are not brought back, customs duty is payable (section 64).

(j) No remission if there is theft in warehouse - Remission cannot be granted if there was theft in warehouse - Maneesh Exports (EOU), In re (2011) 273 ELT 466 (GOI).

Goods not accounted for - If goods are removed in contravention of rules or if goods are not properly accounted for, full duty is payable on such goods together with penalty, interest, rent etc. If duty, penalty etc. is not paid, goods in warehouse can be sold by Customs Officer after giving notice to importer. Besides, bond or bank guarantee executed by importer can be encashed [section 72(l)(d)J.

(k) Goods improperly removed from warehouse

As per section 72(1), following goods are 'goods improperly removed from warehouse, etc'

(a) Warehoused goods removed in contravention of provisions of section 71 are goods improperly removed [section 72(1)(a)]. [Section 71 allows clearance for home consumption on payment of duty, re-exportation or removal to another warehouse].

(b) Warehoused goods not removed at the expiration of warehousing period as specified in section 61 (unless extension is obtained)

(c) Taking samples from warehouse without payment of duty and not returning them

(d) Goods entered into warehousing under bond u/s 59 are not duly accounted for [section 72(1)(d)].

In such case, full duty, along with interest, penalty, rent and other charges can be demanded. If these are not paid, the warehoused goods can be sold by customs officer, besides other action that can be taken under customs law [section 72(2)].

(I) Reassessment cannot be made at warehouse

The department has clarified as follows - 'Insofar as value for assessment of duty is concerned, it is not required to be re-determined and it is the original value as determined at the time of filing of 'Into Bond Bill of Entry' and assessments before warehousing. - Chapter 9 Para 19.3 of CBE&C's Customs Manual, 2001.

(7) Storage in warehouse pending clearance

Normally, imported goods are kept in customs bonded warehouse after goods are assessed to duty. However, occasionally, it may happen that assessment of duty may take time for want of some clarification/reports etc. In such cases, goods lying in docks may incur heavy demurrage. There is a provision that Customs department can issue 'detention certificate' and on the basis of such certificate, port trust authorities may remit demurrage. However, chances of pilferage or loss are high if goods lie at docks.

Hence, if assessment is likely to be delayed, section 49 of Customs Act allows that goods can be stored in public warehouse for period upto 30 days. However, such goods are not to be treated as 'warehoused goods' for purposes of Customs Act as the goods are not assessed. Hence, it is called 'storage without warehousing' or 'warehousing without warehousing'. The goods are cleared from the warehouse after duty is assessed and paid [The limit of 30 days was put w.e.f. 10th May, 2013]

The storage period is 30 days. The period can be extended by Commissioner of Customs by 30 days at a time - [proviso to section 49 of Customs Act, inserted w.e.f. 10th May, 2013].

PRACTICAL PROBLEMS

Example 24: An importer imported some goods in February, 2013 and the goods were cleared from Mumbai port for warehousing on 8th February, 2013 after assessment. Assessable value was ₹ 4,86,000 (US $ 10,000 at the rate of exchange ₹ 48.60 per US $). The rate of duty on that date was 20% (assume that no additional duty is payable). The goods were warehoused at Pune and were cleared from Pune warehouse on 4th March, 2013, when rate of duty was 15% and exchange rate was ₹ 48.75 = 1 US $. What is the duty payable while removing the goods from Pune on 4th March, 2013?

Answer: **Amount in ₹**

The rate of exchange will be ₹ 48.60 per USD Assessable value	4, 86,000
(i.e. US$ 10,000 at ₹ 48.60 per US$) Rate of duty	@15%.
Basic Customs Duty payable	72,900
Education Cess 2% on ₹ 72,900	1,458
SAH @1% on ₹ 72,900	729
Total Duty payable	75,087

Example 25: Certain goods were imported in February 2012. "Into bond" bill of entry was presented on 14th February, 2012 and goods were cleared from the port for warehousing. Assessable value was $5,00,000. Customs officer issued the order under section 60 permitting the deposit of the goods in warehouse on 21st February, 2012 for 3 months. Goods were not cleared even after warehousing period was over, *i.e.*, 21st May, 2012 and extension of time was also not obtained. Customs officer issued notice under section 72 demanding duty and other charges. Goods were cleared by importer on 28th June, 2012. What is the amount of duty payable while removing the goods? Compute on the basis of following information (assume that no additional duty or special additional duty payable).

	14.02.2012	21.05.2012	28.06.2012
Rate of Exchange per USD	₹ 48.30	₹ 48.40	₹ 48.50
Basic customs duty	35%	30%	25%

Answer:

Rate of duty applicable	@30%
Exchange rate	₹ 48.30
Assessable value	₹ 2,41,50,000
Customs Duty @30% x ₹ 2,41,50,000	₹ 72,45,000
Education cess 2% x ₹ 72, 45,000	₹ 1,44,900
SAH @ 1% x ₹ 72, 45,000	₹ 72,450
Total Customs duty payable	₹ 74,62,350

Note: Goods not removed from the warehouse within the permissible period, is considered as deemed to be removed *improperly* on the due date, even though, the goods actually removed at a later date. The rate of duty prevailing on the date on which the goods should have been removed is to be considered *i.e.* 30% (21-5-2012) *[Kesoram Rayon* v *Commissioner of Customs* (1996)]

Example 26: An importer imported some goods on 1st January, 2012 and the goods were cleared from Mumbai port for warehousing on 8th January, 2012 by submitting Bill of Entry, exchange rate was ₹ 50 per US $. FOB value US $ 10,000. The rate of duty on 8th January, 2012 was 20%. The goods were warehoused at Pune and were cleared from Pune warehouse on 31st May, 2012, when rate of basic customs duty was 15% and exchange rate was ₹ 48.75 per 1 US $. What is the duty payable while removing the goods from Pune on 31st May, 2012? CVD @10% and Special CVD 4% are applicable.

You are required to find:

(a) The total Customs duty payable?

(b) The interest if any payable?

Answer:

	(US $)	
FOB	10,000	
ADD: 20% Freight on FOB	2,000	
ADD: 1.125% Insurance on FOB	112.50	
CIF	12,112.50	
ADD: 1% on CIF	121.125	
ASSESSABLE VALUE	12,233.63	
	(₹)	
ASSESSABLE VALUE	6,11,681.25	(i.e. 12,233.625 x ₹50)
Add: BCD 15%	91,752.19	(I.e. 6,11,681.25 x 15%)
Balance	7,03,433.44	
Add: CVD 10%	70,343.34	(i.e. 703,433.44 x 10%)
Balance	7,73,776.78	
Add: 2% Ed. Cess	3,241.91	(i.e. 1,62,095.63 x 2%)
Add: 1%SAH Ed. Cess	1,620.96	(i.e. 1,62,095.63 x 1%)
Balance	7,78,639.65	
Add: Spl. CVD 4%	31,145.59	(i.e. 7,78,639.65 x 4%)
Value of import	8,09,785.24	
Amount of Customs duties	1,98,104.00	

Interest:

(i.e. ₹1,98,104 x 15% x 55/365) 4,478.00

Jan 24 days + Feb 29 days + Mar 31 + April 30 days + May 31 days= 145 days

145 days –90 days = 55 days.

4.16 PROVISIONAL ASSESSMENT OF DUTY [SECTION 18]

Provisional assessment [Section 18]: The provisional assessment can be directed by proper officer in the following circumstances,-

(a) where the importer or exporter is unable to make self-assessment under section 17(1) and makes a request in writing to the proper officer for assessment; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry.

- **Furnishing of security**: The proper officer may direct provisional assessment if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed (as the case may be), and the duty provisionally assessed.
- **Importer required to file bill of entry in case of provisional assessment also**: The provisions of section 18 apply without prejudice to the provisions of Section 46. Hence, the bill of entry is required to be presented in accordance with the provisions of Section 46 even for the purposes of provisional assessment as well.
- **Finalisation of assessment**: When the duty leviable on such goods is assessed finally or re-assessed by the proper officer in accordance with the provisions of this Act, then -

  (a) If the goods are cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed or re-assessed. In case the amount so paid falls short or is in excess of duty finally assessed or re-assessed, the importer or the exporter of the goods shall pay the deficiency or is entitled to a refund.

  (b) If the goods are warehoused and the duty finally assessed or re-assessed is in excess of the provisional duty, the customs officer may require the importer to execute a bond binding himself in a sum equal to twice the amount of the excess duty.
- **Interest of demand**: The importer or exporter shall be liable to pay interest, on any amount payable to Central Government, consequent to the final assessment order or reassessment order, at the rate specified in Section 28AA of the Customs Act, 1962 (i.e. @ 18% p.a.) from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.
- **Interest on delayed refund:** If any amount refundable is not refunded within three months from the date of assessment of duty finally or reassessment of duty, as the case may be, there shall be paid an interest on such amount at the rate specified in section 27A of the customs Act, 1962 (i.e @6% p.a) till the fund of refund of such amount.
- **Circumstances under which refund can be granted:** The amount of duty and the interest shall be credited to Customer Welfare Fund. However , instead of being credited to Consumer Welfare

Fund in the following cases it shall be paid to the importer or the exporter, if such amount is related to,-

(a) the duty and interest, (if any, paid on such duty) paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, to any other person;

(b) duty and interest (If any, paid on such duty) on imports made by an individual for his personal use;

(c) the duty and interest (if any, paid on such duty) borne by the buyer, if he had not passed on the incidence of such duty and interest, to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under section 74 and 75.

4.17 BAGGAGE, COURIER AND IMPORT AND EXPORT THROUGH POST

4.17.1 General Provisions about Baggage

Section 2(3) states that baggage includes 'un-accompanied baggage' but does not include motor vehicles. Thus, baggage rules are also applicable in respect of baggage which comes separately and which is despatched from abroad before or after the traveller's departure. Section 79(1)(b) of Customs Act exempts bona fide baggage of passenger which is for use of the passenger or his family. Section 79(2) authorises Central Government to frame rules for prescribing conditions for granting exemption to baggage. In exercise of these powers, Central Government has issued Baggage Rules, 1998, making provisions in respect of baggage.

Baggage - The term has not been defined as such. However, following may be noted: (a) Baggage means all dutiable articles, imported by passenger or a member of a crew in his baggage (b) Un-accompanied baggage, if despatched previously or subsequently within prescribed period is also covered (c) baggage does not include motor vehicles, alcoholic drinks and goods imported through courier (d) Baggage does not include articles imported under an import licence for his own use or on behalf of others.

Bona fide Baggage Exempt from duty - Bona fide baggage accompanying passenger is exempt from duty. It includes wearing apparel, toilet requisites and other personal effects.

General prohibitions - Following are general prohibitions/restrictions - (a) Foreign and Indian currency can be taken out/ brought in only as per restrictions of RBI under FEMA (discussed later in this chapter). (b) Possession of narcotic drugs is strictly prohibited. (c) Domestic pets like dogs, cats, birds etc. can be brought as per strict health certificate regulations. (d) Taking out exotic birds, wind orchids and wild life, is strictly prohibited. (e) Endangered species or articles made from flora and fauna such as ivory, musk, reptile skins, furs, shahtoosh or antiques are prohibited.

Declaration by owner of baggage

Section 77 of Customs Act provides that owner of any baggage has to make declaration of its contents to Customs Officer. Rate of duty and tariff valuation shall be the rate and valuation in force on the date of declaration.

Green Channel - It is impractical to ask every traveller to declare contents of his baggage. Hence, customs have provided two channels at airports. If a person does not have any dutiable goods, he can go through green channel.

An incoming passenger has to submit disembarkation card, containing written declaration about his baggage. This should be collected when passenger goes through green channel. - MF(DR) circular No. 9/2001-Cus dated 22.2.2001.

Passenger who has nothing to declare can simply walk through green channel with baggage on basis of oral declaration/declaration on their disembarkation cards. Any passenger found walking through green channel with dutiable or prohibited goods (or found mis-declaring quantity, value or description while going through red channel) is liable to strict penal action of seizure and confiscation. He can even be arrested/ prosecuted.

Mere declaration does not absolve the passenger - Mere voluntary disclosure of goods to customs authorities does not preclude the authorities from adjudicating upon the nature of imports and whether the passenger is entitled to clear goods without payment of duty and without any licence - Goods can be confiscated if found that licence is required to import the goods in question - R Karuppan v. B Namachivayam 1998(99) ELT 214 (Mad HC DB).

Red Channel - Person carrying dutiable goods should pass through red channel and should submit declaration. The declaration of goods and value as given by passenger in disembarkation card is generally accepted, but baggage can be inspected by Customs Officer.

4.17.2 Rate of customs duty on baggage

Rate of duty on baggage is as follows:

General Rate on baggage - Baggage is classified in Customs Tariff in Chapter 9803, irrespective of actual classification as per Customs Tariff. The entry reads as "All dutiable articles, imported by passenger or member of crew in his baggage". Tariff rate is 100%. However, effective rate (i.e. specified by a notification) is 35% w,e.f. 1-3-2005. Baggage is exempt from CVD. However, education cess @ 2% and SAH education cess of 1% is payable. Thus, total customs duty on baggage is 36.05%,

This rate is not available to - fire arms, cartridge of fire arms exceeding 50, cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under Baggage Rules and goods imported through courier service. [Notification No. 136/90 dated 20-3-90 as amended]. Since 'baggage' does not include motor vehicles, liquor and firearms, the rate is obviously not applicable for those goods.

Exemption to laptop computer - Laptop computer (notebook computer) brought as baggage by person over 18 years of age (other than member of crew) is fully exempt from customs duty - Notification No. 1 1/2004-Cus dated 8-1-2004.

A laptop is a small portable Personal Computer (in short 'PC'). A notebook computer is a laptop - CC v. Hewlett Packard India (Sales) P Ltd. (2007) 215 ELT 484 (SC).

Import for personal use - Dutiable articles imported by air or post, but not as baggage, intended for personal use, which are not prohibited under Foreign Trade (Development and Regulation) Act are classifiable under 9804 and general rate is 20%. The goods are exempt from additional duty (CVD). However, 9804 does not cover items brought as baggage. Thus, this covers goods sent by post or air by a person abroad to another person in India.

Relevant date for determining rate of duty and valuation - As per section 78 of Customs Act, 'relevant date' for rate of duty and baggage is date on which declaration is made in respect of baggage as required u/s 77 of Customs Act.

Valuation of baggage

In Naresh Lokumal Serai v. CC 2006 (203) ELT 580 (CESTAT), it was held that there are no separate provisions for valuation of baggage. Hence, valuation rules apply to valuation of baggage also. In baggage, most of items may be used. Hence, valuation on basis of best judgment assessment is appropriate. It was also held that valuation on basis of internet prices cannot be considered for valuation. Similarly, price tags on goods cannot be considered for valuation, since the price indicated is for sale within that country and not for export to India.

4.17.3 Exemptions/ Restrictions on Baggage

Tourists can be broadly classified as (a) Indian persons going abroad for a short trip and coming back (b) Indian persons gone abroad for work and coming back after few years (c) tourists visiting India for sight seeing or business purpose. Accordingly, 'Baggage Rules, 1998' contain different provisions for (a) Residents from India (b) Tourists visiting India and (c) Persons transferring their residence.

Exemption only to bona fide baggage - As per section 79(1) of Customs Act, bona fide baggage will be passed free of customs duty. Section 79(1) of Customs Act provides that (a) article in any baggage of passenger or crew will be allowed if it was in use for a period specified in rules and (b) bona fide gifts within the limits prescribed in rules.

Present Baggage Rules do not prescribe any limit for which the articles in baggage should be 'in use', but unused articles may not be held as 'bona fide' baggage.

Baggage declaration form prescribed that 'bona fide baggage' includes - * wearing apparel * personal and household effects meant for personal use of passenger or family members travelling with him and not for sale or gift * Jewellery including articles made wholly or mainly of gold, in reasonable quantity according to status of passenger ' Tools of draftsman * Instruments of physician or surgeon.

Personal effects

The term 'personal effects' has not been defined. Rule 11 of earlier baggage rules stated that the expression 'personal effects' means all clothings and other articles, new or used, which a tourist may personally and reasonably require taking into account all the circumstances of his visit but excluding all merchandise imported for commercial purpose.

Departmental clarification - Following will be covered in 'personal effects'. Only used personal effects are permitted. However, as long as it is not prima facie new goods in their original packings which can be disposed of off hand, it will be permitted. The list as given in MF(DR) circular No. 72/98-Cus dated 24-9-1998 is as follows

- Personal jewellery
- One camera with film-rolls not exceeding 20
- One video camera/camcorder with accessories and with video cassettes not exceeding 12
- One pair of binoculars
- One portable colour TV (not exceeding 15 cms in size)
- One music system including compact disc player
- One portable typewriter
- One perambulator
- One tent and other camping equipment
- One computer (laptop/note book) [Laptop/note book computer has been exempted from customs duty vide notification No. 11 /2004-Cus dated 8-1-2004]
- One electronic diary
- One portable wireless receiving set (transistor radio)
- Professional equipments, instruments and apparatus of appliances including professional audio/ video equipments
- Sports equipments such as one fishing outfit, one sporting firearm with 50 cartridges, one non-powered bicycles, one canoe or ranges less than 51 metres long, one pair of skids, two tennis rackets, one golf set (14 pieces with a dozen of golf balls)
- One cell phone

Bona fide luggage will not include - `Alcoholic liquor exceeding half pint * Perfumed spirit exceeding two ounces in open or unopened bottles' cigars or cheroots exceeding 50 ` Country bidis exceeding 200 " Un-manufactured or manufactured tobacco exceeding 4 ounces and snuff exceeding 10 tolas `Piano, pianola and radio * Carriage, motor car, motor cycle * Refrigerator' Cotton piece goods or textile materials in long lengths "Arms and ammunition except personal licensed gun, rifles, revolver or pistol' Wireless apparatus and dictaphone.

Since 'baggage' does not include motor vehicles, liquor and firearms, these cannot be considered as 'personal effects'.

Baggage fully exempt or at concessional rate of duty - Following baggage is fully exempt from customs duty, as per Notification No. 49/96-Cus dated 23-7-1996

(a) Personal property re-imported

(b) Free replacement under warranty of articles which are private personal property of passenger

(c) foodstuff upto ₹ 50,000

(d) Free gifts and donations to red cross, CARE or Government of India for relief and rehabilitation

(e) Samples, price lists, prototypes, commercial samples etc.

(f) Goods brought for display, exhibition, fair etc., subject to various conditions.

(g) Agricultural products or goods manufactured or produced in Nepal.

(h) Newspapers, drawing and designs and other goods as specified.

Exemption to minor amounts of customs duty - Customs duty is not payable if amount of duty is Equal to or less than ₹ 100. [Section 25(6)].

Export Certificate - If a person had gone abroad from India, he should take 'Export Certificate' while taking out jewellery, camera etc. Otherwise, customs duty will be leviable while bringing back the goods.

Goods cannot be imported in commercial quantity as 'Baggage'?

Import of consumer goods in commercial quantity is not permissible as per Foreign Trade policy and it cannot be treated as 'bona fide baggage. However, if passenger brings other goods also, that portion which is not in commercial quantity would be eligible to free baggage allowance. Only goods brought in commercial quantity will be liable for adjudication, penalty and confiscation.

4.17.4 Baggage of Indian resident or foreigner residing in India

Resident means a person holding Indian Passport and normally residing in India (i.e. Indian persons going abroad for short visit). The concession of free import of used personal effects and General Free Allowance is also available for foreign citizens residing in India.

Exempted baggage- Baggage Rules, 1998 allow following imports as duty free:

Used personal effects - Used articles of personal wear and articles in personal use of passengers for daily necessaries is fully exempt. Used personal effects are also exempt. (This allowance is also available to foreign citizens residing in India returning from abroad).

General Free Allowance

The free allowance as provided in Baggage Rules, 1998 is as follows:

General Free Allowance - In addition to personal effects (excluding jewellery) and a laptop computer, a passenger of 10 or more years of age is allowed general free allowance of ₹ 35,000, if the Indian Resident is returning from country other than Nepal, Bhutan, Myanmar or China [Hong Kong Special Administrative Region (HKSAR) is separate customs territory from China and hence allowance of

₹35,000 will be applicable to persons coming from Hong Kong - MF(DR) circular No. 25/2010-Cus dated 4-8-2010]

This allowance is also available to foreign citizens residing in India, after stay of more than three days. This allowance cannot be pooled with General Free Allowance of other passengers - e.g. husband and wife bringing one item of ₹70,000 will not be permitted duty free. This General Free Allowance is not applicable to un-accompanied baggage.

The limit of ₹35,000 is reduced as follows - (a) ₹15,000 for passengers after stay abroad of three days or less (This limit was ₹12,000 upto 17-3-2012). (b) If the passenger is upto 10 years of age and is returning from country other than Nepal, Bhutan, Myanmar or China (but not in case of Hong Kong), the allowance is ₹15,000 (w.e.f. 23-4-2012 - earlier it was ₹6,000), if a person is returning after stay of more than 3 days and ₹3,000, if his stay was 3 days or less. (c) If the passenger is returning from Pakistan by land route, as specified in Annexure IV of Baggage Rules, the general free allowance is ₹6,000 for passengers above 10 years and ₹1,500 for passengers upto 10 years of age [applicable to passengers returning from countries other than Nepal, Bhutan, Myanmar or China.

Lower General Free allowance in case of certain countries - An Indian Resident or foreigner residing in India of age 10 or more is entitled to lower rate of General Free Allowance of ₹ 6,000, if he is returning from Nepal, Bhutan, Myanmar or China after stay of more than 3 days, by route other than land route. Passenger upto 10 years returning from these countries after stay of more than 3 days is entitled to General Free Allowance of ₹1500. There is no duty on personal effects. There is no general free allowance if a person is returning from these countries after stay of three days or less. There is no free allowance if passenger returns by land route from these countries, even if his stay abroad was more than 3 days. If the passenger is returning from Pakistan by land route as specified in Annexure IV of Baggage Rules, the general free allowance is ₹6000 for passengers above 10 years and ₹1500 for passengers upto 10 years of age.

No General Free allowance in certain cases - General Free Allowance is available to Indian Residents, foreigners who are residing in India and tourists of Indian origin. The allowance is also available if he is transferring his residence or returning after 3/12/24 months. A Non Resident Indian who does not hold Indian passport is also entitled to GFA if he is of Indian origin. The GFA is not available to foreign tourists.

No GFA on un-accompanied baggage - General Free Allowance is not allowed on unaccompanied baggage.

Restricted/Excluded items from General Free Allowance - The exemption is not allowed to items included in Annex Ito Baggage Rules, 1998. Items included in Annex I are : (1) fire arms; (2) cartridges of fire arms exceeding 50; (3) cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 Gms; (Alcoholic liquor or wines in excess of two liters (S) Gold or Silver in any form, other than ornaments.

Allowance to professionals returning to India

An Indian passenger who was engaged in his profession abroad for over three months is allowed to import following duty free goods as additional allowance - (a) Used Household Articles upto ₹12,000 (e.g. linen, utensils, tableware, kitchen appliances, an iron etc.) (b) Professional equipment like portable equipments, apparatus and appliances required in such profession, upto ₹20,000. The limit will be increased to ₹40,000, if he was abroad for over 6 months. [This allowance is in addition to General Free Allowance].

This exemption of professional equipment is only for carpenters, plumbers, welders, masons and the like and not for items of common use like cameras, typewriter, cassette-recorder, computers, word processor etc. - Rule 5 of Baggage Rules, 1998 read with Appendix C.

Limited exemption to jewellery

Bringing jewellery duty free on transfer of residence - If the passenger was residing abroad for over one year, jewellery can be imported duty free upto ₹50,000 in case of gentleman passenger and ₹1,00,000 in case of lady passenger. [Appendix D to Baggage Rules, 1998].

Imported goods taken abroad and brought back

A tourist can take imported equipment like camera, cellular phone, note book computers etc. abroad. In such case, he should take 'Export Certificate' with him while going abroad. This will enable him to bring back the said goods without payment of duty on return. It is now provided that frequent travellers can get such certificate in advance. The certificate will be serially numbered with official seal of issuing authority giving details of the product. Such certificate will be valid for one year and can be obtained from any major customs house, international airport or seaport. - CBE&C circular No 66/96-Cus dated 26.12.1996.

Duty payable on balance un-exempted baggage - The baggage (including unaccompanied baggage) is exempt subject to limits mentioned above. The balance quantity is dutiable at rates explained above. Duty payable on Silver and Gold imported as baggage has been separately prescribed.

4.17.5 Concession to persons transferring his residence (TR)

A person who is transferring his residence to India is eligible to bring used personal and household articles to India without duty. The provisions are applicable to all - i.e. foreigners coming for residing in India as well as Indian resident coming after 2 years and who is transferring his residence to India.

Conditions for TR concession - The conditions for TR concession are:

(a) He should have been residing abroad for at least two years. During this period short visits not exceeding 6 months are permissible.

(b) The provision regarding 2 years' stay can be condoned upto 2 months by Assistant Commissioner, if the early return was due to terminal leave or vacation or other special circumstances.

(c) The provision regarding maximum 6 months stay during 2 years can be relaxed by Commissioner in deserving cases.

(d) The passenger should not have availed this concession in preceding three years. (e) Goods in Annexure I and Annexure II are not allowed under this concession.

(e) Goods in Annexure III are fully exempt from customs duty, if within limit of ₹ five lakhs.

(f) Jewellery upto ₹10,000 for male passenger and ₹20,000 for female passenger can be imported free of customs duty. (Rule 8 of Baggage Rules, 1998, read with Appendix F).

Since 'baggage' does not include motor vehicles, liquor and firearms, the exemption is obviously not applicable for those goods.

Firearms cannot be imported as baggage without a license which is required under Arms Act, 1959 - Anirudh Singh Katochi v. U012O11 (266) ELT 321 (SC).

Limit on bringing jewellery duty free - The jewellery allowed to be imported duty free is limited to ₹10,000 for male passenger and ₹20,000 for female passenger. This limit is not applicable if the passenger produces evidence that the jewellery was, in fact, taken out of India by the passenger or his family.

New and unused goods not eligible for TR concession - New and unused goods are not eligible for transfer of residence benefit - Naresh Lokurnal Serai v. CC2OO6 (203) ELT 580 (CESTAT).

General Free Allowance - A passenger can also avail of 'General Free Allowance' as available to other residents, in addition to above. (Rule 8).

Condonation of shortfall in periods - While calculating the aforesaid period of two years (a) short visits to India totalling not more than six months during the period are ignored. This period can be extended by Commissioner of Customs. (b) Minimum stay abroad of two years can be condoned upto two months by Assistant Commissioner if the early return is caused by his availing terminal leave or vacation or by special circumstances.

Personal and Household goods - The exemption is available only for 'personal and household goods' i.e. those required for use of the passenger or running the household.

Goods need not have been owned by the person? - The goods should be in possession of the person before he left for India. Ownership of goods is not the criteria for determining eligibility to TR concession - CCE v. Hameed Kunhipally Hussainar 2005 (187) ELT 502 (CESTAT) [If he is not owner, how goods will be in his possession?].

Concession for transfer of residence

A person transferring his residence to India after stay abroad for two years and who has not availed this concession in preceding three years is eligible for concession upto value of ₹5 lakhs exclusive of value of his personal effects and other household articles. This concession is available on all articles contained in Annex II and Annex III of Baggage Rules, 1998. [As against only ₹ 75,000 in case of Mini TR - inclusive of personal effects and other household articles - available to those who are coming after stay abroad for 365 days out of last two years].

Articles not allowed under TR - Transfer of Residence concession is not available to motor vehicles, vessels, aircrafts, cinematograph films, alcoholic liquor or wines (in excess of two litres), cigarettes (exceeding 200), cigars (exceeding 50), tobacco (exceeding 250 gms), Gold (other than ornaments), Silver (other than ornaments), fire arms and cartridges of fire arms exceeding 50 - Annex I of Baggage.

Allowance for persons returning after one year i.e. Mini TR

A person who was working abroad and is returning to India on termination of work and who was staying abroad for at least 365 days out of previous two years, is eligible to certain concessions. This is termed as 'mini TR' i.e. 'Mini Transfer of Residence'. He is entitled to bring personal effects and household articles upto ₹75,000 duty free [The limit was ₹30,000 upto 28-2-2002]. This allowance is in addition to General Free Allowance. The conditions are (a) These should be in possession of himself or his family and used for at least six months (b) He shall be allowed to avail himself of this exemption only once in three years. (c) Items in Annex I, Annex II or Annex III to Baggage Rules are not allowed under this rule. (d) Goods should be contained in his bona fide baggage.

Items under Annex I are already explained above. Items under Annex II and Annex III are as follows :

Items in Annexure II - (1) Colour/ monochrome TV (2) Digital Video Disc (DVD) player (3) Video Home Theatre system (4) Dish washer (5) Music system (6) Air conditioner (7) Domestic refrigerator above 300 litres or its equivalent (8) deep freezer (9) Microwave oven (10) Video camera or combination of video camera with TV, sound/video recording apparatus (11) word processing machine. (12) Fax machine. (13) Portable photocopying machine (14) Vessels (15) Aircrafts (16) Cinematograph films of 35 mm and above. (17) Gold or Silver in any form, other than ornaments.

Items in Annexure III - (1) VCR/VCP/VTR/VCDP (2) washing machine (3) Electrical/ LPG Cooking range (4) Personal Computer (Desktop Computer) (5) Laptop (Note Book) Computer (6) Domestic Refrigerators of capacity upto 300 litres or its equivalent.

In other words, the exemption of ₹75,000 is illusory as the items a person would like to bring after stay abroad are mostly not exempt. However, duty payable is 30% on items included in Annex II upto value of ₹1,50,000 in case of Mini TR.

Since 'baggage' does not include motor vehicles, liquor and firearms, the exemption is obviously not applicable for those goods.

Concessional Rate if person returning after stay of 365 days - The general rate of customs duty on baggage is reduced to 30% if a person holding Indian passport, returns to India after staying abroad for at least 365 days in last two years. He should be 'working abroad', i.e. mere stay with relatives or others is not enough to avail this concession. The person is eligible for following concession : duty payable is 30% plus education cess of 2% of duty, on CTV, VCR, VCP, cooking range, washing machines, A/C, Refrigerator, dish washers, musical systems, refrigerator, deep freeze, micro-wave oven, video camera, word processing machine and Fax machine.

Concession is available for one unit of these goods per family upto total value of ₹75,000, inclusive of value of other goods imported duty free under rule 5 of Baggage Rules. [Under these rules, household articles excluding those in Annex I and Annex II are permitted to be imported duty free].

This concession is available if goods were in his possession or were purchased at International airport in duty free shop at the time of his arrival but before customs clearance - probably this is to encourage purchases in duty free shops in our international airports. The concession is also available to un-accompanied baggage despatched later within prescribed period. No CVD is payable.

Rupee payment in duty free shops - Goods upto ₹5,000 per passenger per visit can be purchased against rupee payments in duty free shops at international airport.

4.17.6 Concessions to Tourists

Tourists visit India for various purposes and rules have been framed to allow them to bring goods to India.

Who is a Tourist - Tourist means (a) a person who is not normally resident of India (b) who enters India for stay of not more than six months in the course of twelve month period (c) he should come for legitimate non-immigrant purpose such as touring, recreation, sport, health, family reasons, study, religious pilgrimages or business. [Rule 2(iii) of Baggage Rules, 1998].

Thus, Non-Resident Indians who do not hold Indian passports arc also covered in this definition.

Exemption to Baggage of tourists - Following are the exemptions [Appendix E as amended w.e.f. 14-11-2011]-

(a) Used personal effects of tourist are allowed duty free. Personal effects should be for personal use of the tourist and these goods, other than consumed, should be re-exported when tourist leaves India for foreign destination.

(b) Tourists of Indian origin (even if holding foreign passport) other than those coming from Pakistan by land route as specified in Annexure IV of Baggage Rules, are entitled to General Free Allowance in addition to 'personal effects'.

(c) Foreign Tourists (including tourist of Nepalese or Bhutanese origin, but other than tourists of foreign origin) are permitted to bring articles upto ₹8,000 (₹6,000 if they are coming from Pakistan by land route) for making gifts and travel souvenir. However, articles in Annexure I (cigars, liquor, gold, silver, arms) will not be allowed duty free, Duty has to be paid for gifts over the value of ₹8,000/ 6,000.

(d) Tourists of Pakistani origin or foreign tourists coming from Pakistan (by land route or by air), foreign tourists coming by land route from Pakistan, tourists of Indian origin coming from Pakistan by land route as specified in Annexure IV of Baggage Rules, are entitled to bring used personal effects and articles upto value of ₹6,000 for personal use or as gifts and travel souvenir.

Tourist include tourists of Nepalese origin coming from Nepal or of Bhutanese origin coming from Bhutan - Earlier, tourist of Nepalese origin coming from Nepal and Bhutanese origin coming from Bhutan were not entitled to any exemption. Now, w.e.f. 14-11-2011, they will be eligible for exemption available to any other tourist of foreign origin.

Articles for use of passenger always exempt - As per section 79(I)(b) of Customs Act, articles of baggage for use of the passenger or his family are exempt from customs duty. Hence they will be exempt even if the tourist is of Pakistani origin.

Persona/Effects- The term 'travel souvenirs' are not defined. The term 'Personal effects' as specified in MF(DR) circular dated 24-9-1998 has been explained earlier in this chapter.

Travel Souvenirs - The term 'travel souvenirs' has neither been defined nor explained in the Baggage Rules.

Import by foreign experts - Foreign experts assigned to India under various UN schemes etc. are permitted to bring various articles, including VCR, video camera and Air conditioners. These are exempt from customs duty on obtaining certificate of undertaking from the expert. Duty will be paid by concerned ministry/department- CBE&C circular No. 70/95-Cus dated 20-6-1995.

Foreign nationals can make payment in Rs or foreign exchange in India – Foreign Nationals, including Persons of Indian Origin, while in India, can make payment for charges towards airline/train tickets, hotels, hospitals etc. either in Indian Rupees or in equivalent foreign exchange.

4.17.7 Other provisions of Baggage

Other provisions regarding baggage are explained below:

Crew member of vessel/aircraft - Crew member of vessel/aircraft can bring petty gifts like chocolates, cheese, cosmetics etc. upto ₹1,500 while returning from foreign journey, for their personal use or family use [The limit was ₹600 upto 1-3-2013] - Rule 10 of Baggage Rules.

Indian Government officers posted abroad - Baggage Rules, 1994 are fully applicable to

Indian diplomatic officers and their families as well as Government of India officers posted abroad, when they return to India. Some concessions were granted to them vide instructions dated 16-4-1951. These concessions have now been withdrawn. In specific cases, ad hoc exemption on merits may be granted - CBE & C Circular No. 4/95-Cus dated 12-1-1995.

Export of Baggage

There are very few restrictions in taking out personal baggage. Prohibited goods cannot be taken out as baggage. Foreign and Indian currency can be taken out within the limits prescribed by RBI under FEMA.

Goods even in commercial quantities can be taken out as accompanied or un-accompanied baggage, if the passenger is able to establish source of funds for buying these goods as foreign exchange brought by him on his arrival in India. - CBE&C circular No. 17/95-Cus dated 1-3-1995.

If a tourist purchases goods in free foreign currency and takes it out as tourist baggage, duty drawback and other export benefits are available. The exporter must submit relevant encashment document of foreign currency, shipping bill etc. - CBE&C circular No. 36/98-Cus dated 20-5-1998.

Unaccompanied Baggage

Baggage' includes un-accompanied baggage brought before or after arrival of passenger within the prescribed period. Bona fide unaccompanied luggage is also allowed under above rules and subject to aforesaid restrictions, if it was in his possession abroad. The baggage may be sent by him earlier or after his departure from abroad. The conditions are (A) If despatched before he starts from abroad: Un-accompanied baggage may arrive upto two months prior to his arrival. This limit can be increased, if passenger could not start due to genuine reasons like sudden illness or natural calamities or disturbed conditions or any other genuine reason to the satisfaction of Assistant Commissioner. (B) Goods despatched after he starts journey: The condition is that the goods should be in his possession when he was abroad and despatched within one month of arrival of passenger in India. This limit can be increased by Assistant Commissioner of Customs. (Rule 9 of Baggage Rules,1998).

General Free Allowance is not allowed for un-accompanied baggage. In other cases, concessions available to baggage under Baggage Rules are also available for 'unaccompanied baggage'.

Detention and Transshipment of baggage

It may happen that goods brought by a tourist may be prohibited in India. In such case, if he makes true declaration in respect of those goods, the goods can be temporarily detained by customs authorities. These will be returned to him when he leaves India. If he is not able to personally take the goods, he can authorise any other passenger leaving India to collect the goods. Alternately, the goods can also be returned as cargo consigned in his name - [section 80 of Customs Act].

Transshipment of baggage - It may happen that the un-accompanied baggage lands at once customs station but the passenger may like to clear the goods from another customs station. In such cases, such baggage may be permitted to be transported by air or passenger train, under Baggage (Transit to Customs Stations) Regulations, 1967. The baggage will be under supervision of officer of customs. The passenger will have make all arrangements for transport and pay for supervision charges. This facility is available only at Mumbai, Delhi, Kolkata, Chennai, Bangalore, Trivendrum, Hyderabad, Cochin, Ahmedabad, Goa, Calicut, Coimbatore, Lucknow or Amritsar. The baggage can come by air, passenger train or trucks.

Levy of fees on detained or seized baggage - If customs authorities decide to detain the baggage for inspection/payment of duty/clarification etc.; the same will be kept in store in custody of customs. In such cases, the passenger will have to pay fees as prescribed by Commissioner of Customs. The fees will be prescribed depending on nature of articles contained in baggage and expenses for transportation of goods from landing place to storage place and other expenditure incurred.

Clearance of passenger's baggage for export - Baggage for export also should be allowed after clearance from Customs Officer. The passenger should pay export duty, where leviable and produce export license, if applicable.

No demurrage on baggage - In International Airport Authority of India v. Ashok Dhawan 1999(106) ELT 16 (SC), it has been held that 'baggage' is not 'cargo' and hence no demurrage can be levied upon baggage. Same principle applies in case of transshipment also.

Import of cars

Import of cars in bulk is permitted, but there are restrictions in FTP. However, import of car on individual basis is permitted in following cases: (a) Import of cars by persons returning to India. They should have been staying abroad for continuous period of two years. However, short visits to India during these two years is permitted. This facility of import of cars is permitted only to persons who are returning to India for permanent settlement. - CBE&C circular No. 96/95/CUS. VI dated 29-8-1995. (b) Foreign privileged persons (like diplomats etc.) can import cars. If they want to sell in India, such sale must be only to State Trading Corporation (STC). If the sale is within three years, STC has to pay customs duty on the car. (c) Air conditioned cars can be imported for tourism development. Authorisation /certificate from Director General, Tourism will be deemed to be import licence for this purpose. There is no condition regarding ceiling on value. The import duty can be paid in Indian rupees.

PRACTICAL PROBLEMS

Example 27: Mrs. & Mr. Menon visited Germany and brought following goods while returning to India after 6 days stay abroad on 8th April 2012.

(i) Their personal effects like clothes, etc., valued at ₹ 35,000.

(ii) A personal computer bought for ₹ 36,000.

(iii) A laptop computer bought for ₹ 95,000.

(iv) Two liters of liquor bought for ₹ 1,600.

(v) A new camera bought for ₹ 37,400.

What is the amount of customs duty payable?

Answer:

Their personal effects like clothes, etc., valued at ₹ 35,000.	exempt
A personal computer bought for ₹ 36,000.	36,000
A laptop computer bought for ₹ 95,000.	exempt
Two liters of liquor bought for ₹ 1,600.	1,600
A new camera bought for ₹ 37,400.	37,400
Total	75,000
Less: General Free Allowance ₹ 35,000 + ₹ 35,000	70,000
Baggage taxable	5,000

Customs Duty is ₹ 1,803 (i.e. 5,000 x 36.05%) payable by Mrs. & Mr. Menon.

Example 28: After visiting USA, Mrs. & Mr. Rao brought to India a laptop computer valued at ₹ 80,000 personal effects valued at ₹ 90,000 and a personal computer for ₹ 52,000. What is the customs Duty payable?

Answer: Duty payable on baggage = ₹ (52,000–35,000) x 36.05% = ₹ 6,129

Example 29: Mr. Ram an Indian resident, aged 45 years, returned to India after visiting USA on 10/05/201 2. He had gone to USA on 1/05/2012. On his way back to India he brought following goods with him –

His personal effects like clothes etc. valued at ₹ 90,000:

2 liter of Wine worth ₹ 1,000;

A video camera worth ₹ 21,000;

A watch worth ₹ 23,000.

Find the customs duty payable by Mr. Ram

Answer :

2ltrs of wine	= ₹ 1,000
Video camera	= ₹ 21,000
Watch	= ₹ 23,000
Total	= ₹ 45,000
Less: GFA	= ₹ 35,000
Net value	= ₹ 10,000

Customs duty @ 36.05% on ₹ 10,000 = ₹ 3,605

Example 30: Mr. Venkatesh, an IT professional and a person of Indian origin, is residing in U.S.A. for the last 14 months. He wishes to bring a used microwave oven (costing approximately ₹ 11,200 and weighing 15 kg) with him during his visit to India. He purchased the oven in U.S.A. 6 months back and he has been using that oven for his personal use in his kitchen. He is not aware of Indian customs rules. Could you please provide him some advice in this regard?

Answer :

Free allowances to professionals in respect of their professional equipments upto ₹ 40,000 if Indian passenger returning to India after at least 6 months and in case of house hold articles it is upto ₹ 12,000.

In the given example Amarnath brings the used household articles worth ₹ 11,200 which is free of duty. As per the rule 5 of the Baggage Rules, 1998 he is not liable to pay any duty.

Example 31: Mr. C is a Cost Accountant, Indian resident worked in USA for 4 months, brought with him the following items on his return to India.

Personal effects like clothes etc. of ₹ 5,50,000;

Jewellery of ₹ 25,000

A Camera for ₹ 50,000

Household articles of ₹ 30,000

Professional equipments like electronic diary, calculator and other items worth ₹ 40,000

A Laptop worth for ₹ 3,00,000

Compute the duty payable by Mr. C

Answer:		**Amount in ₹**
Jewellery	=	25,000
Camera	=	50,000
Household articles	=	30,000
Professional equipments	=	40,000
Subtotal	=	1,45,000
Less: GFA 35,000 + 12,000+20,000	=	67,000
Balance subject to duty	=	78,000

Basic Customs Duty ₹ 28,119 (i.e. ₹ 78,000 x 36.05%)

Example 32: Mr. Kishore is a Chartered Accountant (aged 40 years) an Indian resident goes to Nepal on tour. He purchased one computer for ₹ 50,000, one laptop computer for ₹ 1,50,000 and hair dryer of ₹2,000 in a duty free shop in Nepal and brings the same to India. What is the duty payable?

(i) If he returns on 3rd day by air
(ii) If he returns on 3rd day by land route
(iii) If he returns on 15th day by air
(iv) If he returns on 15th day by land route

Answer :

(i) If he returns on 3rd day by air:

Value of Computer and hair dryer is taxable @36.05% One laptop is exempt from duty

General Free Allowance not allowed

Customs Duty = ₹ 18,746 (i.e. 52,000 x 36.05%)

(ii) If he returns on 3rd day by land route:

Value of Computer and hair dryer is taxable @36.05% One laptop is exempt from duty

General Free Allowance not allowed

Customs Duty = ₹ 18,746 (i.e. 52,000 x 36.05%)

(iii) If he returns on 15th day by air (i.e. after 3 days of stay):

Value of Computer and hair dryer is taxable @36.05% One laptop is exempt from duty

General Free Allowance ₹ 6,000 is allowed

Customs Duty = ₹ 16,583 [i.e. (52,000 –6,000) x 36.05%]

(iv) If he returns on 15th day by land route:

Value of Computer and hair dryer is taxable @36.05% One laptop is exempt from duty

General Free Allowance not allowed

Customs Duty = ₹ 18,746 (i.e. 52,000 x 36.05%)

4.17.7 Import and Export through Courier – Postal Articles

As per sections 82 to 84 of the Customs Act, 1962, goods can be cleared by post. Any label or declaration accompanying the goods showing the description, quantity and value thereof, shall be treated as "an entry for import" under the Customs Act.

The rate of duty and tariff value applicable to goods imported by post shall be the rate and valuation in force on the date on which the postal authorities present to the proper officer a list containing the particulars of such goods for the purpose of assessment of duty.

The procedure for clearance:

(i) Post parcels are allowed to pass from port/airport to Foreign Parcel Department of Government Post Offices without payment of customs duty.

(ii) The Postmaster hands over to Principal Appraiser of Customs the memo showing Total number of parcels from each country of origin,

- Parcel bills or senders 'declaration,
- Customs declaration and dispatch notes, and
- Other information that may be required.

The mail bags are opened and scrutinized by Postmaster under supervision of Principal Postal Appraiser of Customs.

(iii) Packets suspected of containing dutiable goods are separated and presented to Customs Appraiser with letter mail bill and assessment memos.

(iv) The Customs Appraiser marks the parcels which are required to be detained if— necessary particulars are not available, or misdeclaration or undervaluation is suspected or goods are prohibited for import.

Appraiser has the power to examine any parcel. After inspection, the parcels are sealed with a distinctive seal. Any misdeclaration or undervaluation is noted or goods are prohibited goods for imports these be detained and the same intimated to Commissioner of Customs.

If everything is in order after verification, goods will be handed over to Post Master, who will hand over the same to the addressee on receipt of customs duty.

4.17.8 Import through post

i. Label/declaration on postal article is treated as 'Entry'. Separate Bill of Entry is not required.

ii. Postal articles are sent to Foreign parcel Department of Post Office. The list is handed over to Principal Appraiser of Customs.

iii. He will inspect mail. Packets suspected of dutiable articles will be opened and examined by him. He will assess the goods and then seal the parcel.

iv. Goods will be handed by postmaster to addressee only on receipt of customs duty payable on the goods.

v. Gifts upto ₹ 10,000 are free. Post parcel is exempt if customs duty is upto ₹ 100.

4.17.9 Import of Samples

In the International trade it is considered often necessary that samples of the goods manufactured in one country be sent to another country for being shown or demonstrated for Customer appreciation. There are duty free imports of genuine commercial samples into the country for smooth flow of trade.

The commercial samples are basically specimens of goods that may be imported by the traders or representatives of manufacturers. However, goods which are prohibited under Foreign Trade (Development and Regulation) Act, 1992 are not allowed to be imported as samples (i.e. wild animals, wild birds and parts of wild animals, arms and ammunitions and so on).

Samples can be imported by the traders, industry, individuals, research institutes and so on. These samples can also be brought by the persons as part of their personal baggage or through port or in courier.

4.18 DRAWBACK

4.18.1 Basic concept

In ' duty drawback' , the excise duty and customs duty paid on inputs and service tax paid on input services is given back to the exporter of finished product by way of 'duty drawback'.

It may be noted that duty drawback under section 75 is granted when imported materials are used in the manufacture of goods which are then exported, while duty drawback under section 74 is applicable when imported goods are re-exported as it is, and article is easily identifiable.

Duty drawback rates are of following types - (a) All Industry Rate (b) Brand Rate and (c) Special Brand Rate. Duty drawback rates can be fixed with retrospective effect [rule 5(2) of Drawback Rules, 1995].

Comparison of the provision of section 74 and 75 is as follows:

Drawback allowable on re-export of duty paid goods – (Sec. 74)	**Drawback on material used in the manufacture of exported goods (sec. 75)**
(i) Drawback, in relation to any goods Exported out of India, means refund of duty paid on importation of such goods in terms of section 74. Thus, drawback is allowed only if import duties of customs.	"Drawback" in relation to any goods manufactured in India and exported, means the rebate of duty or fact, as the case may be, chargeable on cay imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods.
(ii) The identity of the goods exported should be established as the one, which was imported on payment of duty.	The goods exported under this section one different from the inputs as the inputs are manufactured, processed or any operations are carried on then before their export.
(iii) Drawback under this section is available on all goods (Identification is the only criterion)	Drawback under this section is available only on notified goods.
(iv) The exported goods should have been imported and customs duty by paid thereon.	The goods to be exported may be manufactured or processed from imported or indigenous inputs or by utilizing input services.

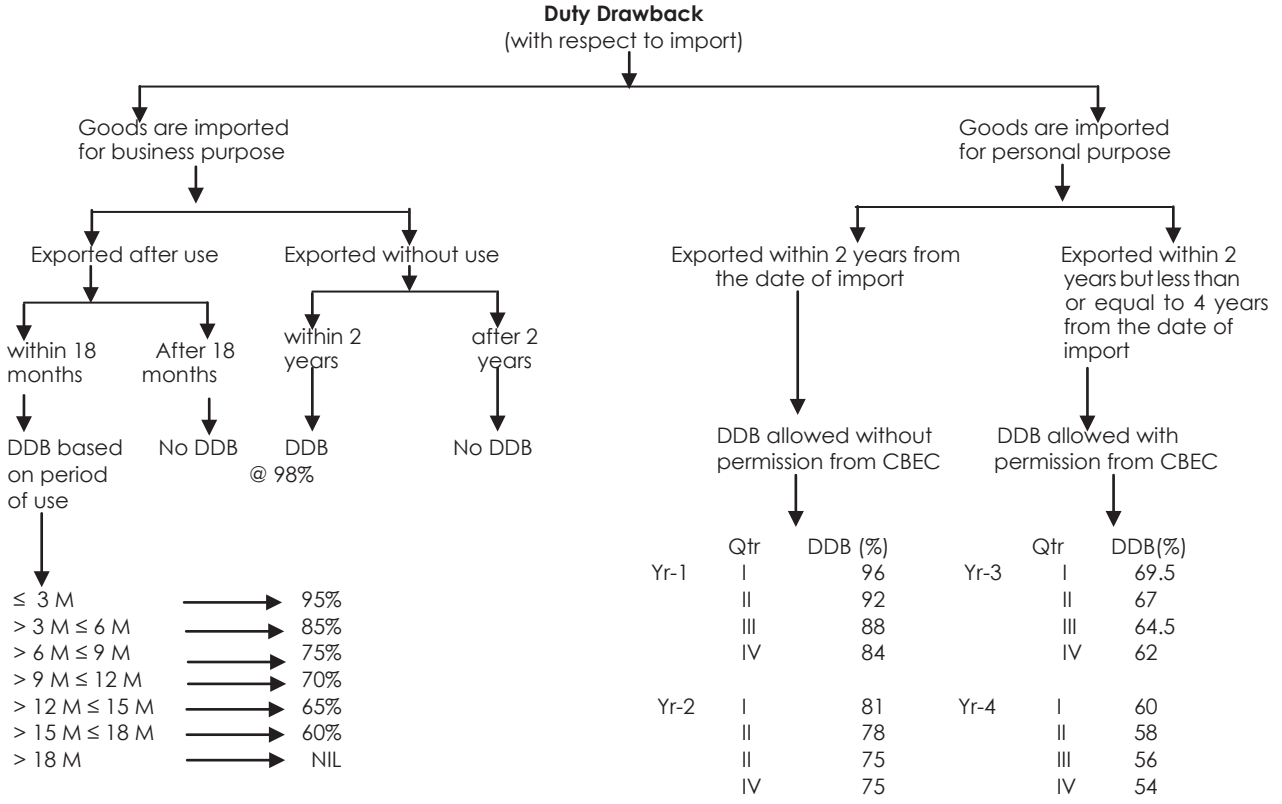
(v) The rate of drawback is 98% in case the goods are exported without use. The rate of drawback on goods taken into use is separately notified depending upon the period of use, depreciation in value and other relevant factors.	Rate per unit of final article to be exported is fixed by taking into account Mode of manufacture Input-output ratio Standardization of the products etc.
(vi) The goods should be exported within two years from the date of payment of duty or such extended time as the board may allow.	No such restrictions.
(vii) There is no criterion of minimum value addition, which is to be fulfilled before export for claim of drawback.	It has been specifically provided that there should not be negative value addition and in case where minimum value addition is specified the same should be achieved for claim of drawback.
(viii) No provision in this behalf	The sale-proceeds in respect of such goods on which the drawback has been allowed, have to be received by the exporter or by any person on his behalf with the period as specified in the FEMA, 1999. In absence of this, such drawback shall be deemed never to have been allowed and procedure for recovery or adjustment of the drawback amount will be initiated
(ix) The drawbacks is governed by the Re-export of imported goods	The drawback, in this case, is governed by the customs central excise duties and service tax drawback Rules, 1995. The rules cover customs duty, central excise duty and service tax.

4.18.2 Duty Drawback on Re-Export – Section 74 of Customs Act, 1962 provide for drawback if the goods are re-exported as such or after use. This may happen in case like import for exhibitions, goods rejected or wrong shipment etc. The re-exported goods should be identifiable as having been imported and should be re-exported within two years from date of payment of duty when they were imported. This period (of two years) can be extended by CBE&C on sufficient cause being shown. These should be declared and inspected by Customs Officer. Original shipping bill under which the goods were imported should be produced. The goods can be exported as cargo by air or sea, or as baggage or by post. After inspection, export and submission of application with full details, 98% of the customs duty paid while importing the goods is repaid as drawback. @98% of import duty is allowed as Duty Drawback if re-exported without use.

Duty draw back allowed based on period of usage:

Period	% of DDB on import duty
≤6M	85%
> 6 M ≤ 1 2 M	70%
> 1 2 M ≤ 1 8 M	60%
> 1 8 M ≤ 2 4 M	50%
>24M≤ 30M	40%
>30M≤36M	30%
>36M	NIL

Summary of duty drawback on re-export has been explained as follows



All Industry Drawback Rates – All Industry Drawback rates are fixed by Directorate of Drawback, Dept. of Revenue, Ministry of Finance, Govt. of India, Jeevan Deep, Parliament Street, New Delhi-110001 . The rates are periodically revised-normally on 1st June every year. The All Industry Drawback Rate is fixed under rule 3 of Drawback Rules by considering average quantity and value of each class of inputs imported or manufactured in India.

Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

Brand Rate of Duty Drawback – It is possible to fix All Industry Rate only for some standard products. It cannot be fixed for special type of products. In such cases, *brand rate* is fixed under rule 6. The manufacturer has to submit application with all details to Commissioner, Central Excise. Such application must be made within 60 days of export.

Upper limit of Drawback Rate – Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

Special Brand Rate of duty drawback

All Industry rate is fixed on average basis. Thus, a particular manufacturer or exporter may find that the actual excise/customs duty paid on inputs or input services is higher than All Industry Rate fixed for his product. In such case, he can apply under rule 7 of Drawback Rules for fixation of Special Brand Rate, within 30 days from export.

The conditions of eligibility are (a) the All Industry Rate fixed should be less than 80% of the duties paid by him (b) rate should not be less than 1% of FOB value of product except when amount of drawback per shipment is more than ₹ 500 (c) export value is not less than the value of imported material used in them - i.e. there should not be *'negative value addition'*.

Practical Problems Related to Customs Duty

Example 33: Calculate the amount of duty drawback allowable under section 74 of the Customs Act, 1962 in following cases:

(a) Salman imported a motor car for his personal use and paid ₹ 5,00,000 as import duty. The car is re-exported after 6 months and 20 days.

(b) Nisha imported wearing apparel and paid ₹ 50,000 as import duty. As she did not like the apparel, these are re-exported after 20 days.

(c) Super Tech Ltd. imported 10 computer systems paying customs duty of ₹ 50 lakh. Due to some technical problems, the computer systems were returned to foreign supplier after 2 months without using them at all.

Answer :

(a) The amount of duty drawback is ₹ 4,40,000 (i.e. ₹ 5,00,000 x 88%), since these goods used in India.

(b) Duty drawback is not allowed on wearing apparel.

(c) Duty drawback is ₹ 49,00,000 *(i.e.* ₹ 50,00,000 x 98%), since these goods are re-exported without being used.

Example 34: Computation of duty drawback: 'A' exported a consignment under drawback claim consisting of the following items—

Particulars	Chapter Heading	FOB value (₹)	Drawback rate
200 pieces of pressure stores mainly made of beans @₹ 80/piece	74.04	16,000	4% of FOB
200 Kgs. Brass utensils @₹ 200 per Kg.	74.13	40,000	₹ 24/Kg.
200 Kg. Artware of brass @₹ 300 per Kg.	74.22	60,000	17.50% of FOB subject to a maximum of₹ 38 per Kg.

On examination in docks, weight of brass Artware was found to be 190 Kgs. and was recorded on shipping bill. Compute the drawback on each item and total drawback admissible to the party.

Answer:

The drawback on each item and total drawback admissible to the party shall be-

Particulars	FOB value (₹)	Drawback rate	Drawback Amount (₹)
200 pcs, pressure stoves made		4% of FOB	640
of brass	16,000	₹ 24 per Kg.	4,800
200 Kgs. Brass utensils	40,000	1 7.50% of FOB subject to	7,220
200 kgs. Artware of brass, whose	60,000	maximum of ₹ 38 per Kg.	
actual weight was 190 Kgs. only.		(₹ 9,975 or ₹ 7,220	
		whichever is less)	
Total Drawback admissible (in ₹)			12,660

Example 35: X Ltd has exported following goods Product P, FOB value worth ₹ 1,00,000 and the rate of duty drawback on such export of goods is 0.75%. FOB value of product 'Q' worth ₹ 10,000 and the rate of duty drawback on such export of goods is 1%. Will X Ltd be entitled to any duty drawback?

Answer:

Duty drawback on product P allowed is ₹ 750 *(i.e.* 1,00,000 x 0.75%), since amount is more than ₹ 500.

Duty drawback on product Q is allowed, because the amount of duty drawback ₹ 100 (which is more than ₹ 50).

Example 36: Y Ltd has been exported following goods to USA. Discuss whether any duty drawback is admissible under section 75 of the Customs Act, 1962.]

Product	FOB Value of Exported goods (₹)	Market Price of goods (₹)	Duty drawback rate
A	2,50,000	1,80,000	30% of FOB
B	1,00,000	50,000	0.75% of FOB
C	8,00,000	8,50,000	3.50% of FOB
D	2,000	2,100	1.50% of FOB

Note: Imported value of product C is ₹ 9,50,000.

Answer :

Duty draw back amount for all the products are as follows

Product A:

Drawback amount = 2,50,000 x 30% = ₹ 75,000 or ₹ 1,80,000 x 1/3 = ₹ 60,000

Allowable duty draw back does not exceed 1/3 of the market value.

Hence, the amount of duty drawback allowed is ₹ 60,000

Product B:

Drawback amount allowed is ₹ 750 (i.e. ₹ 1,00,000 x .0.75%). Since, the amount is more than ₹ 500 even though the rate is less than 1%.

Product C:

No duty drawback is allowed, since the value of export is less than the value of import (i.e. negative sale)
Product D

No duty drawback is allowed, since the duty drawback amount is ₹ 30 (which is less than ₹ 50). Though rate of duty drawback is more than 1%, no duty drawback is allowed.

4.19 OTHER PROVISIONS IN CUSTOMS

4.19.1 Person who had received any Show Cause Notice in Last Three Financial Years is Ineligible –

In order to ensure that scope of the scheme remains limited (and the scheme fails), it is provided that no case should be pending against them. Even show cause notice invoking penal provisions should not have been issued against them is last three financial years. Such importers can be probably counted on fingers. If this condition is insisted upon, the scheme is stillborn and will be a non-starter.

4.19.2 Application for Getting Accreditation

Importers desirous of availing the facility of 'Accredited Client' has to make application for registration in form given in MF (DR) circular No. 42/2005-Cus dated 24-11-2005. Application has to be accompanied by a CA certificate that the accounting system of applicant is as per accounting standards prescribed by ICAI.

4.19.3 Decision regarding ACP status within 30 days

In case of status holders, Customs will communicate decision on conferring ACP status (Accredited Client under Risk Management System of customs clearance, within 30 days from receipt of application by customs.

4.19.4 Risk Management Division in Systems Directorate

A risk management division has been created in Systems Directorate. Risk Management Committees will be constituted at National level and Local level –MF(DR) circular No. 23/2007-Cus dated 28-6-2007.

4.20 PROJECTS IMPORTS

4.20.1 Basic Concept

Project imports status is being granted to the green houses set up for protected cultivation of horticulture and floriculture product. As such, these projects would attract concessional rate of baste customs duty of 5%.

4.20.2 Salient Features of Project Imports

(i) 'Project Imports' is an Indian innovation to facilitate setting up of and expansion of industrial projects. Normally, imported goods are classified separately under different tariff headings and assessed to applicable Customs duty, but as a variety of goods are imported for setting up an industrial project their separate classification and valuation for assessment to duty becomes cumbersome. Further, the suppliers of a contracted project, do not value each and every item or parts of machinery which are supplied in stages. Hence, ascertaining values for different items delays assessment leading to demurrage and time and cost overruns for the project. Therefore, to facilitate smooth and quick assessment by a simplified process of classification and valuation, the goods imported under Project Import Scheme are placed under a single Tariff Heading 9801 in the Customs Tariff Act, 1975. The Central Government has formulated the Project import Regulation, 1986 prescribing the procedure for effecting imports under this scheme.

(ii) The Project Import Scheme seeks to achieve the objective of simplifying the assessment in respect of import of capital goods and related items required for setting up of a project by classifying all goods under heading 9801 of the Customs Tariff Act, 1975 and prescribing a uniform Customs duty rate for them even though other headings may cover these goods more specifically.

(iii) The different projects to which heading 9801 applies are; irrigation project, power project, mining project, oil/mineral exploration projects, etc. Such an assessment is also available for an indus1nal plants used in the process of manufacture of a commodity. The Centra1 Government can also notify projects in public interest keeping in view the economic development of the country to which this facility will apply. Thus, a number of notifications have been issued notifying a large number of projects for assessment under Tariff Heading 9801. However, this benefit is not available to hotels, hospitals, photographic studios. Photographic film processing laboratories, photocopying studio, laundries, garages and workshops. This benefit is also not available to a single or composite machine.

(iv) Goods that can be imported under Project Import Scheme Me machinery, prime movers, instruments, apparatus, appliances, control gear, transmission equipment, auxiliary equipment, equipment required for research and development purposes, equipment for testing and quality control, components, raw materials for the manufacture of these items, etc. In addition, raw material, spare parts, semi-finished material, consumables up to 10%, of the assessable value or goods can also be imported.

(v) The purposes for which such goods can be imported under the Project Import Scheme are for 'Initial setting up' or for 'Substantial expansion' of a unit of the project. The 'unit' is any self contained portion of the project having an independent function in the project. A project would fall under the category of 'substantial expansion' if the installed capacity of the unit is increased by not less than 25%. as per the Project Import Regulations.

4.20.3 Registration of Contracts

(i) In terms of Regulation 4 of the Project Import Reguh1tions. 1986 (PIR) the basic requirement for availing the benefit of assessment under Tariff Heading No. 98.01 is that the importer should have entered into one or more contracts with the suppliers of the goods for setting up a project. Such contracts should be registered prior to clearance in the Customs House through which the goods are expected to be Imported The importer shall apply for such registration in writing to the proper officer of Customs.

(ii) Regulation 5 provides in the manner of registering contracts as follows:-

(a) Before any order is made by the proper officer of customs permitting the clearance of the goods for home consumption;

(b) In the case of goods cleared for home consumption without payment of duty subject to re-export in respect of fairs, exhibitions, demonstrations, seminars, congress and conferences, duly sponsored or approved by the Government of India or Trade Fair Authority of India, as the case may be, before the date of payment of duty.

(iii) To expedite registration, the importers are advised to submit the following documents along with the application for registration:-

(a) Original deed of contract together with true copy thereof.

(b) Industrial License and letter of intent, SSI Certificate granted by the appropriate authority with a copy thereof.

(c) Original Import license, if any, with a list of items showing the dimensions, specifications, quantity, quality, value of each item duly attested by the Licensing Authority and a copy thereof.

(d) Recommendatory letter for duty concession from the concerned Sponsoring Authority, showing the description, quantity, specification, quality, dimension of each item and indicating whether the recommendatory letter is for initial set up or substantial expansion, giving the installed capacity and proposed addition thereto.

(e) Continuity Bond with Cash Security Deposit equivalent to the 2% of CIF value of contract sought to be registered subject to the maximum of ₹ 50,00,000/- and the balance amount by Bank Guarantee backed by an undertaking to renew the same till the finalisation of the contract. The said continuity bond should be made out for an amount equal to the CIF value of the contract sought to be registered.

(f) Process flow chart, plant layout, drawings showing the arrangement of imported machines along with an attested copy of the Project Report submitted to the Sponsoring authorities, Financial Institution, etc.

(g) Write up, drawings, catalogues and literature of the items under import.

(h) Two attested copies of foreign collaboration agreement, technical agreement, know-how, basic/detailed engineering agreement, equipment supply agreement, service agreement, or any other agreement with foreign collaborators/suppliers/persons including the details of payment actually made or to be made.

(i) Such other particulars, as may be considered necessary by proper officer for the purpose of assessment under Heading No. 9801.

(iv) After satisfying that goods are eligible for project imports benefit and importer has submitted all the required documents, the contract is registered by the Custom House and as a token of registration the provisional duty bond is accepted by the Assistant/ Deputy Commissioner of Customs, Project Import Group. The details of the contracts are entered in the register kept for the purpose and a Project Contract Registration Number is assigned and communicated to the importer. The importer is required to refer to this number in all subsequent correspondence.

4.20.4 Clearance of Goods after Registrations

On every Bill of Entry filed for clearance of goods under the Project Import Scheme, the importer I CHA is required to indicate the Project Contract Registration Number allotted to it. After noting, the Bill of Entry is sent to the Project import Group, which is required to check the description, value and quantity of the goods imported vis-a-vis the description, value and quantity registered. In case these particulars are found in order, the Bill of Entry is assessed provisionally and handed over to the importer or his agent for payment of duty. The Project Import Group keeps a note of the description of the goods and their value in the Project Contract Register and in the file maintained in the Group for each project.

4.20.5 Finalisation of Contract

(i) Under Regulation 7 of the PIR, 1986 the importer is required to submit, within three months from the date of clearance of the last consignment or within such extended time as the proper officer may allow, the following documents for the purpose of finalisation of the assessment:-

   (a) A reconciliation statement i.e. a statement showing the description, quantity and value of goods imported along with a certificate from a registered Chartered Engineer certifying the installation of each of the imported items of machinery;

   (b) Copies of the Bills of Entry, invoices, and final payment certificate. The final payment certificate is insisted upon only in cases where the contract provides that the amount of the transaction will be finally settled after completion of the supplies.

(ii) To ensure that the imported goods have actually been used for the projects for which these were imported, plant site verification may be done in cases where value of the project contract exceeds ₹ 1 crore. In other cases plant site verification is normally done selectively.

(iii) In the normal course, after submission of the reconciliation statement and other documents by the importers, the provisional assessments are finalized within a period of three months where plant site verification is not required and within six months where plant site verification is required. In cases where a demand has been issued and confirmed on such finalization and importer has not paid the duly demanded, steps are taken as per law to realise the amount.

Benefit available in the absence of Restrictions of Registration before Warehousing:

Registration of contracts before an order is made permitting clearance for home consumption or before the deposit in warehouse to avail benefit of concessional rate of duty. Goods imported were warehoused awaiting registration cleared for home consumption only after registration. Restrictions of registration before warehousing being absent in present Regulations benefit is available. Regulations 4 and 5 of Project Import Regulations, 1986. [Para's 2, 3, 4)-Bharat Earth Movers Limited u. Commissioner of Customs, Mysore 2006 (201) ELT 60 (Tri.-Bang)

Project Imports benefit not to be denied merely because goods cleared before Registration of contract. Project Imports benefit available to expansion of computer software plant.-Collector v. DPS India (P) Ltd. 1997 (92) ELT A130 (SC)

No Replacement Imports form part of the Original Import:

Contract covering all the imports registered, all the formalities under the Project Imports Regulations fulfilled - Appellants submitted certain reasons for not getting free replacements from original supplier - Secretary to Government of Kerala, sponsoring authority of the project, issued the essentiality certificate for the replacements stating that items imported are entitled for concessional duty under Project Import

Regulations- Lower authorities' reasoning that since replacements are not free, therefore, project import benefit cannot be given has no legal basis - Damaged parts having been exported and no indication that Project Import Regulations have been misused by appellants - Appellants entitled for benefit of project import - Regulations 4, 5, 6 of Project Import Regulations, 1986. [Para 7)-'--BSES Kerala Power Limited v. Commissioner of Customs, Cochin 2006 (196) ELT 246 (Tri.-Bang)

Import of spares be considered under Project Imports:

Original assessment claimed on merits under respective headings - Assessee entitled to claim assessment as project import under Heading 98.01 of Customs Tariff when assessment is reopened- Import of spares to be considered under Project Imports.-Tata Hydro Electric Power Supply Co. Ltd. v. C.C., Mumbai 1999 (114) ELT 171 (Tri.-Bom)

Exemption from Customs duty under other notifications not deniable to Project Imports:

Exemption from Customs duty under other notifications is not deniable to Project Imports - Horological machinery imported without specifying the Tariff Heading but treated as Project Import under Chapter 98 - Notification dated 28-2-1985, exempts Horological machinery from duty in excess of 10% without specifying the Tariff Heading - HELD: Horological machines eligible to the benefit of notification dated 28-2-1985 even if cleared under Heading 98.01 of Customs Tariff since project import notification clearly specifies that exemption under other notifications will not be effected by it and moreover the exemption notification, dated 28-2-1985 did not specify the Heading for the goods exempted under it. -Abrol Watches Put. Ltd. u. Collector of Customs, Bombay 1997 (092) ELT 311 (SC)

No industrial license is necessary from the DGTD before the benefit of Heading 84.66 could be given to an importer:

There is nothing in the Project Imports (Registration of Contract) Regulations, 1965 [sub-regulations 3(a) and 3(c)] to indicate that there must be an industrial license necessarily from the DGTD before the benefit of Heading 84.66 could be given to an importer.-Collector of Customs u. Kodagu Coffee Growers Co-Op. Society Ltd. 1992 (61) ELT 300 (Tri.-Del)- This case was Approved in 1997 (94) ELT 476 (SC)

Project Import Regulations cannot be held as excessive delegated legislation to declare them invalid.

Project Imports Regulations, 1986 defined "industrial plant" so as to exclude service establishments like photographic studios from project import benefit. Note (2) to Chapter 98 of Customs Tariff Act, 1975 does not amount to excessive delegation - Section 157 of Customs Act, 1962. "We are, therefore, of the considered opinion that Chapter Note (2) cannot be faulted as an instance of excessive delegation of essential legislative function nor can the Project Imports Regulations be faulted on the ground of travelling beyond the purview of the statute." [1967 (3) S.C.R. 557, 1979 (1) SCR 845 and 1981 (2) SCR 742 followed].

Project Imports Regulations, 1986 are relatable not only to Section 157 of Customs Act, 1962 but also to express power conferred by Note (2) to Chapter 98 of Customs Tariff Act, 1975. Any alleged practice to the contrary is irrelevant. - Subhash Photographics v. Union of India 1993 (66) ELT 3 (SC)

Captive power plant a part of Project Imports

Zuari Industries Ltd v. CCE & C 2007-T/OL-55-SC-CUS (Dated: March 29, 2007)

Captive power plant - Part of project imports eligible for exemption - Heading 98.01 is a specific entry - Once an essentiality certificate was issued by the sponsoring authority, it was mandatory for the Revenue to register the contract.

4.21 OFFENCES, POWER AND PENALTIES UNDER CUSTOMS

4.21.1 Offences under Customs

The term Offence means a violation or breach of a law, like evasion of duty and breaking prohibitions under the Customs Act, 1962. However, offence not defined under Customs Act, 1962. Thereby, 'Offence' as any act or omission made punishable by any law for the time being in force.

There are basically two types of punishments namely civil penalty and criminal penalty. Civil penalty for violation of statutory provisions involving a penalty and confiscation of goods and can be exercised by the Department of Customs. Criminal punishment is of imprisonment and fine, which can be granted only in a criminal court after prosecution.

4.21.2 Evasion of duty or prohibition under section 135*(1)* of the Customs Act, 1962

If a person has nexus with misdeclaration of value or evasion of duty or handling in any manner goods liable for confiscation under section 111 (i.e. Confiscation of improperly imported goods) or section 113 (i.e. Export goods liable for confiscation), he shall be punishable in the following manner:

4.21.3 Imprisonment upto SEVEN years and FINE for the following four kinds of offences

i. Market value of offending goods exceeds ₹ 1 Crore
ii. Value of evasion of duty exceeds ₹ 30 lakhs
iii. Offence pertains to prohibited goods notified by Central Government of India
iv. Value of fraudulent availment of drawback/exemption exceeds ₹ 30 lakhs

For all other kind of offences imprisonment is upto THREE years or fine or both.

For repeat conviction, the imprisonment can be SEVEN years and FINE and in absences of special and adequate reasons, the punishment shall not be less than ONE year.

4.21.4 Cognizable and Non-cognizable Offence

Cognizable offence means an offence for which a police officer may arrest without warrant (i.e. without the order of a Magistrate). Non-cognizable offence means offences under Customs were a police officer cannot investigate cases without the order of a Magistrate.

Cognizance of Offences

As per Section 137(1) of the Customs Act, 1962, Court cannot take cognizance of offences under the Customs Act, 1962 in the following cases without previous sanction of the Commissioner of Customs:

i. False declaration or documents (Section 132)
ii. Obstruction (i.e. stop the progress) of Officers of Customs (Section 133)
iii. Refusal to be X-rayed (Section 134)
iv. Evasion of duty or prohibitions (Section 135)
v. Preparation to do clandestine export (i.e. improper export) (Section 135A)

As per Section 137(2) of the Customs Act, 1962, for taking cognizance of an offence committed by a Customs officer under section 136 the Court needs previous sanction of the Central Government in respect of officers of the rank of Assistant or Deputy Commissioner and above and previous sanction of the Commissioner of Customs in respect of officers lower in rank than Assistant or Deputy Commissioner.

4.21.5 Section 136 of the Customs Act deals with offences by Officers of Customs:

i. An officer of customs facilitated to do fraudulent export.

ii. Search of persons without reason to believe in the secreting of goods on them.

iii. Arrest of person without reason to believe that they are guilty.

iv. These are called *vexatious actions* of department officers.

4.21.6 Power

Section 100

i. Power to search suspected persons entering or leaving India.

ii. Search of person for any goods liable for confiscation by the proper officer in and around customs area.

iii. Burden of proof on department (section – 123).

Section 101

i. Power to search suspected person in certain other cases.

ii. Search is conducted by the officer of customs empowered by the commissioner.

iii. Search of person for notified goods which are liable for confiscation order by commissioner anywhere in India.

iv. Burden of proof, that goods not smuggled, or importer.

Section 105

i. Power to search premises.

ii. Search of place for goods liable for confiscation & documents useful for any proceeding under the Act.

iii. If notified goods, burden of proof that goods are not smuggled on importer.

Section 106

i. Power to stop and search conveyance.

ii. Stop and search conveyance for any smuggled goods.

iii. Refer section 115.

Section 110

i. Seizure of goods, documents & things.

ii. Seizure of goods & documents are liable to confiscation.

iii. Notice must be made by proper officer for confiscation of goods within 6 months.

Section 100, 101 & 105

i. For prohibited goods may give option to redemption fire (Except arms, RDX etc).

ii. For other goods must give an option.

iii. In both the above case, goods are smuggled goods.

4.18.7 Penalties under Custom Act

i. Smuggling in relation to goods is an act or omission which will make the goods liable to confiscation.

ii. Penalty can be imposed for improper import as well as attempt to improperly export goods. 'Improper' means without the knowledge of the customs officers.

iii. Monetary penalty upto value of goods or ₹ 5,000 whichever is higher can be imposed.

iv. Goods can be confiscated. Permission can be granted for re-export of offending goods.

v. In case of goods covered under section 123 of Customs Act, burden of proof that the goods are not smuggled goods is on the accused.

Following monetary penalties prescribed under section 112 of the customs Act, with regard to improper importation:

Imported Goods (A)	Value in (₹) (B)	Minimum Penalty in (₹) (C)	Minimum Penalty in (₹) (B) or (C)
Prohibited Goods	Value of prohibited goods	₹ 5,000	Whichever is higher
Dutiable goods (Other than prohibited goods)	Duty sought to be evaded	₹ 5,000	Whichever is higher
Misdeclaration of value	Value declared - Actual value = ₹ XXXX	₹ 5,000	Whichever is higher
Prohibited goods plus misdeclaration value	Value of prohibited goods or Value declared – Actual value whichever is higher	₹ 5,000	Whichever is higher
Dutiable goods plus misdeclaration of value	Duty sought to be evaded or Value declared – Actual value whichever is higher	₹ 5,000	Whichever is higher

4.21.8 Export Goods Liable for Confiscation (Section 113)

These are goods attempted to be improperly exported under clause of section 113.

(a) Goods attempted to be exported by Sea or Air from place other than customs port or customs airport.

(b) Goods attempted to be exported by land or inland water through unspecified route.

(c) Goods brought near land frontier or coast of India or near any bay, gulf, creek or tidal river for exporting from place other than customs port or customs station.

(d) Goods attempted to be exported contrary to prohibition under custom Act or any other law

(e) Goods concealed in any conveyance brought within limits of customs area for exportation.

(f) Goods loaded or attempted to be loaded for eventual export out of India, without permission of proper officer, in contravention of section 33 and 34 of the customs Act, 1962.

(g) Goods stored at un-approved place or loaded without supervision of customs officer.

(h) Goods not mentioned or found excess of those mentioned in shipping Bill or declaration in respect of baggage –

  (i) Any goods entered for exportation not corresponding in respect of value or any other particulars in shipping Bill or declaration of contents of baggage

  (ii) Goods entered for Export under claim for duty drawback which do not correspond in any material particular with any information provided for fixation of duty drawback.

(i) Goods imported without duty but being re-exported under claim for duty drawback.

(j) Goods cleared for exportation which are not loaded on account of willful act, negligence or default, or goods unloaded after loading for exportation, without permission.

(k) Provision in respect of 'specified goods' are contravened.

SECTION - B

4.22 ANTI-DUMPING DUTY - AN OVERVIEW

Trade Protection Measures under WTO

Under the WTO regime, international trade has been liberalized allowing free movement of goods and services between member countries by eliminating tariff and non-tariff barriers to a large extent. The liberalization has further being extended in cross-border transactions at regional levels by entering into various regional preferential trade agreements.

With the present low rate of import duty, a small deviation from fair trade practice on the part of the exporter or subsidy offered by exporting country will make it difficult for domestic industries to compete with imported products which are like products to the products manufactured by domestic industry.

The WTO agreements as an exceptional measure, depending upon the situation permit product specific imposition of Anti-dumping duty, safeguards duty and countervailing duty as the case may be for the protection of domestic industry from the injury caused by imported goods.

These three duties are exceptional in nature and are imposed on three different mutually exclusive conditions.

Basis of distinction	Anti-Dumping Duty	Countervailing Duty	Safeguard Duty
Applicability	Export Price < Price normally charged in domestic/home market	Exporting Government is giving subsidy to exporter in that foreign land for the purpose of exporting	In a situation, when there is a sudden and sharp increase in imports as a result of unforeseen developments causing injury to domestic industry
Act of conflict that leads to imposition	Alleged foul play on the part of the exporter	An alleged foul play on the part of the exporting country	Imposed purely for the protection of domestic industry on a no fault principle where domestic industry is temporarily unable to compete with imported products on account of these unforeseen developments.
	Product-specific and exporter specific duty	Product-specific duty imposed against imports coming from all sources irrespective of the exporter and country of origin	
Tenure of applicability	It can continue as long as dumping continues	It can also continue forever as long as subsidy continues	It can continue only for a temporary period not exceeding 10 years.

4.22.1 Anti-Dumping

Dumping means export of goods by exporters of one country/territory to the market of another country/territory at a price lower than the price prevailing in the country of export and the difference in such price is called margin of dumping. This is an unfair trade practice which can have a distortive effect on international trade and needs to be condemned under WTO law.

Anti-dumping is a measure to rectify the trade distortive effect of dumping and re-establish fair trade, which is achieved by imposition of a duty on dumped imports, not exceeding the margin of dumping.

4.22.2 The Salient Features

i. It is an instrument for ensuring fair trade and is not a measure of protection per se for the domestic industry

ii. It provides relief to the domestic industry against the injury caused by dumping and gives domestic industry a level playing field.

iii. The duty is imposed as a deterrent effect to discourage dumped imports, so that users can buy material from domestic industry from whom they were not buying earlier on account of availability of cheap dumped imports.

iv. The idea is to levy and collect extra tax, rather to take the landed value of imports to a level where domestic industry can fairly compete with imports and sell the product in the domestic market.

4.22.3 Application of Anti-Dumping

i. The Anti-dumping duty is levied and collected as a duty of Customs and charged over and above the National Customs Duty chargeable on the import of the item.

ii. Anti-dumping duty is not creditable

iii. It will be charged as an extra cost on dumped imports.

4.22.4 Authority for Anti-dumping Action against Unfair Trade Practices

i. Anti-dumping measure in India are administered by the Directorate General of Anti-dumping and Allied Duties (DGAD) functioning in the Department of Commerce, Ministry of Commerce and Industry, which is headed by the "Designated Authority".

ii. The Designated Authority's function is to conduct the Anti-dumping investigation and make recommendation to the Government for imposition of Anti-dumping duty.

iii. Such duty is finally imposed/levied by a Notification of the Ministry of Finance.

4.22.5 Termination of Investigation under Anti-Dumping

The Designated Authority may suspend or terminate the investigation under Anti-dumping in the following cases:

(1) If there is a request in writing from the domestic industry at whose instance the investigation was initiated

(2) When there is no sufficient evidence of dumping or injury

(3) If the margin of dumping is less than 2% of the export price

(4) The volume of dumped imports from a country is less than 3% of the total imports of the like article imported into India, unless the volume of dumped imports collectively from all such countries who individually account for less than 3%, is not more than 7% of total imports

(5) If injury is negligible.

4.22.6 Terminologies Used

1. **Designated Authority:** It is the authority appointed by the Government of India to investigate the existence, degree and effect of any alleged dumping in relation to any import of any article.

2. **Period of Investigation (POI):** It refers to the specific period, during which there is an action and application of dumping, injury and there exists a casual link between such dumping and injury. It is a period of not less than six months and not more than eighteen months.

3. **Interested Party:** A party/exporter, which is going to be affected if duties are imposed after investigation and those who has an interest in the investigation, is called interested party. Basically, they are the stakeholders.
4. **The Product under Consideration (PUC) or Article under Investigation:** It refers to that imported product which is alleged to have been imported at dumped price and on which Anti-dumping duty is proposed to be levied.
5. **Like Product:** It is a product, which is identical, i.e. alike in all respects with reference to the 'product under consideration' or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the 'product under consideration'.
6. **Domestic Industry:** It refers to the domestic producers as a whole of the like products or those producers whose collective output of the like products constitutes a major proportion of the total domestic production of like products.
7. **Normal Value:** It is the price of the product under consideration, in the ordinary course of trade, when destined for consumption in the exporting country market. Example: Product A is being imported from Country Z. The import price is ₹100 (without any element of duty, freight, insurance, etc) while the price of this product if sold in Country Z is ₹60. So, the normal value of the goods is ₹60, i.e. the price at which it would have been sold in the exporting country.
8. **Export Price:** The export price is the transaction price/value at which the foreign producer sells the product to an importer in the importing country. As per the example given in earlier paragraph, the export Price is ₹100.
9. **Dumping Margin/ Margin of Dumping (DM):** In reference to an article, it means the difference between the normal value and its export price. Example: if the normal value is ₹60 and the export price is ₹100. The Margin of Dumping = Export Price (-) Normal Value = ₹ (100 – 60) = ₹40.
10. **Non-market Economies (NME):** The economies, where the government has a complete or substantial monopoly of its trade or government has a significant role in fixation of domestic prices of inputs and finished goods, are called non-market economies.
11. **Non Injurious Price (NIP):** It is the sale price which is constructed (i.e. arrived at/ ascertained) for the domestic industry, which will give a reasonable return on investment and if Domestic Industry is able to sale its product at that price it will claim no injury.
12. **Landed value of imports:** This refers to cost of the goods imported including all the expenses incurred during the course of importation upto the port including non-creditable duties of customs.
13. **Injury Margin (IM):** This represents the difference between Non Injurious Price (NIP) and Landed Value of Imports.
14. **Price Undercutting (by imports):** Sale value of domestic industry at factory gate (net of taxes) [-] landed value of imports.

Example 37: Sale value of domestic industry at factory gate ₹120 (net of taxes). Landed Value of imports ₹90. Hence, Price under cutting = ₹120 (-) ₹90 = ₹30. This is positive undercutting. It creates pressure on domestic industry from imports, as the imported goods are sold at ₹90, which is less than the price charged by domestic industry.

On the contrary, if the Sale value of domestic industry at factory gate (net of taxes) is ₹100 and the Landed value of imports ₹115, then, Price under cutting = ₹100 (-) ₹115 = ₹(15). This is negative undercutting. The domestic industry is in a comfortable position, as the price of imports is more than the price charged by the domestic industry.

15. **Price Underselling (by exporters):** Non Injurious Price (NIP)of Domestic Industry (-) Landed Value of Imports.

Example 38: Let NIP ₹150, Landed value of imports ₹120. Then, the price underselling by exporters = ₹150 – ₹120 = ₹ 30.

A positive price underselling shows the inability of the domestic industry to sell its product at a price which is non-injurious to it on account of pressure from imports coming into the country

On the contrary, if the NIP is ₹120 and the Landed value of imports ₹140, then the price underselling by exporters = ₹120 (-) ₹140 = ₹(20). This negative price underselling represents a comfortable position for the domestic industry, as the price of its products is lower than imported goods.

16. **Provisional Duty:** It is the duty which is levied/ imposed by the Central Government by a notification based on preliminary findings of Designated Authority, in a case, where a full-fledged investigation is pending.

17. **Final Duty:** It is the duty of Anti-dumping imposed by Central Government by a notification after completion of investigation.

18. **Circumvention of Duty:** When Anti-dumping Duty imposed on a product is being bypassed by exporters or importers by some malpractices like changing the description of product or by import of the product in an unassembled or disassembled form or by changing the country of origin of the product, it is construed that there is a circumvention of duty. In simple words, this is an act of evasion of duty by unfair trade practices.

19. **De-minimis margin of dumping:** Any exporter whose margin of dumping is less than 2% of the export price shall be excluded from the purview of anti-dumping duties. Example: Landed Value of Imports ₹100. Sale Price of like products in domestic market ₹ 101.50. Now, there is a margin of dumping to the extent of ₹ 1.50 (= ₹ 101.50 – ₹ 100). Since the margin of dumping ₹ 1.50 as a percentage on Landed value of imports (₹ 100) is measured to be 1.5%, hence the rule of de-minimis margin of dumping is applicable, and as the tolerance/deviation is less than 2%. Hence, this is not a case to be reviewed under Anti-dumping laws in India.

20. **De-minimus imports:** If the volume of dumped imports, actual or potential, from a particular country accounts for less than 3% of the total imports of the like products, then investigation under Anti-dumping laws should be suspended. However, in such a case, the cumulative imports of the like product from all these countries who individually account for less than 3% should not exceed 7% of the import of the like product.

4.22.7 Principles Governing the Determination of Normal Value, Export Price and Margin of Dumping

The designated authority while determining the normal value, export price and margin of dumping shall take into account inter alia, the following principles-

(1) The elements of costs referred to in the context of determination of normal value shall normally be determined on the basis of records kept by the exporter or producer under investigation, provided such records are in accordance with the generally accepted accounting principles of the exporting country, and such records reasonably reflect the cost associated with production and sale of the article under consideration.

(2) Sales of the like product in the domestic market of The exporting country, or sales to a third country at prices below per unit(fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price. The designated authority may disregard these sales, in determining normal value provided it has determined that:

   (i) such sales are made within a reasonable period of time (not less than six months) in substantial quantities, i.e. when the weighted average selling price of the article is below the weighted average per unit costs or when the volume of the sales below per unit costs represents not less than twenty per cent of the volume sold in transactions under consideration, and

(ii) such sales are at prices which do not provided for the recovery of all costs within a reasonable period of time.

(3) The said prices will be considered to provide for recovery of costs within a reasonable period of time if they are above weighted average per unit costs for the period of investigation, even though they might have been below per unit costs at the time of sale.

(i) The said authority in the course of investigation shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer provided that such allocation has been historically utilized by the exporter or producer, in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditure and other development costs.

(ii) unless already reflected in allocation of costs referred to in clause(1) and sub-clause(i) above, the designated authority, will also make appropriate adjustments for those non-recurring items of cost which benefits further and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operation.

(4) The amounts for administrative, selling and general costs and for profits as referred to in sub-section(1) of section 9A of the Act, shall be based on actual data pertaining to production and sales in the ordinary course of trade, of the like article by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amount incurred and realise by the exporter or producer in question, in respect of production and sales in the domestic market of the country of origin of the same general category of article;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like article in the domestic market of the country of origin; or

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by the exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

(5) The designated authority, while arriving at a Constructed export price, shall give due allowance for costs including duties and taxes, incurred between importation and resale and for profits.

(6) (i) While arriving at margin of dumping the designated authority shall make a fair comparison between the export price and the normal value. The comparison shall be made at the same level of trade, normally at the ex- factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are demonstrated to affect price comparability.

(ii) In the cases where export price is a constructed price, the comparison shall be made only after establishing the normal value at equivalent level of trade.

(iii) When the comparison under this para requires a conversion of currencies, such conversion should be made by using the rate of exchange on the date of sale, provided that when a sale on foreign currency on forward markets is directly linked to the export sale involved the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the exporters shall be given at least sixty days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

(iv) Subject to the provisions governing comparison in this paragraph, the existence of margin of dumping during the investigation phase shall normally be established on the basis of a

comparison of a weighted average normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if it is found that a pattern of export prices which differ significantly among different purchasers, regions or time period and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to -weighted average or transaction-to-transaction comparison.

(7) In case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including India, or where it is not possible, on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin. An appropriate market economy third country shall be selected by the designated authority in a reasonable manner and due account shall be taken of any reliable information made available at the time of the selection. Account shall also be taken within time limits; where appropriate, of the investigation if any made in similar matter in respect of any other market economy third country. The parties to the investigation shall be informed without unreasonable delay the aforesaid selection of the market economy third country and shall be given a reasonable period of time to offer their comments.

4.22.8 Principles governing investigations

(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate information on the following :-

(i) the name of the exporting country or countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed; and

(vi) the time-limits allowed to interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to -

(i) the known exporters or to the concerned trade association where the number of exporters is large, and

(ii) the governments of the exporting countries : Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefore in writing.

(4) The designated authority may issue a notice calling for any information, in such form as may be specified by it, from the exporters, foreign producers and other interested parties and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation:

For the purpose of this sub-rule, the notice calling for information and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, injury where applicable, and causality.

(6) The designated authority may allow an interested party or its representative to present the information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented to it by one interested party to the other interested parties, participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

4.22.9 Principles for determination of non-injurious price [Rule 17(1)]

(1) The designated authority is required under sub-rule (1) of rule 17 to recommend the amount of anti-dumping duty which, if levied, would remove the injury where applicable to the domestic industry.

(2) For the purpose of making recommendation under clause (1), the designated authority shall determine the fair selling (notional) price or non-injurious price of the like domestic product taking into account the principles specified herein under.

(3) The non-injurious price is required to be determined by considering the information or data relating to cost of production for the period of investigation in respect of the producers constituting domestic industry. Detailed analysis or examination and reconciliation of the financial and cost records maintained by the constituents of the domestic industry are to be carried out for this purpose.

(4) The following elements of cost of production are required to be examined for working out the noninjurious price, namely: —

(i) The best utilisation of raw materials by the constituents of domestic industry, over the past three years period and the period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilisation of raw materials.

(ii) The best utilisation of utilities by the constituents of domestic industry, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of utilities.

(iii) The best utilisation of production capacities, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of production capacities.

(iv) The Propriety of all expenses, grouped and charged to the cost of production may be examined and any extra-ordinary or non-recurring expenses shall not be charged to the cost of production and salary and wages paid per employee and per month may also be reviewed and reconciled with the financial and cost records of the company.

(v) To ensure the reasonableness of amount of depreciation charged to cost of production, it may be examined that no charge has been made for facilities not deployed on the production of the subject goods, particularly in respect of multi-product companies and the depreciation of re-valued assets, if any, may be identified and excluded while arriving at reasonable cost of production.

(vi) The expenses to the extent identified to the product are to be directly allocated and common expenses or overheads classified under factory, administrative and selling overheads may be apportioned on reasonable and scientific basis such as machine hours, vessel occupancy hours, direct labour hours, production quantity, sales value, etc., as applied consistently by domestic producers and the reasonableness and justification of various expenses claimed for the period of investigation may be examined and scrutinised by comparing with the corresponding amounts in the immediate preceding year.

(vii) The expenses, which shall not to be considered while assessing non-injurious price include,—

a) research and development Provisions (unless claimed and substantiated as related to the product specific research);

b) since non-injurious price is determined at ex-factory level, the post manufacturing expenses such as commission, discount, freight- outward etc. at ex-factory level;

c) excise duty, sales tax and other tax levies on sales;

d) expenses on job work done for other units;

e) royalty, unless it is related to technical know-how for the product;

f) trading activity of product under consideration; or

g) other non-cost items like bad debts, donations, loss on sale of assets, loss due to fire, flood, etc.

(viii) A reasonable return (pre-tax) on average capital employed for the product may be allowed for recovery of interest, corporate tax and profit. The average capital employed is the sum of "net fixed assets and net working capital which shall be taken on the basis of average of the same as on the beginning and at the end of period of investigation. For assessment of reasonable level of working capital requirement, all the elements of net working capital shall be scrutinized in detail. The impact of revaluation of fixed assets shall not be considered in the calculation of capital employed. Interest is allowed as an item of cost of sales and after deducting the interest, the balance amount of return is to be allowed as pre-tax profit to arrive at the non- injurious price.

(ix) Reasonableness of interest cost may be examined to ensure that no abnormal expenditure on account of interest has been incurred. Details of term loans, cash credit limits, short term loans, deposits and other borrowings taken by the company and interest paid thereon may be examined in detail along with the details of assets deployed.

(x) In case there is more than one domestic producer, the weighted averages of non-injurious price of individual domestic producers are to be considered. The respective share of domestic production of the subject goods may be taken as basis for computation of weighted average non-injurious price for the domestic industry as a whole".

4.22.10 Anti-dumping Application Proforma -

The following is an outline of application proforma under Anti-dumping laws in India:-

PART	Deals with
I	Imported Product Information
II	Indian Industry Profile
III	Evidence of Dumping 1. Estimates of Normal Value 2. Estimates of Export Price 3. Estimates of Dumping Margin
IV	Evidence of Injury
IVA	Injury Information on Domestic Industry
IVB	Country wise landed value
V	Evidence of Casual link
VI	Costing Information Format "A" – Statement of Raw Materials and Packing Materials Consumption and Reconciliation Format "B" – Statement of Raw Material Consumption Format "CI" - Statement of Cost of Production Format "CII" – Allocation and Apportionment of Expenditure Format "D" – Statement of Consumption of Utilities Format "E" – Statement of Sales Relations Format "F" – Certificate

4.22.11 Cost Accounting – as an aid for assessment under Anti-dumping laws in India In moving the Cost and Works Accountants Bill,1959 for reference to the Joint Committee, the then Deputy Minister of Commerce and Industry explained the nature and purpose of cost accounting as follows (*Lok Sabha Debates, Vol. XXIV, dated 20th December, 1958, pp. 6608-09*):

"Cost accounting is a function entirely different from general or financial accounting. Cost accountancy covers a wide range of subjects, with special emphasis on cost accounting, factory organization and management, engineering techniques, and knowledge of the working of the factories. The cost accountant performs services involving pricing of goods, preparation, verification, certification of cost accounts and related statements, or recording presentation or certification of cost facts or data. In a manufacturing concern, he works out the economical cost of production and evaluates its progress at each stage of production. In mass production enterprises, he points out wastage of manpower due to overstaffing or inefficient organization and indicates the output, the capacity of the machines and labour, the stock position, the movement of stores and weakness in the production process. The systematic determination of cost in every single and distinct process of manufacturing provides a continuous check on the margin of waste in the processing of raw and semi-finished materials, on the utilisation of machinery installed, on manpower expended and the percentage of rejection of finished products. This pinpoints also the particular process in which defects and deficiencies exist, thereby enabling immediate remedial measure being taken. Costing, in short, aims at making the organization efficient and economical, by providing the minimum of labour and material and getting the full capacity of the machine output. The cost accountant, therefore, is concerned solely and mainly with the internal economy of the industry, and renders services essential to the day-to-day management of the undertaking."

In the WTO regime and in the post-liberalization era there was a need to enhance and retool the mechanism of cost audit to enable performance management as a part of the governance framework. A need was also felt to reorient the cost audit mechanism, particularly to build up appropriate cost database to fight anti-dumping measures imposed against the country in foreign markets as also to detect the cases of dumping in our market by foreign manufacturers. Such an alignment with the governance framework by linking up with the role of audit committee and in turn presented to the stakeholders a reliable, standardized and industry-wide database is possible only by way of statutory maintenance of Cost Accounting Records and Cost Reporting system.

4.22.12 Generally Accepted Cost Accounting Principles (GACAP)

The Ministry of Corporate Affairs, Government of India implemented Companies (Cost Accounting Records) Rules, 2011. These rules introduced a common set of record rules for industries other than regulated industries specified in the Rules, in place of industry specific rules in vogue earlier.

The Rules require every company to which the rules apply, including all units and branches thereof, to keep cost records in respect of each of its products and activities on regular basis. The cost records are to be maintained in accordance with the generally accepted cost accounting principles and cost accounting standards issued by the Institute of Cost Accountants of India.

The GACAP has defined **Cost of Production**. It consists of Material Consumed, Direct Wages and Salaries, Direct Expenses, Works Overheads, Quality Control Costs, Research & Development Cost, Packing Cost and Administrative Overhead relating to production.

The objective of GACAP can be stated as follows:

(i) To codify as may be applicable to Indian Industry;

(ii) To narrow down diversities in cost accounting practices facilitating the process of development of cost accounting standards;

(iii) To provide reference source to industry and practitioners in preparation and attestation of cost statements, where specific cost accounting standards are yet to be issued;

(iv) To provide reference source to all the stakeholders in the understanding and interpretation of the cost statement; and

(v) To provide a base for monitoring the evolution of new concepts and practices in cost accounting and to codify them as and when they become generally accepted.

4.22.13 Cost Accounting Standards (CASs) - relevance and application in the light of Anti-dumping Laws in India

The following are the Cost Accounting Standards issued by the Institute of Cost Accountants of India. Effective application of CASs brings about uniformity in the principles of measurement and valuation of goods.

CAS	Deals with
1	Classification of Cost
2	Capacity Determination
3	Overheads
4	Cost of Production for Captive consumption
5	Average (Equalized) cost of transportation
6	Material Cost
7	Employee Cost
8	Cost of Utilities
9	Packing Material Cost

10	Direct Expenses
11	Administrative Overheads
12	Repairs and Maintenance
13	Cost of Service Cost Centre
14	Pollution Control Cost
15	Selling and Distribution Overheads

4.22.14 Companies (Cost Accounting Records) Rules 2011

The Companies (Cost Accounting Records) Rules 2011 has made a departure from the erstwhile cost accounting records in so far as prescription of specific cost formats is concerned.

Rule 2(e) has defined "***Cost Records*** *means books of accounts relating to utilization of material, labour and other items of cost as applicable to the production, processing, manufacturing and mining activities of the company*". It has also been clarified that such conformance to GACAP and CAS are to be followed to the extent these are found to be relevant and applicable and the variations, if any, are required to be indicated and explained. The Institute of Cost Accountants of India has so far prescribed 15 Cost Accounting Standards and has also issued GACAP.

The basic purpose of maintenance of these cost records is to enable the company to exercise, as far as possible, control over the various operations and costs with a view to achieve optimum economies in utilization of resources. These records shall also provide necessary data which is required to be furnished under these rules.

Maintenance of Cost Accounting Records is applicable to every company including a foreign company engaged in production, processing, manufacturing or mining wherein:

i) The aggregate value of net worth as on the last date of the immediately preceeding financial year exceeds ₹5 crores; or

ii) The aggregate value of the turnover made by the company from all products or activities during the immediately preceding financial year exceeds ₹ 20 crores; or

iii) The company's equity or debt securities are listed or are in the process of listing on any stock exchange.

Hence, for the purpose of making assessment/proceedings under Anti-dumping laws in India, there would be cost records available to support the needs of the stakeholders.

4.22.15 Companies (Cost Audit Report) Rules, 2011 - relevance and application in the light of Anti-dumping Laws in India

The following states the relevance of respective Para prescribed Cost Audit Reports and Cost Accounting Standards which may be used as reference for making an authentic assessment under Anti-dumping laws in India. Since the Cost Accounting Records are to be maintained by companies satisfying the prescribed parameters, a reference to the Cost Compliance Report or the Cost Audit Report may be an important tool for the stakeholders in ascertainment of injury margin. Further, application of generally accepted cost accounting principles and cost accounting standards, would bring about a uniformity/standardization in the principles followed in measurement and valuation of cost.

Anti-dumping Application Proforma	***Reference to Para prescribed under Cost Audit Report Rules,2011***		***Reference to relevant Cost Accounting Standards***
Format A - Statement of Raw Materials and Packing Materials Consumption and Reconciliation	Para 5 : Abridged Cost Statement	Item No.1 & 2 Raw Material Consumption and Process Materials	CAS 6 – Material Cost
		Item No.16 and 23 – Primary Packing Cost Material and Secondary Packing Cost	CAS 9 – Packing Material Cost
Format B – Statement of Raw Material Consumption	Para 5 : Abridged Cost Statement – Item Nos.1 & 2		CAS – 6 – Material Cost
Format CI – Statement of Cost of Production ***(to be certified by a Cost Accountant in Practice)***	Para 5 : Abridged Cost Statement – Item No. 21 – Cost of Production		CAS 2 – Capacity Determination CAS 6 – Material Cost CAS 7 – Employee Cost CAS 8 – Cost of Utilities CAS 9 – Packing Material Cost CAS 10 – Direct Expenses CAS 12 – Repairs & Maintenance
Format CII – Allocation and Apportionment of Expenditure	Para 2 : Cost Accounting Policy		CAS 1 – Classification of Cost CAS 2 – Capacity Determination CAS 3 - Overheads
Format D – Statement of Consumption of Utilities	Para 5: Abridged Cost Statement – Item No.3 – Utilities		CAS 8 – Cost of Utilities

However, for the purpose of ascertaining the Normal Value, Non-injurious price or to determine price undercutting or price underselling, application of the specific Cost Accounting Standards in all relevant situations may be made which would be a safeguard for the stakeholders.

Example 37: FORMAT "CI" - STATEMENT OF COST OF PRODUCTION

Name of the Company: XYZ Limited

Installed Capacity				1,00,000 units				
Production in Installed				65,000 units				
Capacity Utilization (%)				65%				
Production in Investigation Period				56,000 units				
Capacity Utilisation in Investigation period				56%				
Sales (quantity)				61,000 units				51,000 units
Particulars	**Previous Accounting Year**				**Investigating Period**			
	Qty	Rate (₹)	Value (₹)	Cost per unit (₹)	Qty	Rate (₹)	Value (₹)	Cost per unit (₹)
Manufacturing Expenses:								
• Raw Materials (specify the major raw materials) (MT)	10,000	100.00	10,00,000	15.38	8,000	120.00	9,60,000	17.14
• Utilities								
• Depreciation			2,00,000	3.08			1,90,000	3.39
• Others (specify nature of expenditure)			1,95,000	3.00			1,75,000	3.13
Administrative Expenses								
• Variable			1,30,000	2.00			1,12,000	2.00
• Fixed			78,000	1.20			78,000	1.39
Selling & Distribution Expenses								
• Variable			61,000	1.00			56,000	1.00
• Fixed			40,000	0.66			40,000	0.71
Financial Expenses								
• Variable			1,30,000	0.70			35,700	0.70
• Fixed			21,000	0.32			21,000	0.38
Less: Miscellaneous Income (from product concerned) – Sale of Scrap raw materials			(25,000)				(20,000)	
Total Cost to make and sell			**18,34,000**	**28.22**			**16,47,700**	**29.42**
Selling Price				**35.00**				**32.00**
Profit/Loss				**6.78**				**2.58**

Note: This Statement of Cost of Production is to be authenticated by a Cost Accountant in Practice

One of the major reasons for this decrease in the quantity of sales is identified to be import of like/similar goods by a foreign company to India. The selling price of such goods, in Indian market, as fixed by the foreign counterpart is ₹ 23, while the same goods are normally sold at that foreign country for Rs.35. Landed Value of Imports ₹ 25

XYZ Ltd. being deceived requested the competent authority to have a review. Ascertain the injury margin and suggest the measure suitable to safeguard the Indian Industry.

Solution:

Particulars	Amount (₹)
Price of the "Product under Consideration (PUC) or "Article under Investigation" from the Exporting Country / Export Price	23.00
Normal Value of such product, when sold in the domestic market of the exporting country	35.00
Dumping Margin or Margin of Dumping (DM) = 35.00 – 25.00	10.00
Non Injurious Price (NIP) – this is the constructed sale price of the domestic industry which will give a reasonable return on investment and if the domestic industry is able to sale its product at that price, it will not claim any injury	30.00 (say)
Landed Value of Imports (including all the expenses incurred during the course of importation upto the port including the non-creditable duties of customs	25.00
Injury Margin (IM) = Non Injurious Price (-) Landed Value of Imports = 30.00 (-) 25.00	5.00

Thus, for XYZ Ltd. the Injury Margin is ascertained at Rs.5 per unit. Accordingly, the Authorities shall cause to initiate necessary proceedings to levy additional duty of customs (under the aegis of Anti-dumping Laws) to safeguard the domestic industry.

Example 38: Following is the relevant extract from the Trial Balance of ABC Ltd. for the year ended 31.3.2012.

Particulars	Amount (₹)	Particulars	Amount (₹)
Raw Materials	5,00,000	Sales	21,60,000
Consumable Stores and Spares (Other Inputs)	3,00,000		
Utilities (Power, Fuel, Steam, Water, etc)	1,80,000		
Direct Labour	4,00,000		
Manufacturing Overheads	1,50,000		
Research & Development	60,000		
Administrative Overheads	90,000		
Selling & Distribution Cost	50,000		
Depreciation	30,000		
Financial expenses	10,000		
Other Miscellaneous Expenses	12,000		

Company deals with two products for which necessary information is furnished:

Particulars of Expenses	Product X1	Product X2
Raw Materials (Ratio of utilization)	60%	40%
Consumable Stores and Spares (Other Inputs)	in proportion to raw materials	
Utilities (Power, Fuel, Steam, Water, etc)	in proportion to raw materials	
Direct Labour	2,45,000	1,55,000
Manufacturing Overheads	30%	35%
Research & Development	35%	40%
Administrative Overheads	30%	40%
Selling & Distribution Cost	35%	50%
Depreciation	45%	55%
Financial expenses	50%	30%
Other Miscellaneous Expenses	25%	25%

Prepare Statement showing Allocation and Apportionment of Expenditure for assessment under Anti-dumping laws in India for Product A, which is the Product under Investigation.

Solution: **Format CII**

Statement Showing Allocation and Apportionment of Expenditure for Product X1

Sl. No.	Particulars of expenses	Total applicable to product under investigation	Share applicable to product under investigation	Share not allocation/ apportionment	Basis
1	Raw Materials (Ratio of utilization)	3,00,000	3,00,000	NIL	Actual Ratio
2	Consumable Stores and Spares (Other Inputs)	1,80,000	1,80,000	NIL	Raw Material Ratio
3	Utilities (Power, Fuel, Steam, Water, etc)	1,08,000	1,02,000	6,000	CAS 8
4	Direct Labour	2,45,000	2,41,000	4,000	CAS – 7 (Actual)
5	Manufacturing Overheads	45,000	38,000	7,000	Cost Driver
6	Research & Development	21,000	15,000	6,000	Wrong Basis
7	Administrative Overheads	27,000	24,000	3,000	CAS - 11
8	Selling & Distribution Cost	17,500	16,000	1,500	CAS -15
9	Depreciation	13,500	11,500	2,000	Value of Asset
10	Financial expenses	5,000	5,000	NIL	Actual utilization of borrowed funds
11	Other Miscellaneous Expenses	3,000	3,000	NIL	Actual
12	**Total Expenditure Total of (1) to (11)**	**9,65,000**	**9,35,500**	**29,500**	
13	Sales	10,95,000	10,95,000	Nil	
14	Other Income (Sale of Scrap of Product X1)	3,000	3,000	Nil	
15	**Total Income (13+14)**	**10,98,000**	**10,98,000**	**Nil**	
16	**Profit/Loss**	**1,33,000**	**1,33,000**		

Note:

This statement is to be certified by a Practicing Cost Accountant.

Study Note - 5

EXIM POLICY

This Study Note includes

5.1 Export Promotion Schemes
5.2 Duty Drawback
5.3 EOU and Similar Schemes
5.4 Special Economic Zones
5.5 Advance Authorisation
5.6 Duty Entitlement Pass Book Scheme (DEPB Scheme)
5.7 Duty Free Import Authorisation
5.8 EPCG Authorisation
5.9 Foreign Trade Policy
5.10 Administration of Policy by DGFT
5.11 Import/Export Authorisation
5.12 Export Promotion Councils
5.13 Policy for Import of Goods
5.14 Restrictions on Exports

Introduction

The Govt. of India, Ministry of Commerce and Industry announces Export Import Policy every five years. The current policy covers the period 2009-2014. The Export Import Policy (EXIM Policy) is updated every year on the 31st of March and the modifications, improvements and new schemes are effective w.e.f. 1st April of every year. The EXIM Policy of the Indian Government is regulated by the Foreign Trade (Development and Regulation) Act, 1992. This Act has replaced the earlier law known as the Imports and Exports (control) Act, 1947. Chapter 6 of the Exim policy under the said Act deals with Export Oriented Units and Chapter 7 deal with units in the Special Economic Zones.

Foreign Trade has gained immense importance in India in the recent years. The export import (exim) policy of India has laid guidelines for India to become a major player in world trade, an all encompassing; comprehensive view needs to be taken for the overall development of the country's foreign trade. The new exim policy states that reasonableness and consistency among trade and other economic policies is important for maximizing the contribution of such policies to development. The foreign trade policy implies in its preamble that while incorporating the existing practice of enunciating an annual exim policy, it is necessary to go much beyond and take an integrated approach to the developmental requirements of India's foreign trade. The import laws of India are governed by the foreign trade policy. All exporters/importers trading from India have to adhere to the foreign exim policies in order to gain benefits on the trade front.

5.1 EXPORT PROMOTION SCHEMES

5.1.1 Background

(i) Basic concept is that goods and services are to be exported, taxes are not to be exported.

(i) As per WTO stipulations, export incentives cannot be given, but exported goods can be made tax free.

(iii) Various scheme have been devised to enable exporters to obtain inputs without payment of excise and customs duty and input services without payment of service tax. If tax paid, rebate can be obtained.

(iv) Goods can be exported without payment of excise duty. If excise duty is paid, refund can be obtained.

Broadly, the export incentives for manufacturers are —

(a) Indigenous inputs without payment of excise duty or rebate if duty paid.
(b) No excise charged on final product or rebate if duty paid.
(c) Imported inputs without payment of customs duty, or rebate if duty paid.
(d) No export duty on export of final product.
(e) Bank finance on priority basis and at concessional rate of interest.
(f) Import of capital goods at concessional rate (under EPCG scheme).
(g) Exemptions/relaxations from Income tax.
(h) Exemption from sales tax on final product (refund of CST paid on inputs in case of EOU. No CST for supply to SEZ and SEZ units).
(i) Usance bills of exchange executed by an exporter in relation to export transaction are fully exempt from stamp duty – SO 804(E) dated 8-7-2004.

WTO stipulation - As per stipulation of World Trade Organisation (WTO), no country can give 'export incentives' as such. The reason is that WTO intends to encourage free competition among nations. If incentives are given for exports, there will not be free competition. That is the reason why income-tax incentives on export income are being phased out. However, goods can be made tax-free for export purposes, which is permissible under WTO stipulations. Hence, all our export promotion schemes are directed towards ensuring that inputs as well as final products are made 'tax free'.

5.1.2 Input Duty Relief Schemes

Various schemes have been devised to obtain inputs free from duty or to grant refund of the same. In some schemes, the unit has to be isolated from domestic production units, while in some schemes, the units producing goods for domestic production are also entitled to get inputs free of cost.

A. Schemes where export production unit has to be isolated from domestic production units - There are schemes where units producing goods for export purposes have to be isolated from domestic units. The schemes are - EOU, STP, EHTP, BTP and SEZ. [BTP – Bio-Technology Park]

B. Schemes where domestic production unit can get inputs free from taxes - The schemes of EOU, SEZ, STP, BTP and EHTP are suitable where the unit is exclusively or at least predominantly for export purposes. There are other schemes where a unit producing goods for domestic purposes is also entitled to get inputs / capital goods without payment of customs duty / excise duty. These can be broadly classified as follows.

C. Relief of excise duty on inputs – (a) Cenvat credit of duty paid on inputs can be utilized for payment of excise duty on other final products. Alternatively, refund of duty paid on inputs can be obtained (b) Same result can be achieved by paying duty on final product and claiming rebate. In this case, additional benefit is that duty paid on capital goods will also get refunded indirectly. In first case, only duty paid on inputs is refundable (c) Obtaining inputs without payment of excise duty under notification No. 43/2001-CE(NT). This is advisable when there are one or two major identifiable inputs (d) Rebate of duty paid on inputs under notification No. 41/2001- CE (NT) (e) Excise portion of Duty drawback.

D. Relief of customs duty on inputs – (a) Advance Authorisation (b) Duty Entitlement Pass Book scheme (DEPB) (c) DFIA (d) Customs portion of duty drawback.

E. Capital goods at concessional rate - Capital goods can also be obtained at concessional rate of customs duty under EPCG scheme.

It should be noted that an exporter can get relief only once. He cannot get double benefit.

5.1.3 Concept of EOU/SEZ Scheme

The highlights of EOU (Export Oriented Unit) and SEZ (Special Economic Zone) and distinctions are as follows –

Distinctions

i. Supplies to SEZ from DTA are 'exports' while supplies to EOU from DTA are 'deemed exports'.

ii. SEZ unit has to be located within the specified zones developed, while EOU unit can be set up at any of over 300 places all over India. [Similarly, STP/EHTP/BTP unit can be situated within the zone specifically developed or at any place where EOU can be set up]

iii. There is physical control over movement of goods in Special Economic Zone, but there is no such physical control over goods to individual EOU.

iv. Minimum investment in plant and machinery and building is Rs 100 lakhs for EOU. This should be before commencement of commercial production. There is no such limit for SEZ.

v. Fast Track Clearance Scheme (FTCS) for clearances of imported consignments for EOU. In case of SEZ

units, customs clearance for export and import is obtained within the zone itself.

vi. In case of EOU, sale within India should be on payment of excise duty. In certain cases, excise duty payable will be only 50%/30% of normal customs duty payable on such goods if imported into India. In case of supplies from SEZ to Domestic Tariff Area, normal customs duty as payable on import of similar goods is payable.

vii. EOU unit can sale in DTA (Domestic Tariff Area) sale upto 50% of the FOB value of sales of preceding year, subject to fulfillment of positive NFE, on payment of concessional rate of duty. There is no such restriction in case of SE on percentage, but SEZ have to attain positive NFE.

viii. Restrictions under Companies Act on managerial remuneration are not applicable to SEZ units.

ix. The unit can exit (de-bond) with permission of Development Commissioner, on payment of applicable duties. However, in case of SEZ, the unit has to physically go out of SEZ. This is not the case of EOU.

x. In case of EOU, Central Sales Tax (CST) paid on purchases is refundable (but not local tax), if goods are used for production (and not for services). In case of SEZ unit, supplier does not have to pay CST.

xi. Service tax is exempted in case of services provided with SEZ. In case of EOU, service tax exemption is not available but they can claim refund.

xii. 100% foreign equity is permissible in SEZ, except in a few cases. In case of EOU, restrictions of Foreign Direct Investment (FDI) are slightly more.

xiii. Supplies made to EOU by Indian supplier are 'deemed exports' and supplier is entitled to benefits of 'deemed export' in form of refund of terminal excise duty and duty drawback. Supplies to SEZ are 'exports' and all export benefits i.e. DEPB and duty drawback are available.

xiv. Restrictions on External Commercial Borrowings are less in case of SEZ, compared to restrictions on EOU.

xv. No exemption from labour laws, but State Government can relax certain provisions of labour laws in case of SEZ.

xvi. SEZ are is specific locations where infrastructure is generally better.

xvi. SEZ have more freedom of operations within zone compared to EOU.

Similarities

i. The unit can import capital goods, raw materials, consumables, packing material, spares etc. without payment of customs duty. Similarly, these can be procured indigenously without payment of excise duty. Second hand capital goods can also be imported.

ii. They have to achieve positive NFE (Net Foreign Exchange Earnings).

iii. A bond in prescribed form has to be executed. [B-17 in case of EOU and form prescribed in Special Economic Zone Rules, 2003 in case of SEZ]. There is no physical supervision of customs / excise authorities over production and clearances, but prescribed records are required to be maintained.

iv. Generally, all final production should be exported, except rejects upto prescribed limit.

v. Sub-contracting of production outside on job work basis is permissible after obtaining necessary permission on annual basis

vi. Job work for exports is permitted

vii. Samples can be sold / given free within prescribed limit

viii. Unutilised raw material can be disposed of on payment of applicable duties

ix. all foreign exchange earnings can be retained in EEFC account in foreign exchange.

STP / EHTP/BTP unit – Concept of STP/EHTP/BTP is similar to EOU. The STP/EHTP scheme is administered by Ministry of Information Technology, while BTP scheme is monitored by Department of Biotechnology. The STP/ EHTP/BTP unit can be at a place specifically developed for the purpose or it can be located at any place where EOU can be set up. Thus, a STP/EHTP/BTP unit can be set up as an EOU unit anywhere in India or as a SEZ unit at specified developed locations in India.

5.1.4 Pros and Cons of Various Schemes

It is true that no one scheme can be suitable to all. Each manufacturer has to weigh *pros* and *cons* of each scheme and determine which scheme is most beneficial to him.

Generally, if major production of the company is towards sale in DTA (Domestic Tariff Area) and only partly towards export, schemes like DEPB or DFRC or advance authorisation are suitable. Other things being equal, scheme of duty drawback is simple and easy to operate particularly when All Industry Rate fixed is good.

Schemes like EOU (Export Oriented Unit)/SEZ (Special Economic Zones) are suitable (a) when the undertaking is predominantly export oriented (b) Requirement of imported capital goods and imported raw material is high. EOU has lost most of its attractive features and recently, EOUs are getting step-motherly treatment from Government, while SEZ is 'favoured baby'.

5.2 DUTY DRAWBACK

i. Duty drawback is rebate of excise duty and customs duty paid on inputs used in exported final product u/s 75 of Customs Act.

ii. All Industry drawback rate is fixed on industry average basis for various products. Incidence of service tax is also taken into account while fixing drawback rate.

iii. An individual exporter can get brand rate fixed for his product.

iv. Drawback rate is fixed by Commissioner of Central Excise.

v. Duty drawback is available on re-export u/s 74 of Customs Act.

Drawback of customs and excise duty paid on inputs and service tax paid on input services – As per rule 2(a) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, Drawback, in relation to any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in manufacture of such goods [reference to service tax was inserted w.e.f. 13-7-2006]. 'Input service' has same meaning as assigned to it in Cenvat Credit Rules, 2004 [rule 2(da) of Drawback Rules, 1995].

As per para 9.22 of FTP, Drawback, in relation to any goods manufactured in India and exported, means the rebate of duty chargeable on any imported materials or excisable material used in manufacture of such goods in India. The goods include imported spares, if supplied with capital goods manufactured in India.

Duty Drawback even if CVD paid through DEPB – Duty drawback of CVD is available even when CVD is paid through DEPB credit – MF(DR) circular No. 41/2005-Cus dated 28-10-2005.

5.2.1 Drawback – When not Eligible

Section 75 of Customs Act, 1962 provides some disallowances or cases when drawback allowed can be recovered. Further, section 76(2) of Customs Act, 1962 authorises Central Government to issue notifications prohibiting drawback if the goods are likely to be smuggled back to India after export. Drawback Rules also provide for some disallowances. These are summarised below:

i. If sale proceeds of export goods are not received within time stipulated by RBI [This provision does not apply to goods supplied from DTA unit to SEZ unit]

ii. If no customs/excise duty is paid on the inputs or service tax is not paid on input services

iii. If imported inputs were obtained under Advance License (DEEC scheme) without payment of duty

iv. If importer avails DEPB or DFRC

v. Goods manufactured under Customs Bond or Excise Bond where inputs were obtained without payment of duty

vi. Goods manufactured by EOU or a unit in Special Economic Zone (as they obtain inputs without payment of duty)

vii. If Cenvat was claimed on indigenous inputs. [In such case, excise portion of duty drawback will not be available].

viii. In case of negative value addition – i.e. selling price of exported goods is less than value of imported goods i.e. foreign exchange spent on import of raw material is more than FOB Value of exports.

ix. Jute batching oil used in manufacture of jute yarn, twist, twine etc.

x. Packing materials used in relation to export of jute yarn, jute fabrics and jute manufacture.

xi. Where specific rates are provided, drawback will not be paid if it is less than 1% of FOB Value of the product, unless drawback claim per shipment is over ₹ 500 – para 11 of Notification No. 81/2006-Cus(NT) dated 13-7-2006 [earlier Notification No. 36/2005-Cus(NT) dated 2-5-2005].

xii. If wholesale market price of goods in India is less than the amount of drawback due.

xiii. Exports to Nepal/Bhutan. However, exports to Nepal are eligible if payment is received under hard currency i.e. dollars, euro, Yen British pounds etc.

xiv. No drawback of sales tax, octroi or other taxes – drawback is of customs and Central Excise duties only.

xv. Export of alcoholic liquor, cigarettes, cigar and pipe tobacco; *as stores*; to foreign going vessel of less than 200 tons.

xvi. If goods exported by vessel of less than 1,000 tons; unless certificate is submitted that sale proceeds in foreign currency have been received and goods have landed at destination within three months.

xvii. If drawback is less than ₹ 50.

Broadly, drawback is not allowed if excise/customs duty or service tax has not been paid on inputs or manufacturer has availed some other benefit in respect of duty paid on inputs or input services. Principle is that there cannot be double benefit.

5.2.2 Type of Drawback Rates

Duty drawback rates are of following types – (a) All Industry Rate (b) Brand Rate and (c) Special Brand Rate.

A. All Industry Drawback Rates - All Industry Drawback rates are fixed by Directorate of Drawback, Dept. of Revenue, Ministry of Finance, Govt. of India, Jeevan Deep, Parliament Street, New Delhi – 110 001. The rates are periodically revised – normally on 1st June every year. Data from industry is collected for this purpose.

Whenever specific rates are provided, drawback shall be payable only if amount is more than 1% of FOB value, except when the drawback claim per shipment exceeds Rs 500. Revised rates have been announced vide Notification No. 68/2007-Cus(NT) dated 16-7-2007 [earlier Notification No. 81/2006-Cus(NT) dated 13-7-2006].

The all industry drawback rates are given in two ways – (a) when Cenvat facility has been availed and (b) when Cenvat facility not availed. The difference between the two is central excise portion of duty drawback. If rate indicated in both is same, it means that it pertains to only customs portion and is available irrespective of whether exporter has availed Cenvat or not – Condition No 5 to Notification No. 68/2007-Cus(NT) dated 16-7-2007 [earlier No. 81/2006-Cus(NT) dated13-7-2006].

Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

In case of some cases, value cap has been fixed. In such cases, maximum drawback allowable per unit of quantity has been specified (This is to avoid misuse by over-valuation of export goods].

B. Brand Rate of duty drawback – It is possible to fix All Industry Rate only for some standard products. It cannot be fixed for special type of products. In such cases, *brand rate* is fixed under rule 6. The manufacturer has to submit application with all details to Commissioner, Central Excise. Such application must be made within 60 days of export. This period can be extended by Central Government by further 30 days. Further extension can be granted even upto one year in if delay was due to abnormal situations as explained in MF(DR) circular No. 82/98-Cus dated 29-10-1998.

Duty drawback rate shall not exceed 33% of market price of export goods (Rule 8A w.e.f. 15-2-2006).

C. Special Brand Rate of duty drawback – All Industry rate is fixed on average basis. Thus, a particular manufacturer or exporter may find that the actual excise/customs duty paid on inputs or input services are higher than All Industry Rate fixed for his product. In such case, he can apply under rule 7 of Drawback Rules for fixation of Special Brand Rate, within 30 days from export. The conditions of eligibility are (*a*) the All Industry Rate fixed should be less than 80% of the duties paid by him (*b*) rate should not be less than 1% of FOB value of product except when amount of drawback per shipment is more than ₹ 500 (c) export value is not less than the value of imported material used in them – i.e. there should not be 'negative value addition'.

5.2.3 Drawback Rate Fixation

Forms and procedures have been prescribed for submitting details to jurisdictional Commissioner of Central Excise, who will fix the rate of duty drawback. [Earlier, it was done by Director of Drawback, New Delhi, upto 31-3-2003]. Manufacturer has to make application for fixation of duty drawback rate. Application for fixation of rate has to be filed to Commissioner of Central Excise within 30/60 days of export. [60 days in case of brand rate and 30 days in case of special brand rate]. This period can be extended by him upto further 30 days in exceptional and genuine cases, for which a special request should be made.

5.2.4 Drawback Claim Procedure

At the time of export, exporter shall endorse on the 'shipping bill' the description, quantity and other details to decide whether goods are eligible for duty drawback. He should submit one extra copy of shipping bill for drawback purposes. Copy of Invoice should be submitted.

If shipping bill under drawback is submitted electronically, that itself will be treated as claim for drawback [rule 13(5) of Drawback Rules amended w.e.f. 13-7-2006].

Declaration by Exporter – A declaration should be made rule 12(1)(a)(ii) of Duty Drawback Rules, on shipping bill or bill of export that claim of drawback. Further declarations are also required when brand rate or special brand rate has been fixed. These declarations have to be signed by exporter.

Forms of declarations for claiming All Industry Rates have been given in CC, Mumbai PN 10/2005-Cus dated 16- 3-2005 [182 ELT T12].

Triplicate copy of Shipping Bill is the drawback copy and should be marked as 'Drawback Claim Copy'. It should be submitted with pre-receipt on reverse side with revenue stamp.

Declaration for non-availment of Cenvat – (a) If the manufacturer-exporter or supporting manufacturer of merchant exporter is registered with Central Excise, fact of non-availment of Cenvat credit can be verified from ARE-1 form furnished (b) If the manufacturer-exporter or supporting manufacturer of merchant exporter is not registered with Central Excise, they have to submit self-declaration about non-availment of Cenvat in prescribed form. – MF(DR) circular No. 8/2003-Cus dated 17-2-2003.

5.2.5 Duty Drawback on Re-Export

Section 74 of Customs Act, 1962 provide for drawback if the goods are re-exported as such or after use. This may happen in cases like import for exhibitions, goods rejected or wrong shipment etc. The re-exported goods should be identifiable as having been imported and should be re-exported within two years from date of payment of duty when they were imported. This period (of two years) can be extended by CBE&C on sufficient cause being shown. These should be declared and inspected by Customs Officer. Original shipping bill under which the goods were imported should be produced. The goods can be exported as cargo by air or sea, or as baggage or by post. After inspection, export and submission of application with full details, 98% of the customs duty paid while importing the goods is repaid as drawback.

Section 74 is applicable when imported goods are re-exported as it is and article is easily identifiable, while section 75 is applicable when imported materials are used in the manufacture of goods which are then exported – *ABC India Ltd.* v. *UOI* 1992(61) ELT 205 (Del HC).

5.3 EOU AND SIMILAR SCHEMES

Key Points

i. EOU scheme enables a manufacturer to import inputs without payment of customs duty and export final products.

ii. EOU should have positive NFE (Net Foreign Exchange Earning).

iii. They have to execute B-17 bond. Indigenous goods can be obtained without payment of excise duty by submitting CT-3 certificate.

iv. EOU can sale in DTA (Domestic Tariff Area) upto 50% of FOB value of their previous year's exports.

v. Scheme of STP (Software technology Park), EHTP (Electronic Hardware Technology Park and BTP (Bio Technology Park) are similar to EOU.

vi. EOUs are presently getting step motherly treatment from Government.

5.4 SPECIAL ECONOMIC ZONES (SEZ)

SEZ is as if it is a separate island as if outside India, where inputs, capital goods and input services can be obtained without duty and service tax. SEZ are governed by Special Economic Zones Act and SEZ Rules. Supplies to SEZ from India is 'exports' and supplies from SEZ to DTA (Domestic Tariff Area) is 'import'.

SEZ are like a separate island within country. These are treated as if they are outside India for customs purposes. Goods can be brought in SEZ without payment of customs duty or excise duty. Supplies to SEZ from other parts of India are treated as 'exports' and are entitled to all export benefits. On the other hand, supplies from SEZ unit to any person outside SEZ is treated as 'import' by that person and normal customs duty is payable.

SEZ have full freedom of operations within SEZ and all facilities of import and export are provided within the zone itself.

SEZ units may be set up for manufacture of goods and rendering services. Trading units are also permitted.

Exemption from all taxes - SEZ and SEZ units will be exempt from all taxes like customs duty, excise duty, Central sales tax, State Vat, Income tax etc.

Types of SEZ - Multi-product SEZs should have an area of 1,000 hectares or more. Minimum 35% area shall be earmarked for processing. Remaining 65%/75% area will be available for developing residential and commercial areas. Sector specific SEZ can be as small as 10 hectares, out of which 50% should be for processing and balance can be for residential and commercial areas. SEZ for Free Trade and Warehousing (FTW) shall have an area of 40 hectares or more with a built up area of not less than one lakh square meters.

Integrated township plus manufacturing facilities - SEZ can be set up in public, private, joint sector or by Central Government or State Government, jointly or severally SEZ will be developed by Developers.. The Developer can allocate fully developed plots to entrepreneurs on purely commercial basis.

Developer of SEZ can provide services like water, electricity, security, restaurants, recreation etc. He can also develop township adjacent to SEZ. Proposal to establish a SEZ will be approved by Board of Approvals (BOA).

Trading in SEZ - Trading in imported goods as well as indigenous goods is permitted. However, benefit of section 10AA of Income Tax will not be applicable to such trading, other than trading in nature of re-export of imported goods – MC&I (DC) Instruction No. 4/2006 F No. 5/1/2006-EPZ) dated 24-5-2006 [210 ELT E12]. In case of trading, income tax benefits are available only in case of re-exports [see *explanation* to rule 76].

5.4.1 Special Economic Zones Act and Rules

Special Economic Zones Act, 2005 was passed by Parliament in May 2005. Basic purpose of the Act is smooth and hassle free operations in SEZ and a 'Single Window Clearance' for setting up an SEZ or a unit in SEZ. Major provisions of the Act have been made effective w.e.f. 10-2-2006. Sections 20 to

24 (dealing with offences in SEZ and civil suits arising in SEZ) and sections 31 to 41 (Establishment of SEZ Authority) have not been brought into force.

SEZ Act and Rules provide complete policy towards SEZ. The SEZ Act provides for the following -

i. Establishment of SEZ with approval from Board of Approvals (section 3 of SEZ Act).

ii. Notifying an area as SEZ by Central Government (sections 4 and 5 of SEZ Act).

iii. Board of Approval to approve establishment of SEZ (Sections 8 to 10 of SEZ Act).

iv. Development Commissioner for one or more SEZ as administrative authority for the SEZ (sections 11 and 12 of SEZ Act).

v. Approval Committee to approve setting up an unit in SEZ (sections 13 and 14 of SEZ Act).

vi. Single window clearance by Approval committee for setting up unit in SEZ, OBU (Offshore Banking Unit) or International Finances Service Centre (sections 15 to 20 of SEZ Act).

vii. Appeal against decision of Approval Committee to Board of Approval [section 16(4) of SEZ Act and rules 55 to 69 of SEZ Rules]

viii. Enforcement Agency or Enforcement Officer in respect of notified offences committed in SEZ (sections 21 and 22 of SEZ Act - Not brought into effect).

ix. Special Civil Courts for SEZ and criminal courts to try notified offences in SEZ and appeal to High Court [sections 23 and 24- Not brought into force].

x. Reliefs from Income Tax, customs duty, service tax, central sales tax and excise duty and duty drawback on goods brought or services provided from DTA to SEZ developer or SEZ Unit (sections 26 to 29 of SEZ Act).

xi. Exemption from taxes as specified in First Schedule to SEZ Act (sections 7 and 26 of SEZ Act).

xii. Customs duty on goods supplied from SEZ unit to DTA (section 30 of SEZ Act).

xiii. Establishment of SEZ Authority (sections 31 to 41 - these sections have not been brought into force).

xiv. Compulsory reference of dispute to arbitration (sections 42 and 43 of SEZ Act).

xv. Exemptions and relaxations from provisions of certain Central Acts (sections 49 and 54 of SEZ Act).

5.4.2 Highlights of SEZ Rules

SEZ Rules, 2006 provide for the following :

i. Procedure for establishment of SEZ (Rules 3 to 16).

ii. Procedure for establishment of a Unit in SEZ (Rules 17 to 21).

iii. Terms and conditions for entitlement of exemptions, drawbacks and concessions (Rules 22 to 46 - Chapter IV).

iv. Conditions for removal of goods from SEZ to DTA (Chapter V - Rules 47 to 50).

v. Requirements and monitoring of Foreign Exchange Earnings (Chapter VI - Rules 53 to 54).

vi. Procedures for appeal to Board of Approval from order of Approval Committee (Chapter VII - Rules 55 to 69).

vii. Provisions relating to Identity Card, foreign exchange remittances, revival of sick unit, exit of unit and self declaration.

viii. Prescribed Forms A to K

SEZ Rules provide for-

i. Simplification of procedures for development, operation, and maintenance of the Special Economic Zones and for setting up and conducting business in SEZs.

ii. Single window clearance for setting up of an SEZ.

iii. Single window clearance for setting up a unit in a Special Economic Zone.

iv. Single Window clearance on matters relating to Central as well as State Governments.

v. Simplified compliance procedures and documentation with an emphasis on self certification; and

vi. A wide range of services can be rendered from SEZs.

vii. Documentation for various activities of the units has been reduced to the barest minimum with an emphasis on self-certification.

viii. No requirement for providing bank guarantees, thereby reducing transaction costs.

ix. Contract manufacturing for foreign principals allowed.

x. Option to obtain sub-contracting permission at the initial approval stage.

xi. Import - Export of all items, through personal baggage has been allowed.

5.4.3 Policy to Set Up SEZ

Central Government has liberal policy for setting up such zones. SEZ can be set up in public, private, joint sector or by Central Government or State Government, jointly or severally [section 3(1) of Act]. Developer of such SEZ can allocate fully developed plots to entrepreneurs on purely commercial basis. Developer of SEZ can provide services like water, electricity, security, restaurants, recreation etc. He can also develop township adjacent to SEZ.

Proposal to establish a SEZ will be approved by Board of Approvals (BOA). Procedure to be followed for establishment of SEZ is given in Rules 3 to 16 of SEZ Rules, 2006.

5.4.4 Conditions Relating to Area and its Utilisation

SEZ should have minimum specified area. In respect of non-processing areas, developer cannot lease vacant lands.

A. Area requirements of SEZ - Minimum area of land and other terms and conditions of approval shall be prescribed by Central Government [section 3(8) of SEZ Act]. Minimum area requirements stipulated for various categories of SEZs are as follows.

As per press report dated 5-4-2007, maximum area of SEZ can be 5,000 hectares. Minimum processing area shall be 50%. State Government shall not undertake any compulsory acquisition of land for such SEZ. Comprehensive resettlement and rehabilitation policy will be worked out ensuring livelihood of displaced persons.

B. **Multi-product SEZ** - Multi-product SEZs should have an area of 1,000 hectares or more [rule 5(2)(a) of SEZ Rules]. "Special Economic Zone for multi-product" means a Special Economic Zone where Units may be set up for manufacture of two or more goods in a sector or goods falling in two or more sectors or for trading and warehousing or rendering of two or more services in a sector or rendering of services falling in two or more sectors [rule 2(za) of SEZ Rules]

Minimum 35% area shall be earmarked for processing. This can be relaxed to 25% by Central Government on recommendation from Board of Approvals. Thus, remaining 65%/75% area will be available for developing residential and commercial areas.

C. Service Sector SEZ - Services-Sector SEZs should have an area of 100 hectares or more [first proviso to rule 5(2)(a) of SEZ Rules].

Minimum 35% area shall be earmarked for processing. This can be relaxed to 25% by Central Government on recommendation from Board of Approvals. Thus, remaining 65%/75% area will be available for developing residential and commercial areas.

D. **SEZ in port or airport -** In case of SEZ in port or airport, the area must be at least 100 hectares [rule 5(2)(b) of SEZ Rules]. "Special Economic Zone in a port or airport" means a Special Economic Zone in an existing port or airport for manufacture of goods in two or more goods in a sector or goods falling in two or more sectors or for trading and warehousing or rendering of services [rule 2(zc) of SEZ Rules].

E. **Sector Specific SEZ -** In some sectors where India has a competitive advantage, such as gems and jewellery, information technology, electronic hardware and software, bio-technology, sector-Specific SEZs can be set up over an area of 10 hectares or more Similarly, in case of SEZ in non-conventional energy, solar energy, the area shall be 10 hectares or more [first and second proviso to rule 5(2)(b) of SEZ Rules]

In case of SEZ for specific sectors, at least 50% of the area shall be earmarked for developing processing area. Thus, remaining 50% area will be available for developing residential and commercial areas.

5.5 ADVANCE AUTHORISATION

Inputs required to manufacture export products can be imported without payment of customs duty under Advance Authorisation. Advance Authorisation can be granted to merchant exporter or manufacturer exporter to import raw materials. Since the raw materials can be imported before exports of final products, the Authorisation issued for this purpose is called '*advance Authorisation*'. [This was termed as 'Advance License' upto 1-4-2006].

Advance Authorisation is issued to allow duty free import of inputs with normal allowance for wastage. In addition, fuel, oil, energy, catalysts etc. required can also be allowed. Duty free import of mandatory spares upto 10% of CIF Value of Authorisation, which are required to be exported with resultant products may also be allowed. However, prohibited items of imports cannot be imported.

Advance Authorisation will indicate name and description and of items to be imported and exported/ supplied, aggregate CIF value of imports, FOB/FOR value and quantity of exports/supplies. If quantity cannot be indicated, value shall be indicated. Goods can be exported in anticipation of Advance Authorisation, after submission of application to licensing authority.

The Advance Authorisation will be for Actual User only. It is not transferable. The material imported under Advance Authorisation is also not transferable even after completion of export obligation. However, goods manufactured out of such imported material can be disposed of, after export obligation is fulfilled.

There must be positive value addition.

(i) **Export Obligation –** Export should be within 24 months from date of issuance of Authorisation. In case of projects, export obligation shall be fulfilled within duration of execution of project. In case of Advance Authorisation for drugs issued against specific order, export obligation shall be fulfilled within 6 months from date of import of first consignment.

Advance Authorisation can be revalidated for 6 months if export obligation was fulfilled, on payment of composition fee of 2% of duty saved on all unutilized imported items, by submitting application in 'Aayat Niryat Form'. Further extension of 6 months can be obtained on payment of 5% of duty saved on all unutilised imported items as composition fee.

There is no extension beyond 36 months (24+12 months) – MF(DR) circular N. 16/2006-Cus dated 9-5-2006.

If it is not possible to fulfill export obligation in time, extension has to be obtained from licensing authority (i.e. DGFT). If there is marginal shortfall upto 5%, it can be regularised. If shortfall is higher (upto 50%), extension upto one year can be obtained on submission of bank guarantee of full amount of duty saved. Shortfall in exports can be regularised on payment of duty along with interest @ 15%.

(ii) Application for advance authorisation – Application for authorisation shall be made in duplicate in '*Aayat Niryat Form*' given in Handbook of Procedures (HOP).

SION – The imports of raw materials is on the basis of standard input–output norms (SION). The SION are finalised and quantity allowed to be imported will be based on quantity exported. The price of inputs will be as declared by applicant. However, there must be positive value addition.

SION is fixed by 'Norms Committee'. Advance authorisation can be issued on basis of self declaration, subject to final adjustment as per SION fixed by NC (Norms Committee).

(iii) Exports in anticipation of authorisation – Exports in anticipation of Advance Authorisation is permissible, if procedure as specified is followed. Advance authorisation after exports can be issued on basis of actual proof of exports. In such case, BG/LUT [Bank Guarantee/Letter of Undertaking] is not necessary. In *CC* v. *Hindustan Tobacco* 2006 (193) ELT 190 (CESTAT), it was confirmed that export can be made in anticipation of license (now authorisation w.e.f. 1-4-2006).

(iv) EOU / SEZ / EHTP / BTP / STP can supply goods against advance authorisation – EOU / SEZ / EHTP / DTP/STP units can supply goods against advance authorisation. It is not necessary to convert advance authorisation into advance release order. The supplier will be entitled to benefits of deemed exports.

(v) Advance release order – Goods can be procured from indigenous manufacturer against advance release order (ARO) to be issued by RA (Regional Authority) (earlier known as Regional Licensing Authority upto 31-3-2006). The ARO can be denominated in foreign exchange/Indian Rupees. Alternatively, exporter can obtain goods from indigenous sources on basis of back to back Inland Letter of Credit (LC) from bank. The value of Advance Authorisation will be reduced to that extent.

Goods can be obtained from EOU/EHTP/SEZ/STP/BTP unit on basis of Advance Authorisation or DFRC. It is not necessary to convert Advance Authorisation into ARO (Advance Release Order).

(vi) Advance authorisation for intermediate supplies – In respect of supplies made against advance authorisation/ DFRC/DFIA against 'deemed export', the supplier is entitled to Advance Authorisation/DFRC/DFIA for intermediate supplies.

(vii) Import and Export from specified port – Export and import under advance authorisation can be through sea ports, airports, ICDs and LCS. Export shipments can be effected from any of SEZs.

(viii) Advance authorisation for annual requirements to exporters – Annual Advance authorisation would be issued to exporters having past export performance to enable them to import their requirements of inputs on annual basis. Annual Advance Authorisation will be granted upto 300% of FOB value of exports in preceding financial year. There should be positive value addition. Customs Notification No. 94/2004-Cus dated 10-9-2004 make provisions for such annual authorisation.

5.6 DUTY ENTITLEMENT PASS BOOK SCHEME (DEPB SCHEME)

The scheme is easy to administer and more transparent. The scheme is similar to Cenvat credit scheme. The exporter gets credit when he exports the goods. The credit is on basis of rates prescribed. This credit can be utilized for payment of customs duty on imported goods.

DEPB scheme will continue to be in operation until it is replaced by a new scheme, which will be drawn up in consultation with exporters. DEPB scheme has been extended upto 31-3-2008 by

customs notification No. 48/2007-Cus dated 29-3-2007. Same provisions in amendment to Foreign Trade Policy, announced on 18-4-2007.

The scheme is proposed to be replaced by a new scheme, since it is said that existing scheme is not WTO compliant.

The objective of the scheme is to neutralise incidence of customs duty on the import content of export product. The neutralisation shall be provided by way of grant of duty credit against the export product.

Exporter can have either DEPB or duty drawback and not both.

Exports under DEPB scheme are allowed only when DEPB rate for the concerned export product is finalised. Under this scheme, exporters will be granted duty credit on the basis of notified entitlement rates. The entitlement rates will be notified by DGFT. The entitlement rates will be a percentage of FOB made in free foreign currency.

The entitlement rate will be fixed on basis of SION (Standard Input Output Norms) and deemed import content.

Value addition achieved in export product will also be taken into account.

DEPB is a post export duty remission scheme, which allows neutralization of deemed import duty charges on inputs used in the export product as per SION and the basic customs duty payable on such deemed imports. Value addition is also taken into account.

Credit can be utilised for payment of customs duty on *any item* which is freely importable. [Till 1-4-2006, the credit could not be used for payment of customs duty on capital goods].

Credit can be used for payment of basic customs duty as well as CVD. The importer has option to pay CVD by cash.

The credit can also be used for payment of special CVD of 4%. If the CVD is paid by debit to DEPB, Cenvat credit/brand rate of duty drawback is available – MF (DR) circular No. 18/2006-Cus dated 5-6-2006.

The credit can be transferred to another person, but the transfer will be valid for imports within the same port from where exports were made. Import from other port will be available under TRA facility.

DEPB is valid for 24 months for import. The DEPB and/or the items imported are freely transferable. However, DEPB can be transferred only after realisation of export proceeds.

The scheme is available to both manufacturer exporters as well as merchant exporters. DEPB has to be registered with customs house.

Application for DEPB - Filing of applications for DEPB and Advance Authorisation through DGFT website is compulsory w.e.f. 16-1-2006. The application should be digitally signed and fees shall be paid electronically. The procedure is prescribed in DGFT policy circular No. 44 (RE-2005)/2004-09 dated 10-1-2006.

Actual import content in export product not required – DEPB credit to be granted is not related to actual content of imported goods in export products, but deemed import content – *Anjani International* v. CC 2005 (186) ELT 512 (CESTAT).

No All India rate of duty drawback if goods exported under DEPB – If goods are exported under DEPB, All Industry Rate of duty drawback will not be available - para 2(g) of customs Notification No. 8/2005-Cus(NT) dated 18-1-2005.

Duty drawback and CVD credit available even if duty paid through DEPB, w.e.f. 17-9-2004 – Earlier, it was clarified that Cenvat of CVD can be availed only if CVD is paid in cash. Similarly, duty drawback was allowed only if CVD was paid in cash. However, para (vi) of notification No. 96/2004-Cus dated 17-9-2004 now specifically provides that drawback or Cenvat credit of CVD can be availed against amount debited in DEPB. The benefit is available only in respect of DEPB issued under Foreign Trade Policy i.e. on or after 1-9-2004 – confirmed in MF(DR) circular No. 59/2004-Cus dated 21-10-2004.

'Normally, the exports made under the DEPB scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as Cenvat credit or duty drawback as per rules framed by Department of Revenue'. Thus, Cenvat credit is available whether CVD is paid in cash or by debit to DEPB.

Duty drawback of CVD is available even when CVD is paid through DEPB credit – MF(DR) circular No. 41/2005- Cus dated 28-10-2005.

Customs can check PMV – In *Om Prakash Bhatia* v. *CC* 2003 AIR SCW 3452 = 155 ELT 423 (SC), it was held that over invoicing is an offence. To such goods, section 113(d) would apply and they can be confiscated. - - If margin of profit appears unreasonable, it is for the exporter to establish that it was a true export value stated in the shipping bill. [view held in *Om Prakash Bhatia* v. *CC* 2001(127) ELT 81 (CEGAT 5 member bench) confirmed].

Who cannot avail DEPB? – Following cannot avail DEPB – (a) Goods manufactured in customs bonded warehouse (b) Goods exported against discharge of export obligation under Advance Authorisation (c) EOU, SEZ, STP, BTP or EHTP units (d) Export of goods of foreign origin, unless there is manufacture or processing (e) Exports made under specified paras of FTP.

Sales tax on sale of DEPB – DEPB (Duty Entitlement Passbook Scheme) is freely tradable. It is right to claim back credit. It is freely tradable and is 'goods'. It is taxable under sales tax. It is not actionable claim. – *Philco Exports* v. *STO* (2001) 124 STC 503 (Del HC DB). However, Haryana Tax Tribunal in case of *Sadhu Overseas*, has held that DEPB is a sort of money which can be used either by dealer or anybody else. Hence it is not 'goods'.

5.7 DUTY FREE IMPORT AUTHORISATION (DFIA)

'Duty Free Import Authorisation' (DFIA) has been introduced w.e.f. 1-5-2006 as per para 4.4 of Foreign Trade Policy. Corresponding customs notification No. 40/2006-Cus dated 1-5-2006 has been issued. The scheme is said to contain features of Advance Authorisation and DFRC scheme.

'Advance Authorisation' is not transferable, while material imported under DFIA will be transferable after fulfillment of export obligation. In case of Advance Authorisation, positive value addition is sufficient, while in case of DFIA, 20% value addition is required, except in case of gem and jewellery sector.

DFIA is issued to allow duty free import of inputs used in manufacture of export product (with normal allowances for wastages), and fuel, energy, catalyst etc. Duty free import of mandatory spares upto 10% value of authorisation, which are required to be exported/supplied with resultant product is also allowed.

DFIA is issued on basis of SION. Import Authorisation will be limited to quantity mentioned in SION. DFIA is issued to manufacturer-exporter or merchant-exporter for following – (i) Physical exports including supplies to SEZ (b) Intermediate supplies and (c) Main contractors for supply of goods under Deemed Exports (except supply against Advance Authorisation and marine containers). In case of some deemed exports, DFIA is available to sub-contractors also.

DFIA is initially issued with 'actual user condition'. Imports will be exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-Dumping Duty and Safeguard duty, if any.

After export obligation is fulfilled, the scrip can be made transferable by Regional Authority. After endorsement of transferability, duty free inputs (except fuel) can be transferred. However, where SION is subject to 'actual user' norm, transferability is not allowed. In case of fuel, import entitlement can be transferred only to companies which have been granted authorisation to market fuel by Ministry of Petroleum and Natural Gas.

Cenvat credit will not be available in respect of inputs. Drawback will be available only in respect of duty paid material used in goods exported as per drawback rate fixed by Ministry of Finance.

Duty free procurement from domestic market is permissible against ARO/invalidation letter/back to back inland LC.

Value addition should be minimum 20%, except in case of gem and jewellery sector and items for which higher value addition has been prescribed under Advance Authorisation Scheme.

In respect of supplies made against advance authorisation/DFRC/DFIA against 'deemed export', the supplier is entitled to Advance Authorisation/DFRC/DFIA for intermediate supplies.

In respect of sensitive items, exporter will have to furnish declaration with regard to technical characteristics, quality and specification in shipping bill – MF(DR) circular No. 16/2006- Cus dated 9-5-2006.

Customs procedures as prescribed in customs notification No. 40/2006-Cus dated 1-5-2006.

5.8 EPCG AUTHORISATION

Under Export Promotion Capital Goods (EPCG) scheme, an authorisation holder can import capital goods (i.e. plant, machinery, equipment, components and spare parts of the machinery) at concessional rate of customs duty of 5%. Capital goods can be imported for pre-production, production and post production (including CKD/ SKD of capital goods and computer software systems).

Capital goods which can be imported under 'project imports' can be imported under EPCG scheme. The export obligation will be 8 times the duty saved i.e. difference between concessional rate under project imports and rate applicable under EPCG.

Capital goods required for retailers having minimum area of 1,000n SqM is permissible. Importer will be issued 'EPCG Authorisation' for this purpose.

Importer can either claim exemption of CVD or pay CVD in cash. If he pays CVD in cash, that amount will not be considered for purpose of fixation of export obligation. However, in that case, he cannot avail Cenvat credit of the CVD paid (Amendment w.e.f. 2-3-2005. Till now, importer could pay CVD in cash and avail Cenvat credit. Now, if he pays CVD in cash, his export obligation will get correspondingly reduced, but he cannot avail Cenvat of CVD paid in cash).

Computer software systems are also eligible. Import of spares of capital goods is permitted, without any limit. Jigs, fixtures, dies, moulds will be allowed to the extent of 100% of CIF value of authorisation. Spares for existing plant and machinery can also be imported. Second hand capital goods can also be imported under EPCG scheme

However, second hand capital goods of Indian origin are not permitted under EPCG scheme – DGFT Policy circular No. 16 (RE-2005)/2004-09 dated 15-7-2005.

Hotel equipment (window cleaning equipment in this case) can be imported under EPCG scheme – *CC* v. *Hotel Leela Venture Ltd.* 2003 (158) ELT 777 (CESTAT).

Authorisation will be issued on the basis of certificate of Chartered Engineer in respect of imported capital goods and exported final product.

Merchant Exporters can also import capital goods under EPCG scheme, if the capital goods are installed in the factory of their supporting manufacturer. The name and address of supporting manufacturer should be endorsed on EPCG authorisation and bond with Bank guarantee has to be executed jointly and severally by merchant exporter and his supporting manufacturer.

The import is permitted only through specified port of registration. If EPCG is registered at one place but import is from other customs house, the import shall be permitted against TRA (Telegraphic Release Order) which will be issued by customs house at port of registration.

Clubbing of EPCG authorisations - All EPCG authorisations issued under one notification in one financial year and for export of same product/s or services will be clubbed for reducing paper work and easy monitoring.

Export obligation - Importer has to fulfill export obligation equal to eight times duty saved on imported capital goods to be fulfilled over a period of 8 years. In respect of capital goods imported for technological upgradation, export obligation will be six times the duty saved. 50% export obligation should be fulfilled in first block of 6 years and balance 50% in next block of two years. SSI units will have export obligation equal to 6 times duty saved on capital goods imported, to be fulfilled over a period of 8 years. Agro units will have export obligation of 6 times the duty saved, to be fulfilled over period of 12 years.

Extension of export obligation beyond 8+2 years can be considered for a further period of two years with condition that 50% of duty payable in proportion to unfulfilled export obligation is paid to customs.

In respect of EPCG authorisation for Rs 100 crore or more, the export obligation shall be required to be fulfilled over a period of 12 years. Similarly, sick companies under BIFR and units in Agri Export Zones can fulfil export obligation in 12 years. Export obligation for every block has been specified. Extension for fulfilling export obligation upto two years can be obtained.

If 75% export obligation is completed in half or less than half the prescribed period, companies can be freed from their obligations in remaining period.

The export obligation shall be fulfilled by export of goods capable of being manufactured or produced by the capital goods imported under the scheme. However, goods can be manufactured in other unit of authorisation holder also. The export obligation will be over and above the average level of exports achieved during preceding three licensing years. — Export obligation can also be fulfilled by export of other goods manufactured by the importer. Exports of goods/services by group companies will also be considered towards fulfilment of export obligation. However, in such case, additional export obligation will be over and above the average exports achieved by unit/group company/managed hotel in preceding three years.

Exports shall be physical exports, but some deemed exports are eligible. Royalty payments and payments for R&D services received in free foreign exchange will be considered towards fulfillment of export obligation.

EPCG authorisations can be clubbed for discharge of export obligation.

Example 1 : Discuss whether any duty drawback is admissible under section 75 in the following cases and if yes, what is the quantum of such duty drawback—

	FOB value of exported goods (₹)	**Rate or amount of drawback**	**Market price of goods (₹)**	**Value of imported material used in goods (₹)**
(a)	1,00,000	0.75% of FOB value	80,000	50,000
(b)	49,000	1% of FOB value	50,000	30,000
(c)	60,000	0.8% of FOB value	70,000	35,000
(d)	3,000	1.5%	3,100	2,500
(e)	2,00,000	40% of FOB value	1,50,000	1,20,000
(f)	1,00,000	₹ 30 per kg.	55,000	40,000
	(2,000 kgs.)			
(g)	4,00,000	3.5% of FOB value	4,60,000	4,50,000
(h)	4,20,000	4% of FOB value	4,10,000	3,00,00

In this case, the Central Government has specified that the export value should be 40% more than the value of the imported material used therein.

Answer :

The admissibility or otherwise of duty drawback in the aforesaid cases in discussed hereunder—

(a) **Drawback Admissible ₹ 750 :** Even inf the rate of drawback is less than 1% of FOB value of goods, drawback will be admissible because the amount of drawback i.e. 0.75% of 1,00,000 i.e. ₹ 750/- exceeds ₹ 500.

(b) **Drawback Admissible ₹ 490 :** Even if the amount of drawback is less than ₹ 500, drawback will be admissible because it is 1% or mor of the FOB value of the goods,

(c) **Drawback Inadmissible :** The drawback will n ot be admissible because it is less than 1% of the FOB value of the goods and its maount (0.8% of 60,000 i.e. 480) is less than ₹ 500.

(d) **Drawback Inadmissible :** Even if the drawback is 1.5% of FOB value, drawback will be inadmissible as the amount thereof is 1.5% of 3,000 i.e. ₹ 45, which is less ₹ 50.

(e) **Drawback Admissible ₹ 50,000 :** The amount of drawback i.e. 40% of 2,00,000 i.e. ₹ 80,000 shall be restricted to 1/3rd of the Market price of the goods i.e. 1/3rd of 1,50,000. Hence, the amount of drawback admissible shall be ₹ 50,000.

(f) **Drawback Inadmissible :** In this case the market price of the goods ₹ 55,000 is less than the amount of drawback i.e. 2,000 kgs. × ₹ 30 i.e. ₹ 60,000. Hence, no drawback shall be allowed.

(g) **Drawback Inadmissible :** No drawback shall be allowed in this case, as the export value i.e. FOB value of the goods is less the value of imported material used therein.

(h) **Drawback Inadmissible :** The value 40% more than value of imported materials is ₹ 3,00,000 + 40% of 3,00,000 i.e. ₹ 4,20,000. Since, the export value is not more than ₹ 4,20,000, no drawback shall be admissible.

Example 2 : As per proviso to section 3 of Central Excise Act, excise duty payable is equal to customs duty on like articles imported into India. As per Sr No. 2 of Notification No. 23/2003-CE dated 31.3.2003 (as amended), the duty payable is to be calculated as if (a) customs duty is reduced to 50% and (b) Special duty of 4% u/s 3(5) of Customs Tariff Act is not payable. However, if goods cleared in DTA are exempt from VAT, this special additional duty will be payable.

Answer :

If assessable value = ₹ 10,000, Basic customs duty = 10%; basic excise duty = 12%, education cess is 2%, secondary and higher education cess is 1%, the duty calculation will be as follows—

	Duty %	Amount (₹)	Total Duty
(A) Assesable Value		10,000.00	
(B) Basic Customs Duty	5	500.00	500.00
(C) Sub-Total for calculating CVD (A+B)		10,500.00	
(D) CVD 'C' × excise duty rate	12	1,260.00	1,260.00
(E) Sub-total for education cess of customs (B+D)		1,760.00	
(F) Education cess of customs - 2% of 'E'	2	35.20	35.20
(G) SAH education cess of customs - 1% of 'E'	1	17.60	17.60
(H) Sub-total for spl CVD (C+D+F+G)		11,812.80	
(I) Special CVD u/s 3(5) - 4% of 'H'	4	472.51	472.51
Total duty			2,285.31
Total duty rounded off			2,285.00

5.9 FOREIGN TRADE POLICY

India had for long time adverse balance of payment position in international trade i.e. imports were more than exports; due to which there was shortage of foreign exchange in India. Foreign Exchange Regulation Act was introduced in 1947. This was later replaced with 'the Foreign Exchange Regulation Act, 1973' (FERA), which came into effect on 1st Jan., 1974 (Now FEMA is in force w.e.f. 1-6-2000].

The policy adopted was to restrict imports by licensing and heavy customs duty on imports.

Import Trade Controls were first introduced in early stages of Second World War by notification under Defense of India Rules. Later, Imports and Exports (Control) Act, 1947 was passed. Foreign exchange rate was artificially controlled by RBI.

India's poor export performance - India's share in total world export of goods and commercial services was 0.6% in 1995. It rose to 0.7% in 2001 and is 1% in 2007. China's share in world exports was 4.3% in 2001 which rose to 8.4% in 2007 [source - Economic Survey 2007-08 - Government of India].

India has adverse balance of trade i.e. imports are more than exports. In 2006-07, imports were 1,85,747 million USD and exports were 1,26,360 million USD.

Policy Changes Since 1991

Government realised the ill effects of controls on imports and foreign exchange rates. Liberalisation of policies started in 1991. Restrictions on imports have been considerably reduced. Rupee has been made freely convertible on current account. Customs duty has been gradually reduced to almost international level.

Policy for Foreign Direct Investment (FDI) in India has been considerably liberalised. India has established a good lead in service exports - particularly in software sector.

Import and export free in majority of cases - As per WTO stipulations, Quantitative Restrictions (QR) on imports (i.e. import license restrictions) have to be removed. Such restrictions are permitted only if country has difficult position of foreign exchange reserves. However, since India's foreign exchange position is comfortable, European countries, USA, Japan and Canada took a stand that import restrictions must be removed. Finally, India agreed to remove all import restrictions w.e.f. 1-4-2001.

Exports shall be free, except in cases where these are regulated by provisions of FTP or any other law for the time being in force. The item-wise export and import policy shall be as specified in ITS (HS) [Import Trade Classification (Harmonised System)] published and notified by DGFT, as amended from time to time.

Most of non-agricultural goods are freely importable. Even import of gold and silver has been considerably liberalised.

However, there are some restrictions on imports of agricultural produce, old cars etc. There will be prohibition of import of animal skins, narcotics, drugs, environmentally dangerous goods etc. Such prohibitions are permissible under WTO.

5.9.1 Foreign Trade Policy 2004-09

Section 5 of FT(D&R) Act authorises Central Government to formulate and announce Export and Import Policy and also amend the same from time to time, by notification in Official Gazette. The policy, which was earlier termed as Exim policy is now termed as 'Foreign Trade Policy'.

New Foreign Trade Policy for 2004-2009 (FTP) (earlier known as EXIM Policy) was announced on 31-8-2004. The policy is effective from 1-9-2004. Generally, it is amended every year in April (besides amendments done throughout the year). Annual amendments were made last year on 19-4-2007. This year, amended policy has been issued on 11-4-2008.

Contents of Foreign Trade Policy - The Foreign Trade Policy for the period 2004-2009 as announced on 31-8-2004 is a 5 volume document, as follows -

i. Foreign Trade Policy having 9 chapters giving basic policy.

ii. Handbook of Procedures (HBP) Vol 1, containing 9 chapters, covering procedural aspects of policy. It also contains many Appendices, giving various forms, guidelines and lists.

iii. Standard Input-Output Norms (SION) of various products for purpose of Duty Exemption Scheme

iv. ITC(HS) Classifications of Export and Import Items and policy in respect of each item.

v. Handbook of DEPB Rates

Matters covered by Foreign Trade Policy

Following issues are covered under FTP -

i. Policy for regulating import and export of goods and services.

ii. Export Promotional Measures

iii. Duty Remission and Duty Exemption schemes for promotion of exports

iv. Export Promotion Capital Goods (EPCG) scheme

v. EOU/EHTP/STP and BTU schemes

vi. Special Economic Zones

5.9.2 Foreign Trade Policy 2009-14

In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2009-2014, the Central Government notified the Foreign Trade Policy, 2009-201. The Policy has already come into force w.e.f. 27th August, 2009.

The year 2009 was witnessing one of the most severe global recessions in the post-war period. Countries across the world have been affected in varying degrees and all major economic indicators of industrial production, trade, capital flows, unemployment, per capita investment and consumption have taken a hit. The WTO estimates project a grim forecast that global trade is likely to decline by 9% in volume terms and the IMF estimates project a decline of over 11%.

The recessionary trend has huge social implications.

In the last five years our exports witnessed a robust growth to reach a level of US$ 168 billion in 2008-09 from US$ 63 billion in 2003-04. Our share of global merchandise trade was 0.83% in 2003; it rose to 1.45% in 2008 as per WTO estimates. Our share of global commercial services export was 1.4% in 2003; it rose to 2.8% in 2008. India's total share in goods and services trade was 0.92% in 2003; it increased to 1.64% in 2008. On the employment front, studies have suggested that nearly 14 million jobs were created directly or indirectly as a result of augmented exports in the last five years.

The short term objective of the present policy is to arrest and reverse the declining trend of exports and to provide additional support especially to those sectors which have been hit badly by recession in the developed world. The policy objective was set to achieve an annual export growth of 15% with an annual export target of US$ 200 billion by March 2011. In the remaining three years of this Foreign Trade Policy i.e. upto 2014, the country should be able to come back on the high export growth path of around 25% per annum. By 2014, we expect to double India's exports of goods and services. The long term policy objective for the Government is to double India's share in global trade by 2020.

5.10 ADMINISTRATION OF POLICY BY DGFT

The FTP is controlled and supervised by DGFT.

Central Government can appoint Director General of Foreign Trade (DGFT) and other officers like Additional Director, Joint Director, Deputy Director, Assistant Director, Export Commissioner etc. The DGFT advise Central Government in formulating policy and exercise specified powers under the Act.

i. **Transitional provisions in case of midway policy changes –** Policy in respect of import and import changes frequently. If some restriction or regulation is placed on import or export, shipment of export or import within original validity with respect to balance and time period of irrevocable letter of credit will be permitted, if such LC was established before date of restriction. However, time limit for operationaling such LCs may be prescribed.

ii. **Issue of authorisation by DGFT –** DGFT issues 'authorisation' for import/export [*earlier, it was termed as 'license'*]. The word 'license' has been replaced by 'authorisation' w.e.f. 1-4-2006. Thus, 'Advance License' will be known as 'Advance Authorisation', 'Advance License for Annual Requirements' and EPCG license will be known as 'EPCG Authorisation'.

    'Authorisation' means a permission as per section 2(g) of Foreign Trade (Development and Regulation) Act, 1992 [FT (D&R] to import or export as per provisions of Foreign Trade Policy (FTP).

iii. **Regional Authority -** DGFT has established Regional Authority (RA) [earlier known as Regional Licensing Authority (RLA) upto 31-3-2006] at various places under Joint Director General of Foreign Trade. 'Regional Authority' means authority competent to grant an Authorisation under FTDR Act and Orders. Powers have been delegated to various regional offices to issue authorisation upto prescribed limits.

iv. **Interpretation of DGFT final and binding -** Decision of Director General of Foreign Trade (DGFT) is final and binding in respect of (a) Interpretation of any provision of policy (b) Classification of any item in ITC(HS)(c) Schedule of DEPB rates (d) content, scope or issue of an authorisation issued under Policy.

    Authorisation (earlier 'License') issued by DGFT or clarification issued by DGFT cannot be challenged by customs authorities.

v. **Committees** – Following are some important committees – (i) Norms Committee to fix/modify norms under all schemes (ii) EPCG Committee for nexus with Capital Goods and benefits under EPCG (iii) Policy Relaxation Committee (PRC) for all other issues.

vi. **Procedures for application, fees etc.**

    Handbook of Procedures (HBP) gives procedures for issue of authorisation. Objective of 'Handbook of Procedures' is to lay down simple and transparent procedures for easy compliance and administration. The Handbook contains provisions and procedures in respect of various heads under Foreign Trade Policy.

vii. **Filing of application forms -** Electronic filing of application is permitted in many of the offices. Facility of clarification / interview through e-mail is provided. Digital signature has been introduced to facilitate online application.

    Aayat- Niryat form – Aayat Niryat Forms ANF 1 to ANF 8 have been designed and notified for various purposes.

viii. **Certificate of realisation of export proceeds –** In case of imports made under export obligation, the importer is required to issue certificate from Bank regarding export realisation.

    If RBI has permitted offsetting of export proceeds against import payables/equity investment/ loan repayment etc., certificate for offsetting export proceeds should in form given in Appendix 22D of HBP Vol 1 to DGFT. The certificate should be duly certified by CA/Cost Accountant.

Payment through ECGC cover will be counted for benefits under FTP.

Payment of general insurance cover for transit loss would be treated as payment realised for exports under various export promotion schemes.

ix. **Late fee and supplementary claims –** If application is filed after last date for submission but within six months from last date, application will be considered on payment of late cut @ 2% on entitlement. For delay between 6 months and one year, late cut will be 5%. Supplementary claim may also be considered after imposing a cut @ 2% on entitlement.

x. **Import/Export Code Number**

Every importer and exporter must obtain a 'Importer Exporter Code Number' (IEC) from DGFT (Director General of Foreign Trade) or officer authorised by him, by applying in prescribed form (section 7 of FT(D&R) Act).

Import and export without IEC number is not permitted, unless specifically exempted.

xi. **Application for IEC number -** Application for IEC number has to be made to DGFT in prescribed form ANF 2A, with fees of ₹ 250 (It was ₹ 1,000 upto 11-4-2008).

Format of bank certificate is given in Appendix 18A of HBP Vol 1. Profile of importer/exporter should be given in form ANF 1.

xii. **Declaration of IEC number on import/export documents –** IEC number will be declared on Bill of Entry, Shipping Bill and other documents relating to customs [Rule 13 Foreign Trade (Regulation) Rules, 1993].

Application for IEC number has to be made to DGFT in prescribed form with specified documents, with fees of ₹ 1,000 in prescribed form.

xiii. **Change in name, address and Constitution –** Change in name/ address/ constitution should be incorporated within 90 days. Delay may be condoned on payment of penalty of ₹ 1,000.

5.11 IMPORT/EXPORT AUTHORISATION

Application for license for import or export has to be made to DGFT. Application fees are payable as prescribed. [section 8(1) of FT(D&R) Act].

License can be granted or refused. Refusal can be only by recording reasons in writing [section 8(2) of FT(D&R) Act].

License can be suspended or cancelled by giving notice and giving him opportunity of being heard.

If license is refused, not renewed, suspended or cancelled, appeal against such order can be filed u/s 15 of FT(D&R) Act [section 9(5) of FT(D&R) Act].

Application for Authorisation is to be made in form ANF 2B for import of restricted items, and in form ANF 2D for export of restricted items and ANF 2E for export of SCOMET items.

Two copies of Authorisation - Authorisation (earlier termed as License) is issued in two originals - one is 'Exchange Control Copy' (which has to be submitted to bank for remitting foreign exchange) and other 'Customs Copy' to be submitted to customs authorities for permitting imports.

Denomination of import authorisation and EO – CIF value of Import Authorisation and FOB value of Export Obligation (EO) will be denominated in free foreign currency as well as in Rupees. However, control will be on basis of foreign exchange amount and not on basis if Rupees. Export Obligation in case of intermediate supply and for deemed export shall be denominated in Indian Rupees.

Application fees for Authorisation - Application fees payable are prescribed in Schedule to Foreign Trade (Regulation) Rules, 1993. Fee is not payable if application is by Government, local authority, institutions setup for educational, charitable or missionary purpose for import of goods, or import of goods (other than motor vehicle) for personal use - [rule 5(3) of Foreign Trade (Regulation) Rules, 1993].

5.12 EXPORT PROMOTION COUNCILS

19 Export Promotion Councils have been set up to promote and develop export of the country. These EPCs (Export Promotion Councils) are expected to monitor and encourage exports and to assist and guide the exporters. Their main aim is to project India's image abroad as a reliable supplier of high quality goods and services.

EPC are non-profit autonomous organizations.

Each Council is responsible for promotion of a particular group or products like Engineering Export Promotion Council, Apparel Export Promotion Council, Gem and Jewellery Export Promotion Council etc. These Councils are non-profit organisations registered as Companies or registered Societies.

Export Promotion Council for EOU and SEZ units has also been constituted.

Some Agencies like Coffee Board, Tea Board, Tobacco Board etc. are also considered as Export Promotion Councils. These are autonomous professional bodies. Government may provide financial support to these EPCs.

RCMC - Exporter has to obtain Registration Cum Membership Certificate (RCMC) from Export Promotion Council or Commodity Board. Membership of EPC is compulsory, if an exporter intends to get export incentives. In other cases, membership is optional.

RCMC is valid from the 1st April of licensing year and is valid for five years –

Exporter should submit quarterly export returns to Export Promotion Council in Appendix 149C of HBP Vol 1. Status holders should also file return with FIEO.

5.13 POLICY FOR IMPORT OF GOODS

As per WTO Stipulation, India had to remove all quantitative restrictions (QRs) on imports in phased manner. Hence, the imports were being liberalised every year and import restrictions were completely lifted on 1-4-2001. Now almost all non-agricultural items are freely importable.

A. Import free unless restricted or prohibited - Exports shall be free, except in cases where these are regulated by provisions of FTP or any other law for the time being in force. The item- wise export and import policy shall be as specified in ITS (HS) [Import Trade Classification (Harmonised System)] published and notified by DGFT, as amended from time to time.

All items, except restricted, prohibited and importable through State Trading Enterprises (earlier termed as canalised items) can be freely imported [Items which could be freely imported were earlier termed as 'OGL' *i.e.*'Open General License'].

B. ITC(HS)

The ITC (HS) [Import Trade Classification (Harmonised System)] notified by DGFT, gives item-wise policy for import of various articles].

The list is based on HSN system of classification (which is also followed in Customs Tariff Act]. Policy in respect of each item is given against each item, in following categories –

(a) Free – no restriction on imports (However, in some cases, prescribed conditions have to be fulfilled)

(b) Prohibited goods

(c) Restricted through authorisation or in terms of a public notice issued [para 2.7 of FTP]

(d) Importable through State Trading Enterprises (STE) (earlier terms as Canalised). However, these goods can be imported by anyone on obtaining Authorisation from DGFT.

General restrictions – General prohibitions/restrictions on import/export are as follows –

i. Import/export of arms and related material from/to Iraq

ii. Direct or indirect export and import of nuclear related or weapons of mass destruction from/to Democratic People's Republic of Korea

iii. Direct or indirect export and import of nuclear related or Iran's enrichment related or heavy water related activities

Restriction through notification by DGFT – DGFT can adopt and enforce any measure necessary for protection of public morals, protection of health, protection of IPR, conservation of natural resources etc., by issuing a notification.

Actual User - If the import authorisation or license is required, it is issued only to Actual User, unless the condition is specifically waived by RA (Regional Authority).

'Actual User' may be Industrial on non-industrial.

The Actual User (Industrial) means a person who utilises the imported goods for manufacturing in his own industrial unit or manufacturing for his own unit in another unit including a jobbing unit. [Thus, actual user can supply the machinery / raw material etc. to other unit for manufacture on job work basis].

Actual User (Non Industrial) means a person who utilises imported goods for commercial establishment, laboratory, R&D Institution, University, educational institution or any service industry.

In *Northern Plastics Ltd.* v. *CCE* 1998 AIR SCW 2355 = AIR 1998 SC 2371, it was held that a registered SSI unit can be an 'actual user'.

C. ***Transfer of goods imported under Actual User condition*** – Goods imported with Actual User condition can be transferred with prior permission of Regional Authority. Application giving details as prescribed in para 2.43 of HBP Vol. 1 should be made.

D. Broad Policy for import of goods

Broad outline of policy is as follows -

(a) Import of agricultural products like wheat, rice, maize, other coarse cereals, copra and coconut oil will be in State Trading category. Similarly, import of petroleum products including petrol, diesel and ATF will be in the category of State Trading. Urea will also be in State Trading.

(b) Import of Food Articles will be subject to compliance of provisions of Food Adulteration Act and Rules. Import of meat and poultry products will comply with provisions of Meat Food Product Order. Import of Tea Waste will be as per Tea Waste (Control) Order. Import of beef or even oils and food products containing beef is prohibited.

(c) Import of textile material using prohibited dyes like azo dyes is not permitted.

(d) New cars can be imported only from country of manufacture. They should comply with provisions of Central Motor Vehicle Rules. They should be right hand drive, with speedometer in KM. Import is permitted only through specified ports. Customs duty on new cars (CBU – Completely Built Units) has been kept high to discourage imports.

(e) Import of alcoholic beverages (liquor) will be as per mandatory requirements stipulated by State Governments.

(f) Second hand capital goods (except computers) are freely permitted without actual user condition. Thus, even traders can import and sale second hand capital goods Duty can be paid through DEPB credit.

(g) **Prohibited Items -** Wild animals, their parts, ivory, tallow, fats or oils of animal origin, fish nail/ tail/waste, pig fats, margarine of animal origin, degras, mutton tallow, chicory plants, and animal rennet are prohibited goods for obvious reason of saving wild life. These cannot be imported even on obtaining an 'authorisation'.

(h) **Second hand goods –** Second hand capital goods including refurbished/reconditioned spares are freely permitted. Other second hand goods are restricted. Import of second hand PC, laptop, air conditioner, DG set, photocopier will require authorization. Import of re-manufactured goods will also require authorisation.

(i) **Import of gold & silver –** Import of silver and gold and coins is free subject to RBI regulations.

(j) **Import only through State Trading Enterprises -** Some items should be imported only through State Trading Enterprises [earlier termed as 'Canalised items' upto 31.3.2001]. (*a*) Petroleum Products can be imported only through Indian Oil Corporation (*b*) Urea only through STC, MMTC and Indian Potash Ltd. (*c*) Wheat, maize, rice etc. Food Corporation of India (FCI) *(d)* Copra and crude oil – STC.

Users in India who require these goods have to register their indent with the canalising agency. Normally, the goods are released to only actual users. After the quota of goods is released in the favour of indentor, payment should be made within the stipulated period and delivery should be taken. Otherwise, the allotted quota lapses.

(k) **Import on export basis** – New or second hand capital goods, equipments, components, parts, containers, jigs, fixtures, tools, moulds, dies etc. can be imported for export without an authorisation, if item is freely importable. A bond or bank guarantee for its re-export has to be submitted to Customs Authorities.

(l) **Repairs abroad and re-import -** Capital goods or their parts (whether imported or indigenous) can be sent abroad for repairs, testing or upgradation and re-imported without authorisation (license).

(m) **Import of gifts -** Import of gifts is permitted when goods are freely importable. In other cases, Customs Clearance Certificate (CCP) from DGFT will be required. Gifts upto ₹ 10,000 are exempt from customs duty.

(n) **Import of metallic waste and scrap –** The metallic scrap should not contain hazardous, toxic waste, radioactive material, arms, ammunition, mines, shells, cartridge or explosive material.

Import of steel, cast iron, copper, brass, Nickel, Aluminium, Zinc, Tin and Magnesium scrap is free subject to prescribed conditions. Pre-shipment inspection can be prescribed. Import will be permitted through specified ports only. Import of other metallic scrap will be allowed only as per conditions given in ITC (HS).

*Pre-shipment inspection can be prescribed for this purpose***.**

(o) **Import of live stock and live stock products, poultry products –** Import of live-stock and live-stock products is prohibited in view of Aviation Influenza.

Samples upto ₹1,00,000 (₹3,00,000 for gem and jewellery sector) can be imported by all exporters without duty as amended w.e.f. 1-4-2008.

(p) **Samples in baggage -** Commercial samples are not treated as '*bona fide*' luggage. Its import is as per provisions of Foreign Trade Policy as applicable to normal imports of commercial goods. These should be declared before customs officers at the time of arrival. [*New Delhi Commissionerate TN 12/96 dated 15-2-1996*]. The commercial samples are exempt from duty only to the extent explained below.

(q) **Small commercial samples and protopypes –** *Bona fide* samples and prototypes upto ₹ 10,000 are exempt from customs duty, if imported by post or in aircraft or by courier service. While calculating vale of samples / prototypes, postal charges or airfreight are not considered.

5.14 RESTRICTIONS ON EXPORTS

Restrictions on exports are less compared to restrictions on imports. The Policy gives negative list of exports. This negative list is under three headings (*a*) Prohibited goods (*b*) Restricted through Authorisation (*c*) State Trading Enterprises [earlier termed as canalised].

A. Third party exports – Third party exports means exports made by an Exporter or Manufacturer on behalf of another exporter/s. The Shipping Bill shall indicate the names of both the exporter/ manufacturer and exporter. The BRC, GR declaration, export order and the Invoice shall be in name of the third party exporter.

B. Merchant Exporter – Merchant Exporter means a person engaged in trading activity and exporting or intending to export goods.

C. General restrictions – General prohibitions/restrictions on import/export are as follows –

i. Import/export of arms and related material from/to Iraq

ii. Direct or indirect export and import of nuclear related or weapons of mass destruction from/ to Democratic People's Republic of Korea

iii. Direct or indirect export and import of nuclear related or Iran's enrichment related or heavy water related activities

D. Restriction through notification by DGFT – DGFT can adopt and enforce any measure necessary for protection of public morals, protection of health, protection of IPR, conservation of natural resources etc., by issuing a notification.

E. Prohibited goods for export - Wild life including their products and parts, exotic birds, endangered plants, beef, pig fat, carcasses of buffalo, certain rock lobsters, meat and bones of wind animals, milk, skimmed milk, milk food for babies, peacock feathers and handicrafts of peacock feathers, dried leguminous vegetables, guar seeds, lentils, wheat and meslin, specified plant and plant portions, sea weeds, tallow/flat/oil of any animal origin excluding fish oil, sugar, sea shells, ivory, bovine semen, potato seeds, seeds, margarine of animal origin, human skeletons, wood and wood products, wood pulp, sandalwood and red sanders wood are prohibited.

Thus, items related to conservation of our natural resources, are mainly prohibited.

F. Export of personal luggage - *Bona fide* personal luggage can be exported either with passenger or one year before or after his departure from India. Export of items in negative list will require licence or authorisation.

G. Export of gifts - Gifts upto ₹ 5,00,000 can be exported without authorisation. These can include edible items

For export of gifts/spares/replacement goods in excess of ceiling/period, application can be made to DGFT.

H. Exports of warranty spares and replacement - Warranty spares of plant, machinery etc. can be exported without authorisation along with the main equipment or subsequently within warranty period, subject to approval of RBI. [It is not clear why this new hurdle is created when we are talking of more and more liberalization].

If goods exported were found to be defective/damaged or otherwise unfit] can be replaced free of charge by exporter. Such replacement is allowed provided the replacement goods are not under restricted category.

For export of gifts/spares/replacement goods in excess of ceiling/period, application can be made to DGFT.

I. SCOMET Items - Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) is either prohibited or restricted. These cover nuclear material, nuclear reactors, equipment for nuclear explosive devises, rocket systems, toxic chemicals, micro-organisms, chemicals for weapons, viruses, etc.

Application for license for exporting these items is to be made to DGFT. Application will be considered by Exim Facilitation Committee (EFC). In respect of items specified in Appendix 3 to Schedule 2 of ITC (HS), application will be considered by Inter-Ministerial working group in DGFT based on criteria as specified.

On export of SCOMET items, the end use is required to issue certificate in form given in Appendix.

J. General System of Preferences (GSP) – Under this scheme, industrialized i.e. developed countries extend tariff concessions to developing countries on unilateral basis. USA, EOU, Japan, Australia, Russia etc. Provide such concessions. Information is required to be submitted in prescribed form and is to be certified by authorised agencies. List of agencies authorised to issue GSP CoO (Certificate of Origin) is given in Appendix.

K. Global System of Trade Preference (GSTP) – Under this scheme, tariff concessions are exchanged among developing countries who have signed agreement. Some 46 countries are members of GSTP. India has exchanged tariff concessions with few countries in respect of some products. Certificate of Origin (CoO) is required to be obtained from Export Inspection Council [EIC].

L. SAARC Preferential Trading Agreement (SAPTA) – SAPTA came into operation in 1995. More than 3,000 tariff items are under tariff concessions. Certificate of Origin (CoO) is to be obtained from agencies as notified in Appendix.

M. *Asia-Pacific Trade Agreement (APTA)* – Bangladesh, Sri Lanka, South Korea, India and China are exchanging tariff concessions under APTA. Certificate of Origin (CoO) is required to be obtained from Export Inspection Council [EIC].

Study Note - 6

SERVICE TAX

This Study Note includes

6.1 Introduction
6.2 Registration Under Service Tax
6.3 Reverse Charge
6.4 Brand Name of Another Person
6.5 Payment of Service Tax
6.6 Rate of Service Tax
6.7 Invoices Under Service Tax
6.8 Records to be Maintained
6.9 Automation of Central Excise and Service Tax (ACES)
6.10 Electronic Accounting System in Excise and Service Tax (EASIEST)
6.11 Negative List, Exempted Services & Mega Exemptions
6.12 Point of Taxation
6.13 Taxable Event in Service Tax
6.14 Place of Provision of Service Rules
6.15 Valuation of Taxable Services (Section 67)
6.16 Important Issue under Service Tax Provisions
6.17 E-payment of Service Tax
6.18 Self Adjustment of Excess Tax Paid
6.19 Special Audit
6.20 Return
6.21 Penalties
6.22 Adjudication & Appeals

6.1 INTRODUCTION

There is no separate Act for Service Tax. The provisions of service tax are contained in Chapter V of the Finance Act, 1994 and administered by the Central Board of Excise & Customs (CBEC).

Service tax is being imposed by amending Finance Act, 1994 and the scope has been amended time to time.

The power to change service tax vests with the Central Government. This authority is granted to the Central Government by Entry 92C (yet to be made effective) of the union list. However, currently, the service tax is collected under the power of the Residuary Entry 97 of the Union List.

Service tax was introduced in the year 1994. No separate Act on Service Tax is in force as yet but it finds its enactment in the Finance Act, 1994. Till date, the service tax amendments are being introduced by amending the Finance Act, 1994 from time to time. The taxable services are defined in section 65 of the Finance Act, 1994. Section 66 is the charging section of the said Act.

6.1.1 Statutes Governing the Levy of Service Tax

i. The Finance Act, 1994 Chapter V — Sections 64 to 96-I. This chapter extends to the whole of India except the State of Jammu and Kashmir.

ii. The Finance Act, 2004 Chapter VI — for levy of Education Cess @ 2% on the Service Tax.

iii. The Finance Act, 2007 — for levy of Secondary and Higher Education Cess of 1% on service tax.

iv. The Service Tax Rules, 1994. (Also referred to as 'Rules' or 'STR, 1994').

v. The CENVAT Credit Rules, 2004.
vi. The Place of Provision of Services Rules, 2012
vii. The Service Tax (Registration of Special categories of persons) Rules, 2005.
viii. The Service Tax (Determination of Value) Rules, 2006 (with effect from 19th April, 2006)
ix. The Point of Taxation Rules, 2011

6.1.2 Sources of Service Tax Law

As you are aware there is no separate Act for the service tax. However, the sources of service tax law are:

i. Finance Act, 1994
ii. Various Rules on service tax
iii. Notifications on service tax
iv. Circulars/Instructions on service tax issued by CBEC time to time
v. Orders on service tax published by the CBEC (Rule 3) and the Central Government (Section 95) and
vi. Trade notices on service tax issued by Central Excise and Service tax commissionerates

6.1.3 Extent and scope of service tax [section 64 of the Finance Act, 1994]

Chapter V of the Finance Act, 1994 (i.e. the service tax law), which came into force from 1-7-1994, extends to the whole of India except the state of Jammu and Kashmir. The various aspects relating to the extent of applicability of the service tax law are as follows:

(1) India [Section 656(27)]: India means,-

(a) the territory of the Union as referred to in clauses (2) and (3) of Article 1 of the Constitution i.e. the States and Union Territories;

(b) its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976;

(c) the seabed and the subsoil underlying the territorial waters;

(d) the air space above its territory and territorial waters; and

(e) the installations, structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof.

(2) Service Tax extends to the Continental Shelf & Exclusive Economic Zone (CS & EEZ) of India [Notification No. 14/2010-S.T., dated 27-2-2010]: The Central Government has extended provisions of Chapter V of the Finance Act, 1994, to the following areas in the continental shelf and exclusive economic zone of India for the following purposes mentioned correspondingly –

Area	Purpose for which service tax law extended
(1) Whole of continental shelf economic zone of India and exclusive	Any service provided for all activities pertaining to construction of installations, structures and vessels for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof.
(2) Installations, structures and the continental shelf and vessels within the exclusive economic zone of India, constructed for the purposes of prospecting or extraction or production of mineral oil and natural gas.	Any service provided or to be provided by or to such installations, structures and vessels and for supply of any goods connected with the said activity.

(3) Service tax doesn't extend to the State of Jammu and Kashmir: This means that the services provided (as per the Place of provision of service rules, 2012) in the territorial jurisdiction of the State of Jammu and Kashmir are not liable to service tax. The location of the service provider or the service recipient doesn't matter.

6.1.4 Salient features of levy of service tax

The salient features of levy of service tax are as under -

(i) Service defined: The word service has been defined under section 65B(44) of the Chapter V of Finance Act, 1994. It is an exhaustive definition and covers all the activities except those specifically excluded from the ambit of service tax.

(ii) Scope: Section 66B is the charging section which provides that service tax shall be levied on all the services provided or agreed to be provided in a taxable territory other than services specified in Negative list.

(iii) Negative list: Section 66D specifies services which are covered in negative list. The *services so* specified go out of ambit of chargeability of service tax. In all, there are seventeen heads of services that have been specified in the negative list.

(iv) Exempted Services: In addition to services specified in negative list, a mega exemption Notification No. 25/2012-S.T., dated 20-06-2012 has been issued exempting many services from payment of service tax.

(v) While the services in the negative list are not taxable at all, the exempted services are those that are otherwise taxable but exempt *vide* notification issued by the Central Government.

(vi) Declared services: To avoid disputes between sale of goods and services, Section 66E provides certain activities to be specifically treated as declared services. Nine activities have been specified in the said section which are deemed to be declared service.

(vii) Taxable Territory: Since provision of service in taxable territory is an important ingredient of taxability, Section 66C empowers the Central Government to make rules for determination of place of provision of service. The Central Government has notified Place of Provision of Service Rules, 2012 in this regard.

(viii) Principles of Interpretation: Principles of Interpretation have been laid down in Section 66F of the Act for interpretation whenever services have to be treated differentially for any reason and also for determining the taxability of bundled services.

(ix) Date of determination of rate of tax, value of taxable service & exchange rate: Section 67A has been inserted w.e.f. 01-07-2012 which states that the rate of service tax, value of taxable service & exchange rate shall be the rate in force or as applicable at the time when taxable service has been provided or agreed to be provided. Point of taxation Rules, 2011 has been framed for this purpose.

(x) Rate of service tax: The rate of service tax specified under section 66B is 12% of value of taxable services. Service tax is to be increased by Education cess @ 2% and Secondary & Higher education cess @1%. Hence, effective rate of charge of service tax is 12.36% of value of taxable service.

(xi) Valuation of services: For the purpose of levy of service tax, the value of taxable service is to be determined in accordance with Section 67 read with Service Tax (Determination of Value) Rules, 2006,

(xii) Payment of service tax: The liability for payment of service tax is affixed either on service provider or on recipient of service (in case of reverse charge). With effect from 01-07-2012, a new scheme of taxation is brought into effect where the liability of payment of service tax will be shared by service provider as well as service recipient in specified services. This is called as partial reverse charge.

(xiii) Cenvat credit: The credit of service tax and excise duty across goods and services are available in accordance with Cenvat Credit Rules, 2004.

(xiv) Procedural compliances: Provisions have been made for registration, assessment including self assessment, rectification, special audit, appeals and penalties for non compliance of the provisions of the Act and Rules.

6.1.5 Concept of charge of service tax

Charge of service tax on and after Finance Act, 2012 [Section 66B]: There shall be levied service tax at the rate of 12% on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

Essentials for charge of service tax: Thus, important ingredients for charge of service tax are -

(i) The service should have been provided or agreed to be provided.

(ii) The service should be provided for a consideration.

(iii) The service should be provided by one person to another person.

(iv) The service should be provided in taxable territory *(i.e.* India excluding State of Jammu & Kashmir) as per Place of Provision of Service Rules, 2012.

(v) Services must not be specified in the negative list.

(vi) Service tax is levied @ 12% (increased by EC @ 2% & SHEC @ 1%) of value of taxable service. Hence, effective rate is 12.36% of value of taxable service.

(vii) Service tax is collected in such manner as may be prescribed (i.e. in accordance with Service Tax Rules, 1994).

6.1.6 Nature of Service Tax

Service tax can be levied on the following:

(a) Taxable Service, and

(b) Value of Taxable Service.

Taxable Services

Service tax is levied on all services except negative list of services in the Finance Act, 1994. There are several services which are taxable if service is provided by a service provider; any person to any person.

However, all taxable services are NOT subject to service tax.

This is because taxability is not only dependent on the nature of service but also on—

(i) Who is the service provider,

(ii) Who is the service receiver.

Example 1:

X Ltd, an advertising company is not liable to collect and pay service tax on advertisement service rendered to the Approved International Organisation in India, even though for the same service to another entity X Ltd will have to collect and pay tax. ("Who is the Service receiver" principle)

Example 2:

Mr. A, a professional dealing in indirect tax gives consulting advice to the government of India, he is required to collect service tax from the Government of India and remit the same to the Service Tax department. However, if the Reserve Bank of India were to render the same service to the Government of India it is not required to collect and pay service tax. ("Who is the Service provider" principle) such services are taxable services; RBI is not liable to pay the service tax. Likewise any services provided by the service provider which are in the nature of statutory services, then service tax cannot be levied.

6.1.7 Service [Section 658(44)]: "Service" means -

- any activity carried out by a person for another for consideration, and
- includes a declared service,
- but shall not include, -
  - **(a)** An activity which constitutes merely, -
    - (i) A transfer of He in goods or immovable property, by way of sale, gift or in any other manner; or
    - (ii) Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of Article 366(29A) of the Constitution; or
    - (iii) A transaction in money or actionable claim;
  - **(b)** A provision of service by an employee to the employer in the course of or in relation to his employment;
  - **(c)** Fees taken in any Court or tribunal established under any law for the time being M force.

Explanation 1: For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to, -

(A) The functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) The duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) The duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2: For the purposes of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Explanation 3: For the purposes of this Chapter,-

(a) An unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) An establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4: A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.

The following are the ingredients of service, -

(1) Service means any activity carried out by a person:

- **(a)** The term 'Activity' would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation.
- **(b)** Activity could be active or passive and would also include forbearance to act. Agreeing to an obligation, to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.

(2) The activity shall be carried out by one person for another person:

(b) Person [Section 65B(37)]: Person includes, -

- an individual,
- a Hindu undivided family,
- a company,
- a society,
- a limited liability partnership,
- a firm,
- an association of persons or body of individuals, whether incorporated or not,
- Government,
- a local authority, or
- every artificial juridical person, not falling within any of the preceding sub-clauses.

(b) Two separate persons are required for taxability: Service must be provided by one person to another i.e. service provider and service receiver. Thus, self service is outside the purview of service tax. However the following are its exceptions, -

- **Deemed Separate person:** As per Explanation 3 of Section 65B(44) which are as under,-
  - **(a)** an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons.
  - **(b)** an unincorporated association or body of persons and members thereof are also treated as distinct persons.
- **Implications of these deeming provisions:** Thus, inter-se provision of services between such persons, deemed to be separate persons, would be taxable. This provision is an exception to the 'principle of mutuality'.

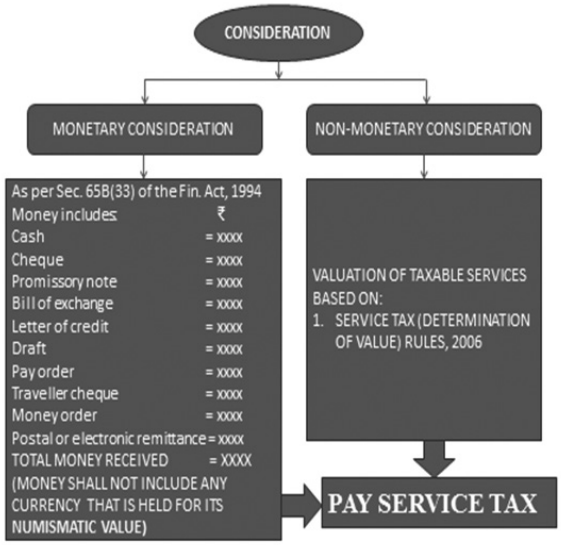
Example 3:

(a) Services provided to the branch office in India of a multi-national company by the headquarters of the multi-national company located outside India;

(b) Services provided by a club to its members,

would be taxable provided other conditions relating to taxability of service are satisfied.

(3) Activity must be carried out for a consideration:



(a) **Consideration:** "Consideration" means everything received or recoverable in return for a provision of service which includes monetary consideration as well as non-monetary consideration.

Monetary consideration: "Monetary consideration" means any consideration received in the form of money.

Non monetary consideration: Non-monetary consideration essentially means compensation in kind such as the following:

- Supply of goods and services in return for provision of service ;
- Refraining or forbearing to do an act in return for provision of service ;
- Tolerating an act or a situation in return for provision of a service;
- Doing or agreeing to do an act in return for provision of service.

In case of non-monetary consideration, the money value of such consideration is to be determined in accordance with Service Tax (Determination of Value) Rules, 2006.

(b) **Activities carried out without consideration are outside the scope of service:** Activity carried out without any consideration like donations, gifts or free charities are, therefore, outside the ambit of service.

Examples 4:

(i) Grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research. Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.

(ii) Donations to a charitable organization is not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor. *(Circular No.* 127/09/2010-ST, *dated* 16-8-20101

(c) **Consideration need not only be paid by service receiver:** Consideration may be paid by any person and not necessarily receiver of service.

(d) **Consideration must arise out of contractual reciprocity:** An activity done without express or implied contractual reciprocity of consideration would not be an activity for a consideration even if such activity may lead to accrual of gains to the person carrying out such activity.

Examples 5:

(i) Life time achievement award will not comprise an activity for a consideration.

(ii) Artist performing at street where viewers are under no obligation to pay any amount.

(iii) Provision for free tourism, access to free TV channels or governmental activities without charges will not comprise an activity for a consideration.

(iv) Grant of pocket money, a gift or reward (which has not been given in terms of reciprocity), amount paid as alimony for divorce would be examples in this category.

However a reward given for an activity performed explicitly on the understanding that the winner will receive the specified amount in reciprocity for a service to be rendered by the winner would be a consideration for such service.

Thus amount paid in cases where people at large are invited to contribute to open software development (e.g. Linux) and getting an amount if their contribution is finally accepted will be examples of activities for consideration.

(e) Fines and penalties which are legal consequences of persons actions are not in nature of activity for a consideration.

(4) Certain instances:

Sl. No.	A	B
	Nature of payment	**Whether consideration for service?**
1.	Amount received in settlement of dispute.	It shall not be regarded as consideration unless it represents a portion of the consideration for an activity that has been carried out. If the dispute itself pertains to consideration relating to service then it would be a part of consideration.
2.	Amount received advances for performance of service.	Such advances are consideration for the agreement to perform a service.
3.	Deposits returned on cancellation of an agreement to provide a service.	Returned deposits are in the nature of a returned consideration. If tax has already been paid the tax payer would be entitled to refund to the extent specified and subject to provisions of law in this regard.
4.	Advances forfeited for cancellation of an agreement to provide a service.	Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provision of service.
5.	Security deposit that is returnable on completion of provision of service.	Returnable deposit is in the nature of security and hence do not represent consideration for service. However if the deposit is in the nature of a colorable device wherein the interest on the deposit substitutes for the consideration for service provided or the interest earned has a perceptible impact on the consideration charged for service then such interest would form part of gross amount received for the service. Also security deposit should not be in lieu of advance payment for the service.
6.	Security deposits forfeited for damages done by service receiver in the course of receiving a service.	If the forfeited deposits relate to accidental damages due to unforeseen actions not relatable to provision of service then such forfeited deposits shall not be regarded as consideration and the same is specifically excluded in the Valuation Rule, 2006.
7.	Excess payment made as a result of a mistake.	If returned it is not consideration. If not returned and retained by the service provider it becomes a part of the taxable value.

(5) Declared Services:

The definition of service includes declared service. Declared services are activities that have been specified in Section 66E of the Act. When such activities are carried out by one person for another in the taxable territory for a consideration, then such activities are taxable services. In fact, most of the declared services have been specified with the intent of clarifying the distinction between the deemed sales and activities related thereto which are outside the realm of deemed sales but qualify as a service.

Exclusions from the definition of Service / Activities not covered under Service -

(1) Sale/Deemed sale/Transaction only in money do not constitute service:

(a) Sale - Mere transfer in title of goods or immovable property: Mere transfer in title of goods or immovable property by way of sale, gift or in any other manner for a consideration, does not constitute service.

(i) **Goods [Section 65B(25)]:** Goods means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached *to or* forming part of the land which are agreed to be severed before sale or under the contract of sale.

(ii) **Immovable property [Clause (26) of the General Clauses Act, 1897]:** Immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

(iii) **Transfer of title:** "Transfer of title" means change in ownership. Mere transfer of custody or possession over goods or immovable property *where* ownership is not transferred does not amount to transfer of title. For example giving the property on rent or goods for use on lure would not involve a transfer of fide, and will therefore, be charged to service tax.

(iv) **Composite transactions:** A transaction which, in addition to a transfer of title in goods or immovable property, involves an element of another activity carried out or to be carried out by the person transferring the tide would not be out rightly excluded from the definition of service.

(b) Deemed sales: "Service" shall not include an activity which constitutes merely transfer, delivery or supply of *any* goods which is deemed to be sales within the meaning of Article 366(29A) of the Constitution. 'Deemed sales' refer to those transactions which will be deemed as sales even if, as per the normal definition, these cannot be held as sales.

Though deemed sales are outside the purview of 'Service' but activities related to deemed sales which qualify as a service, has been declared as a service as per the provisions of Section 66E of the Finance Act, 1994.

(c) A mere transaction in money or actionable claims: Any activity which constitutes merely a transaction in money or actionable claim will not constitute service.

(i) **Money [Section 65B(33)]:** "Money" means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any such similar instrument but shall not include any currency that is held for its numismatic value.

(ii) **Actionable Claim [Section 65B(1)]:** Actionable claim shall have the meaning assigned to it in Section 3 of the Transfer of Property Act, 1882. As per Section 3 of the Transfer of Property Act, 1882 'Actionable claim' means a claim to,-

(a) any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property; or

(b) any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief,

whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Examples of actionable claims are -

- Unsecured debts;
- Right to participate in the draw to be held in a lottery.

[**Note:** Only those debts which can be enforced through Court of Law can be said to be actionable claims.]

(iii) **Activities regarded as transaction only in money:** The following are some of the activities which fall under this category -

(a) principal amount of deposits in, or withdrawals from a bank;

(b) advancing or repayment of principal sum on loan to some one;

(c) conversion of, say Z 1,000 currency notes into one rupee coins (to the extent amount is received in money form);

(d) actionable claims like transfer of unsecured debts.

Thus, transaction in money per-se would be outside the ambit of service.

Related activities covered: Any related activity for which separate consideration is charged would not be treated as transaction in money and would be chargeable to service tax if other elements of taxability are present.

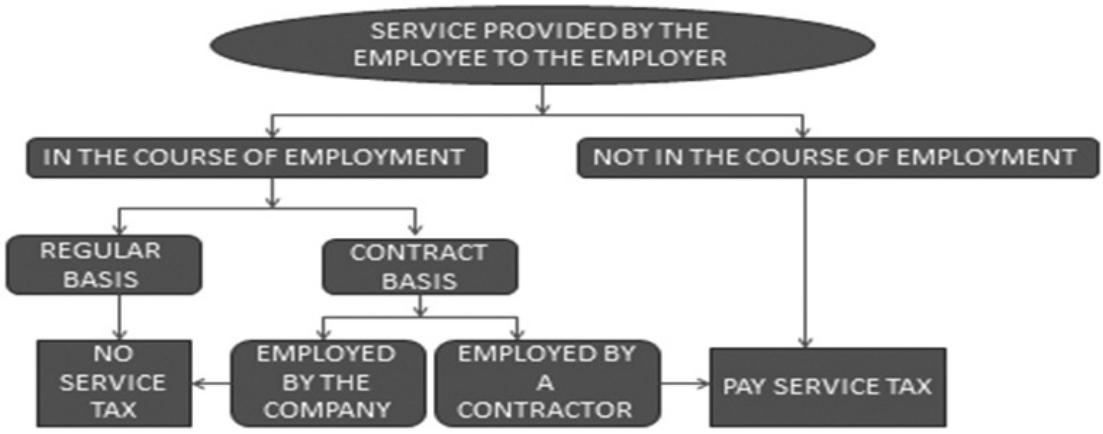
For example: Making of a bank draft, where the bank charges a commission for the preparation of the same is not transaction only in money and the commission charged shall be the value of service provided.

(iv) Activities relating to use of money or its conversion into another form/ currency/ denomination for consideration included in definition of service [Explanation 2]: Activities relating -

- to use of money; or
- its conversion from one form, currency or denomination to another form, currency or denomination;

for which a separate consideration is charged; shall be included as 'service'.

(2) Service by an employee to employer in course of employment do not constitute service:



Any service provided by an employee to his employer during the course of his employment is outside the ambit of service. Therefore,-

Functions performed by MPs, MLAs, persons holding constitutional posts are not included in 'service' [Explanation 1]: As per explanation 1, the following functions/ duties will not be covered in service,-

(a) The functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(b) The duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(c) The duties performed by any person as a Chairperson or a Member or a Director in a body

established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

However, the following will be covered in scope of service -

(i) **Services provided outside employment for a consideration -Taxable:** Services provided outside employment for a consideration would be covered under the definition of 'service'.

Example: If an employee provides his service on contract basis to an associate of the employer, it would be covered under 'service'.

(ii) **Services provided on contract basis - Taxable:** Services provided on contract basis i.e. principal to principal basis are not services in course of employment and therefore come within the ambit of taxable service.

(iii) **Amounts received by an employee from the employer on premature termination of contract of employment - Not regarded as service:** Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to service tax.

(iv) **Non competing fees - Taxable:** Any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.

(d) **Status of services provided by casual workers or contract labour:**

If	Then
Services provided by casual worker to employer who gives wages on daily basis to the worker	These are services provided by the worker in the course of employment
Casual worker are employed by a contractor, like a building contractor or a security service agency, who deploys them for execution of a contract or for provision of security services to a client.	Service provided by the workers to the contractor are services in the course of employment and hence not taxable. However, services provided by the contractor to his client by deploying such workers would not be a service provided by the workers to the client in the course of employment. The consideration received by the contractor would therefore be taxable if other conditions of taxability are present.

(3) **Service of Court/Tribunal - Not covered:**

Fees taken in any Court or tribunal established under any law for the time being in force is outside the coverage of 'service'

6.1.8 Extent and scope of levy of service tax on 'Composite contracts of sale and service'

The power to levy tax on sale of goods is within the legislative competence of the states. A transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be outrightly excluded from the definition of service.

(1) **If two transactions can be separable then service portion will be leviable to service tax:** If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. The service portion will only be liable for service tax.

Example 6: A builder carrying out an activity for a client wherein a flat is constructed by the builder for the client for which payments are received in instalments and on completion of the construction the title in the flat is transferred to the client involves two elements namely provision of construction service and transfer of title in immovable property. The two activities are discernibly separate. The activity of construction carried out by *the* builder would, therefore, be a service and the activity of transfer of title in the flat would be outside the ambit of service.

(2) Composite contract for sale of goods & **provision of services - Inseparable - `Dominant Nature Test' applicable:** Service is different from sale. The fact that some goods have been used in the course of providing 'service' doesn't make that transaction a 'sale'.

The nature of the transaction depends on the intention of the parties. If the parties intended to enter into a transaction of purchase and sale of 'goods', the transaction will be 'sale' even though some services might have been provided, which will be taxed separately. However, in case where goods have been used in providing services or in case where the sale of goods is incidental to the provision of services, the transaction would primarily be that of service.

Therefore, if the predominant factor in a transaction is 'sale', the transaction would be classified as 'sale', however, if the predominant factor in a transaction is 'service', the transaction would be classified as 'service' only. This is commonly known as "Dominant Nature Test". - *Bharat Sanchar Nigain Ltd. v.* i.IOI [2006] 2 STR 161 (SC)

(3) Exceptions to Dominant Nature Test - Transactions of 'deemed sales' under Constitution [Article 366(29A)]: As per Article 366(29A) of Constitution of India, sale includes some transactions which are regarded as deemed sale. The dominant nature test doesn't apply to the aforesaid transactions of deemed sales, which are deemed to divisible. The 'sale' element, which is deemed to be divisible, cannot be subjected to service tax.

Further, the States can impose tax only on the 'sale' element of these transactions; the States cannot impose any tax on 'service element' in these transactions, as the 'service element' can be taxed only by Parliament/ Centre.

The present status as regards taxation of deemed sales is as under -

		'Sale Element'	**'Service Element'**
(1)	**Transfer, otherwise than in pursuance of a contract**	Transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;	There is no service element
(2)	**Works Contract**	Transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;	Service portion in the execution of a works contract is a declared service under section 66E(h);
(3)	**Hire-purchase contract**	Delivery of goods on hire-purchase or any system of payment by installments;	Activities in relation to delivery of goods on hire purchase or any system of payment by instalments is a declared service under section 66E(g);
(4)	**Lease contract**	Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;	Transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a declared service under section 66E(f);

(5)	**Supply of goods by association to its members**	Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;	According to section 65B(44) explanation 3(b), An unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons and provision of service between them is chargeable to tax.
(6)	**Catering Contract**	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.	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 a part of the activity is a declared service under section 66E(i).

6.2 REGISTRATION UNDER SERVICE TAX

Any person liable to pay service tax has to register with the Superintendent of Central Excise (Section 69) within 30 days from the date of commencement of the business of providing taxable service (Rule 4 of Service Tax Rules, 1994).

Service Tax Registration is required if —

i. the taxable turnover of the service provider during the previous year exceeds ₹ 9 lakhs, or

ii. the service provider is acting as an input service distributor irrespective of his turnover.

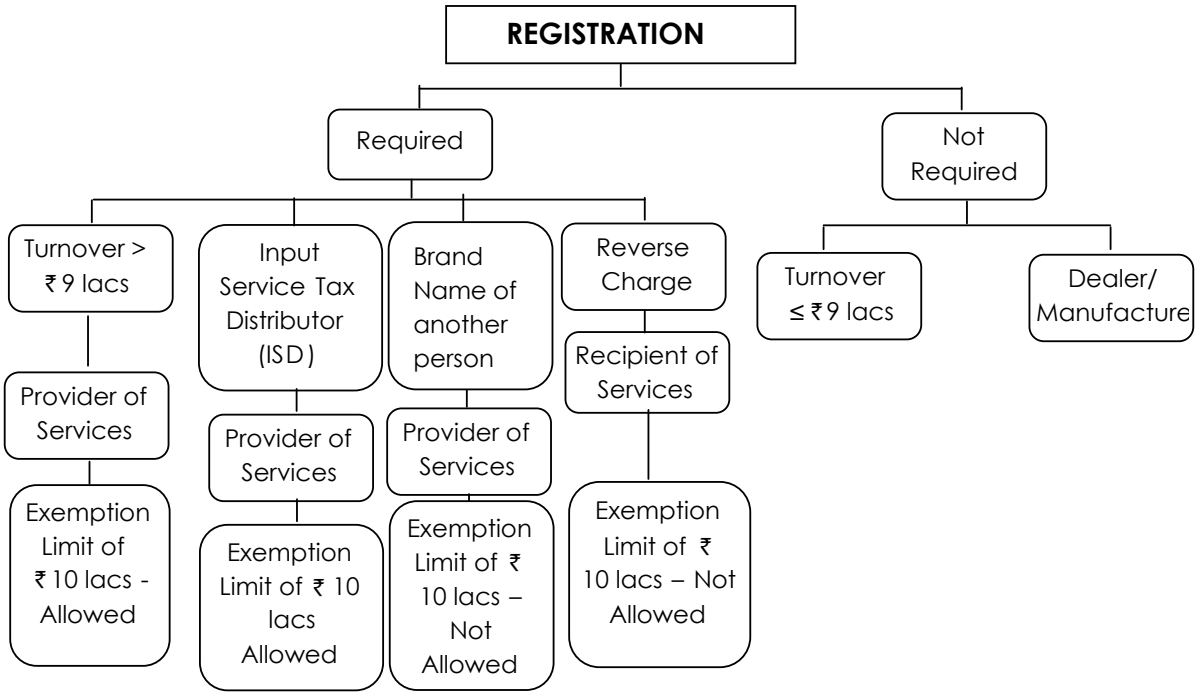
iii. Service provider provided services under the brand name of another person.

iv. the service receiver is liable to pay service tax being recipient of any services under Reverse Charge.

A service provider whose value of service exceeds ₹ 9 lakhs, in the year of providing the service or in any subsequent year, when the value of service cross ₹ 9 lakh for the first time, would require registration, however such service provider can avail exemption if the value of service does not exceed ₹ 10 Lakhs per annum.

Small Service Provider Exemption

Service tax provides for an exemption to small service providers who provide taxable services of a value not exceeding the specified limit. The specified limit is now ₹ 10 lakhs. In other words where the value of taxable services provided do not exceed ₹ 10 lakhs in the previous financial year, the concerned service provider would not be required to pay service tax upto receipts of ₹ 10 lakhs in the current financial year. The exemption is through notification 6/2005 ST dated 01.03.05 as amended from time to time.



6.2.1 Registration procedure under Service Tax

Step 1: Apply for registration in Form ST-1 to the Superintendent of Central Excise

Step 2: Submit along with Form ST-1 the following documents

- Permanent Account Number (PAN)
- Affidavit declaring the commencement of the services (prescribed Format)
- Copy of passport or ration card or any other document as residential proof
- Passport size photograph of the assessee in case of individual and of partners in the case of partnership firm and of directors in the case of a company.
- Partnership deed in case of firm
- Memorandum and Articles of Association in case of company

Step 3: The Superintendent of Central Excise will grant a certificate of registration in Form ST-2 within 7 days of the date of receipt of the application. If the registration is not granted within 7 days registration is deemed to be granted. It means deeming provision in rule 4(5) is applicable to registration granted by the Superintendent of Central Excise. However, no time stipulated on the Commissioner of Central Excise to grant centralized centralised registration under rule 4(2), the provision of deemed registration is not attracted in case of grant of centralised registration by the Commissioner *[Karamchand Thapar & Bros. (Coal Sales) Ltd. v UOI 2010 (20) STR 3 (Cal)]*.

Step 4: Certificate of Registration can be surrendered if the assessee ceases to provide the taxable services for which he had been registered.

Where a service is rendered from different locations falling under different Commissionerates, multiple registrations are required. However, even in this case a single registration is possible, with the permission from the Department, if the assessee maintains centralized billing or centralized accounting for multiple services provided from more than one premises.

Dealer's registration not available under service tax unlike First Stage Dealer and Second Stage Dealer under Central Excise

Such permission can be granted by the Chief Commissioner of Central Excise or Commissioner of Central Excise if all the premises are falling under the jurisdiction of one Chief Commissioner or Commissioner.

If the premises of the assessee are falling under the jurisdiction of more than one Chief Commissioner then the permission has to be got from the Director General of Service Tax (DGST).

Registration under service tax can also be done through online system namely ACES mode (i.e. Automation of Central Excise and Service Tax).

6.2.2 Registration in case of Multiple Services

One application for registration is enough even though the service provider is providing or provides multiple services. Registration is not granted service wise but assessee wise. All services can be mentioned in one ST-1 form and the same can be submitted in the office of the Superintendent of Central Excise.

Example 7:

Mr. B is providing erection, commissioning and installation and mining services in addition to Mandap keeping services. How many applications for registration under service tax provisions Mr. B need to apply?

Answer:

Single ST-1 Form is enough for all multiple services rendered by Mr. B.

6.2.3 Transfer of Business

If the assessee transferred his business to another person, the transferee shall obtain a fresh certificate of registration. Certificate of registration is non-transferable.

Example 8:

Mr. Ram provider of interior decorating services since 2009, hold's service tax registration under service tax provisions. Mr. Ram subsequently sold the entire business to Mr. Y for ₹ 10 lacs. You are required to answer wether the registration number of Mr. Ram will be the registration number of Mr. Y?

Answer:

No, the registration certificate under the service tax is non-transferable.

6.2.4 Amendments in Registration Certificate

Certain changes may require amendments in registration certificate. Whereas any change in constitution of the business, new registration number is required to be obtained.

Changes in registration certificate:

In Case of

i. Service provider providing any taxable service other than that provided in the registration certificate.

ii. Change of billing address from one location to other etc.

Service provider should furnish such additional information or details, in writing to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise within 30 days of such change.

Hence, the revised registration certificate will be issued after cancelling the registration certificate issued earlier. However, no new registration number will be allotted.

Change of business constitution:

Where there in change in the constitution of business such as, a new registration certificate for the changed form of business need to be obtained, like partnership firm converting into a private limited or public limited company, a private limited company converted into public limited company and so on. In the case of change, the transferee needs to obtain a fresh new registration certificate with a new number.

6.2.5 Salient Features of STC

Service Tax Registration number also known as Service Tax Code (STC) contains 15 digits PAN based number.

i. The first 10 digits of this number (i.e. STC) are the same as the PAN of such person.
ii. Next 2 digits are ST
iii. Next 3 digits are serial numbers indicating the number of registrations taken by the service taxpayer against a common PAN. (for example 001 for one registration number, 002 for two registration numbers of such a person having common PAN for such premises)

6.2.6 Premises Code

In addition to PAN based STC number, another number, namely, 'premises code' is also given in the registration certificate (i.e. ST-2). This number indicates the code of the jurisdictional Commissionerate, division, range and serial number within the range. This number is issued for easy identification of location of registration of the service tax payer.

6.2.7 Multiple Centralized Registration

A bank has its head office at Mumbai and regional offices at Chennai, Hyderabad and Cochin and the bank has centralized billing or centralized accounting facilities available at each of these regional offices, in addition to the Head office. Such bank at its option can obtain multiple centralized registration for each regional offices for the purpose of discharging the service tax liability.

6.2.8 Cancellation or Surrender of Registration Certificate

Once registration is granted it will be valid till such time it is surrendered. However, registration can be cancelled in the following cases:

i. Service provider ceases to provide the taxable service
ii. Service provider deceased (in case of a sole proprietor)
iii. Service provider transferred his business in favour of others

Before cancellation of registration the Superintendent of Central Excise shall ensure that the assessee has paid all monies due to the Central Government and then cancel the registration certificate.

6.2.9 Input Service Distributor (ISD)

In case of input service distributor registration under Service Tax provisions is compulsory irrespective of the turnover limit.

Input service distributor means an office managing the business of manufacturer or producer of final products or provider of output services, which receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchase of input services and issues invoice, bill or, as the case may be, challan for the purpose of distributing the credit of service tax paid under said services to such manufacturer or producer or provider, as the case may be. [Rule 2(m) of the CENVAT CREDIT RULES, 2004]

Manner of distribution of credit by input service distributor (Rule 7 of the CENVAT CREDIT RULES, 2004) (w.e.f. 1-4-2012):

The input service distributor may distribute the CENVAT CREDIT in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely:-

(a) The Input service distributor must ensure that such a distribution should not exceed the service tax paid.
(b) In case an input service is attributable to service use in a unit exclusively engaged in manufacture of exempted goods or exempted services, then such credit of service tax shall not be distributed.
(c) Credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and
(d) Credit of service tax attributable to service used in more than one unit shall be distributed pro-rata on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates.

Example 9:

X Ltd. has three units namely:

Place	Nature	Turnover for the April 2012 (₹)	Output
Chennai	Factory	2,50,000	Dutiable goods
Bangalore	Factory	1,50,000	Dutiable goods
Hyderabad	Service unit	1,10,000	Taxable service
Total		**5,10,000**	

M/s Mudra Pvt. Ltd an advertising agency provided services for ₹ 3,00,000 in the month April 2012 by charging Service Tax @12.36% to X Ltd. to promote products of Chennai and Bangalore factories. However, Hyderabad unit not received input services from M/s Mudra Pvt. Ltd.

In the given case X Ltd can distribute the CENVAT CREDIT on input service to Chennai and Bangalore factory, in respect of their turnover ratio. It means input service distributor should not distribute the CENVAT CREDIT on input service to the Hyderabad unit. Since, this unit were not received any input service.

6.3 REVERSE CHARGE

Every person providing a taxable service is required to pay service tax at the prescribed rate. However in certain cases the service recipient is made liable to pay service tax on the services received. Since the person receiving services is made liable to pay service tax, the mechanism of collection of such tax is called as reverse charge (RCM).

This concept is set out in service tax law by virtue of section 68(2) by empowering the Central Government to notify services positively on which the said RCM would apply. To support this the person liable to pay service tax as defined in rule 2(1)(d) of the Service Tax Rules, 1994 also includes service recipients.

The SSI exemption is not available for the service tax payable under reverse charge in Service tax, person receiving the service covered under RC is liable to pay irrespective of quantum.

However, in addition to the concept of reverse charge a new concept of joint charge (recipient and provider of services liable to pay tax) is also introduced.

Joint Charge Mechanism

Under the concept of joint charge, for one service the service provider as well as service receiver is made liable for payment of service tax to the extent notified. This liability is independent of the other person's liability. In other words the failure to comply with the provisions by one person on his part would not impact the compliance requirement of other person and vice versa.

The notified taxable services are as follows:

(i) Insurance Services: General Insurance Services or Life Insurance Services provided by the insurance agents to the insurance company. Hence, the insurance company being recipient of service is liable to pay service tax. However, an option to pay service tax at a rate other than standard rate (i.e. 12%) is given an insurer carrying on life insurance business. Life insurance company collects premium which covers risk plus savings has option to pay service tax @ 3% 1ST YEAR AND SUBSEQUENTLY @1.5% on PREMIUM (w.e.f. 1-4-2012). Cenvat Credit Fully Allowed on Inputs, Capital Goods and Input Services.

(i) However, such option shall not be available in cases where

(ii) the entire premium paid by the policy holder is only towards risk cover in life insurance; or

(iii) the part of the premium payable towards risk cover in life insurance is shown separately in any of the documents issued by the insurer to the policy holder.

(ii) Import of Services: Services imported from a country outside India, into India for business or commerce. Hence, the importer being recipient of service is liable to pay service tax.

Example 10: X Ltd an Indian company, imported services from A Ltd of USA for the personal purposes. X Ltd liable to pay service tax in India, since there is no personal service in the case of a body corporate.

(iii) GTA Services: As per the new rule, if the person liable for making payment of freight in a specified person then he is liable to pay taxes otherwise GTA is liable to pay taxes.

Goods Transport Agency means any person who provides service in relation to transport of goods by road and issues consignment note.

RULE 4B: Issue of consignment note - Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of Service:

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

Explanation - For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the names of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignees or the goods transport agency.

Contents of Consignment Note:

(i) Name of the consignor or consignee

(ii) Registration number of the goods carriage (i.e. vehicle registration number)

(iii) Details of goods transported

(iv) Details of the place of origin and destination

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

Exemption based on amount charged:

The gross amount charged on an individual consignment transported in a goods carriage does not exceed ₹ 750 (i.e. Freight collected for transporting small consignment for persons, who paid less than or equal to ₹ 750 for each consignment) or

The gross amount charged on consignments transported in a goods carriage does not exceed ₹ 1,500 (i.e. Freight collected for transporting goods in small vehicles for persons, who paid less than or equal to ₹ 1,500 per trip)

Note: (i) An individual consignment means all goods transported by a goods transport agency by road in a goods carriage for a consignee.

(ii) S.T. is Payable afer Claiming an Abatement @ 75%

(iv) Sponsorship services to any body corporate or firm located in Taxable Territory: In case of sponsorship service provided to a body corporate or firm located in India, the body corporate or firm receiving such services will be liable to pay service tax. However, if the recipient of sponsorship service is located outside India, service tax is required to be paid by the service provider and not by the recipient of such sponsorship services.

Example 11:

Ferrari conducting the Formula 1 races by displaying logo or brand name of various companies. Hence, companies receiving sponsorship services from Ferrari are liable to pay service tax.

Example 12:

Sponsorship services provided for events like Indian Premier League (IPL) cricket matches, golf and tennis etc., are covered under reverse charge.

(v) Services Provided by an Arbitral Tribunal to any business entity located in taxable territory then recipient of service is liable pay service tax (w.e.f. 1-7-2012)

(vi) Legal Consultancy Service: In case of Services provided by an individual advocate or a firm of advocates by way of legal services to any business entity located in the taxable territory, the recipient of such services is liable to pay service tax.

(vii) Support Services by Govt. or Local Authority: Support services provided by Govt. or local authority to a business entity then the liability to pay S.T. is on the business entity.

Support services includes :

i. Infrastructural
ii. Operational
iii. Administrative
iv. Logistic,
v. marketing

(viii) Directors Remuneration (VIDE NT 45/2012 W.E.F. 7-8-2012): Services provided or agreed to be provided by a director of a company to the company, such company would be liable to pay service tax on remuneration paid to such directors.

Note: No service tax is payable if the director is employee of the company.

List 1 - Service under Full Reverse Charge Mechanism:

Sl. No.	Nature of Service	Description of services	Percentage of Service tax payable by Service Provider	Percentage of Service tax payable by Service Recipient
i.	Goods transport Service	Transport of goods by road (If the person is specified person)	Nil	100%
ii.	Sponsorship Service	Sponsorship service	Nil	100%
iii.	Legal Services	Legal Serivces by Individual advocate or a firm of advocate including arbitral services.	Nil	100%
iv.	Government Services	Support services by Government or local authority (excluding renting of immovable property and certain other specified services)	Nil	100%
v.	Directors Fees	Services provided or agreed to be provided by a Director of a company to a said comapny	Nil	100%
vi.	Import of Service	Any taxable service where the Service provider is located in a non taxable territory and service recipient located in a taxable territory	Nil	100%

(ix) Partial Reverse Charge (w.e.f. 1-7-2012)

By the virtue of powers conferred under Sub-section (2) of Section 68 of the Act, the Central Govt. has issued notification dated 1.7.2012 notification dated 1.7.2012 notifying the following below services which shall be covered under the partical reverse charge mechanism.

Partial reverse charge is applicable in relation to service provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or supply of manpower for any purpose of service portion in execution of works contract by any individual, hindu undivided family or partnership firm whether registered or not, including association of person, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory, both the service provider and the service recipient to the extent notified under sub-section (2) of section 68 of the act, for each respectively.

"Body Corporate" or "corporation" includes a company incorporated outside India but does not include –

(a) a corporation sole;

(b) a co-operative society registered under any law relating to co-operative societies; and

(c) any other corporate (not being a company as defined in this act) which the central Government may, by notification in the Official Gazette, specify in this behalf.

The service provider and service recipient will pay the service tax in the following proportion as notified by the Government:

List 2 - Service under Partial Reverse Charge Mechanism:

S. No.	Nature of Service	Description of services	Percentage of Service tax payable by Service Provider	Percentage of Service tax payable by Service Recipient
i.	Rent-a-cab Service	Hiring of a motor vehicle designed to carry passengers		
		(a) With abatement (i.e. 60%)	Nil	100%
		(b) Without abatement	60%	40%
ii.	Manpower supply Service	Supply of manpower for any service	25%	75%
iii.	Works contract service	Works contract service	50%	50%
iv.	Security Service	Security Service	25%	75%

Partial Reverse Charge is not Applicable in the following cases:

Service Provider	Recipient of Service
Company or body corporate	Individual or partnership firm or body corporate or any other person
Renting of motor vehicle designed to carry passengers by individual / firm / Huf/Aop	Any person who is in the same business of carry in passengers (i.e. sub-contract)

6.4 BRAND NAME OF ANOTHER PERSON

Service provider who is providing taxable services under the brand name of another person is not eligible for claiming exemption limit of ₹ 10 lakhs and hence, is liable to pay service tax irrespective of the turnover.

Notification No. 8/2005-ST clearly provides that small scale service provider exemption will not be applicable to taxable services provided by a person under a brand name or trade name, whether registered or not, of another person.

Example 13: Mr. Ram who markets his goods under the brand name of TATA Company. Therefore, it is very clear that Mr. Ram is a provider of services under the brand name of the company and his services are taxable under Business Auxiliary Services. Hence, he can not avail the benefit of ₹ 10,00,000 exemption.

6.5 PAYMENT OF SERVICE TAX

Service Tax on value of taxable services provided or received during the calendar month whichever is earlier should be paid by the 5th of the following month. In case the assessee is an individual or proprietary firm or partnership firm (other than HUF) or Limited Liability Partnership firm, the tax is payable on quarterly basis within 5 days from the end of the quarter.

If the payment is made through internet banking, such e-payment can be made by the 6th of the following month or following quarter as the case may be upto 8 p.m.

If the last day of payment and filing return is a public holiday, tax can be paid and return can be filed on the next working day.

If the service tax paid during the previous year exceeds or equal to ₹ 10 lacs, w.e.f. 1-4-2010 e-payment is mandatory.

Manual Payment of service tax may be either by cheque or cash depositing it through GAR-7 Challan with the bank designated by the CBEC.

Delay in payment of service tax attracts the simple interest (as per Section 75 of the Finance Act, 1994) at the rate as prescribed below and penalty. Notification No. 26/2004, dated 10-9-2004 has specified the rate. The table below shows the rate of interest applicable at relevant period of time:

Interest on delayed payment of service tax - Section 75 of the Finance Act, 1994

Sr. No.	Period	Rate of Interest
i.	Till 11-5-2001	1.5% per month
ii.	11-5-2001 to 11-5-2002	24% per annum
iii.	11-5-2002 to 10-9-2004	15% per annum
iv.	From 10-9-2004 to 31-3-2011	13% per annum
v.	From 1-4-2011	18% per annum
vi.	From 1-4-2011	15% per annum (whose annual turnover of taxable services during the previous year is ₹ 60 lakh).

6.6 RATE OF SERVICE TAX

The table below shows the rate of service tax applicable at the relevant period of time:

Sr. No.	Period	Rate of Service Tax	Rate of Education Cess
i.	Till 13-5-2003	5%	Nil
ii.	14-5-2003 to 9-9-2004	8%	Nil
iii.	10-9-2004	10%	2% of the S.T.
iv.	18-4-2006 onwards	12%	2% of the S.T. and 1% S A H w.e.f. 11th May 2007
v.	w.e.f. 24-2-2009	10%	2% plus 1% cess
vi.	w.e.f. 01 -04-2012	12%	2% plus 1% cess

Note: SAH means Secondary and Higher Education Cess.

6.7 INVOICES UNDER SERVICE TAX

RULE 4A: Taxable service to be provided or credit to be distributed on invoice, bill or challan –

(1) Every person providing taxable service shall, not later than thirty days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect of such taxable service provided or agreed to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely :-

(i) the name, address and the registration number of such person;

(ii) the name and address of the person receiving taxable service;

(iii) description and value of taxable service provided or agreed to be provided; and

(iv) the service tax payable thereon.

Provided that in case the provider of taxable service is a banking company or a financial institution including a non-banking financial company providing service to any person, an invoice, a bill or, as the case may be, challan shall include any document, by whatever name called, whether or not serially numbered, and whether or not containing address of the person receiving taxable service but containing other information in such documents as required under this sub-rule:

Provided further that in case the provider of taxable service is a goods transport agency (GTA), providing service to any person, in relation to transport of goods by road in a goods carriage, an invoice, a bill or, as the case may be, a challan shall include any document, by whatever name called, which shall contain the details of the consignment note number and date, gross weight of the consignment and also contain other information as required under this sub-rule.

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

Provided also that in case the provider of taxable service is a banking company or a financial institution including a non-banking financial company providing service to any person, the period within which the invoice, bill or challan, as the case may be, is to be issued, shall be forty-five days:

Provided also that in case the provider of taxable service is providing the service of transport of passenger, an invoice, a bill or as the case may be, challan shall include ticket in any form by whatever name called and whether or not containing registration number of the provider of service and address of the recipient of service but containing other information in such documents as required under this sub-rule.

Provided also that wherever the provider of taxable service receives an amount upto rupees one thousand in excess of the amount indicated in the invoice and the provider of taxable service has opted to determine the point of taxation based on the option as given in Point of Taxation Rules, 2011, no invoice is required to be issued to such extent.

(2) Every input service distributor distributing credit of taxable services shall, in respect of credit distributed, issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him, for each of the recipient of the credit distributed, and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely:-

(i) the name, address and registration number of the person providing input services and the serial number and date of invoice, bill, or as the case may be, challan issued under sub-rule (1);

(ii) the name, and address of the said input services distributor;

(ill) the name and address of the recipient of the credit distributed;

(iv) the amount of the credit distributed.

Provided that in case the input service distributor is an office of a banking company or a financial institution including a non-banking financial company providing service to any person an invoice, a bill or, as the case may be, challan shall include any document, by whatever name called, whether or not serially numbered but containing other information in such documents as required under sub-rule.

6.8 RECORDS TO BE MAINTAINED

Rule 5: Records

(1) The records including computerized data as maintained by an assessee in accordance withnthe various laws in force from time to time shall be acceptable.

(2) Every assessee shall furnish to the superintendent of Central Excise at the time of filing of return for the first time or the 31st day of January, 2008, whichever is later, a list in duplicate, of –

(i) all the record prepared or maintained by the assessee for accounting of transactions in regard to,-

(a) Providing of any service;

(b) receipt pr procurement of input services and payment for such input services;

(c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;

(d) other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in the normal course of business.;

(3) All such records shall be preserved at least for a period of five years immediately after the financial year to which such records pertain.

Explanation – For the purpose of this rule, "registered premises" includes all premises or offices from where an assessee is providing taxable services.

6.9 AUTOMATION OF CENTRAL EXCISE AND SERVICE TAX (ACES)

The Central Board of Excise & Customs (CBE & C) has developed a new software application called *Automation of Central Excise and Service Tax (ACES),* which aims at improving tax-payer services, transparency, accountability and efficiency in indirect tax administration.

It is a centralized, web based software application which automates various processes of Central Excise and Service Tax for Assessees and Department, and gives complete end to end solution.

In ACES, the various processes of Service Tax automated are —

i. Registration,
ii. Returns,
iii. Refunds,
iv. ST-3A,
v. Dispute Resolution and
vi. Audit.

ACES can be used for:

i. Online registration and amendment of registration details
ii. Electronic filing of documents such as Returns, Claims, Intimations and permissions
iii. Online tracking of the status of applications, claims and permissions
iv. Online facility to view documents like Registration Certificate, Returns, Show Cause Notice, Order-In-Original etc.

Certified Facilitation Centre (CFC)

CFC stand for Certified Facilitation Centre under ACES project of CBEC and is an e-facility, which may be set-up and operated by a Cost Accountant/Chartered Accountant/Company Secretary or a proprietary concern/firm of Cost Accountants or Chartered Accountants or Company Secretary in practice to whom a certificate is issued under the ACES project, where the assessees of Central Excise and Service Tax can avail this facility to file their returns and other documents electronically along with associated facilitation on payment of specified fees.

6.10 ELECTRONIC ACCOUNTING SYSTEM IN EXCISE AND SERVICE TAX (EASIEST)

EASIEST has been developed to make payment of tax easy. An assessee paying service tax manually by filing GAR – 7 challan one single copy of challan and its acknowledgement is sufficient. This facility is available with 28 banks across the India.

Benefits of EASIEST:

(a) One copy of the challan has to be filled (earlier 4 copies were required to file)
(b) Facility of online verification of the status of tax payment using Challan Identification Number

PRACTICAL PROBLEMS

Registration

Example 15: Sri R is a practicing Chartered Accountant. His Gross taxable services during the year 2011-12 are ₹ 9,50,000. Registration is compulsory for him? If so in which year?

Answer:

Yes, Registration is compulsory in the year 2011-12 (i.e. exceeded ₹ 9,00,000).

Example 16: Mr. Hari, an engineer, renders the taxable services during the year 2011-12 for ₹ 4,00,000. During current year 2012-13 he rendered the taxable services ₹ 9,00,010 up to the end of the 30th June 2012. Explain for him registration is compulsory? If so what the last date for registration?

Answer:

Yes, Registration is required in the year 2012-13 on or before 30th July 2012.

Example 17: Mr. X is a provider of taxable service under the brand name of others. He started his business in April, 2011. Taxable turnover for the year 2011-12 is ₹ 5 lakh. Registration is compulsory for him?

Answer:

Yes, Registration is compulsory for service provider irrespective of his turnover, if he provides service under the brand name of others. For Mr. X registration is compulsory under the Finance Act, 1994.

Example 18: Mr. D is provider of taxable services from head office located at Hyderabad and from two branch offices located at Chennai and Mumbai.

(a) Is centralized registration is permissible. If centralized billing and accounting carried out from Head Office?

(b) Who will be the competent authority to grant centralized registration?

(c) Rework (a) and (b) if his turnover is ₹ 8 lacs for the year 2011-12, but acting as input service distributor?

Answer:

(a) Yes, centralized registration is permissible

(b) DGST

(c) Registration is compulsory. Service provider should obtain multiple registrations to act as input service distributor.

Example 19: State briefly whether the following persons are liable to apply for registration under the Finance Act, 1994 and Service tax (Registration Special Category of Persons) Rules, 2005 and if so from which date:

(i) An input service distributor who starts his business with effect from 1st January, 2011.

(ii) A provider of taxable service under an unregistered brand name of another person.

In both cases aggregate value of taxable services was ₹ 6,00,000 upto 31-3-2012.

Answer:

(i) In case of input service distributors registration is compulsory without any threshold limit. Such person has to obtain the registration within 30 days from the date of commencing the business.

(ii) A Job worker or a person who renders taxable services under some other brand name, then such person is not eligible to get the exemption limit. Therefore such a job worker is liable for registration within 30 days from the date of under taking such activities.

Reverse Charge

Example 20: ABT transport providing goods transport services. 'A Ltd' sold goods from Mumbai to 'B Ltd' of Chennai. Freight charged by ABT transport for transporting said goods is ₹ 1,00,000 (exclusive of ST) as per consignment note, dated 1st July 2012. Freight paid by A Ltd on 15th September 2012.

You are required to answer:

(a) Name of provider of service and recipients of service?

(b) Who is liable to pay service tax and why?

(c) Due date of payment of service tax?

(d) Service Tax liability?

Answer :

(a) Service provider→ 'ABT' transport services.
Service recipients→ 'Both 'A Ltd' & 'B Ltd'.

(b) Either 'A Ltd' (or) 'B Ltd' being the recipients of the services. However, in the given case A Ltd is liable to pay service tax, since, freight paid by A Ltd.

(c) 5th October, 2012 in case of manual payment. 6th October, 2012 in case of e-payment.

(d) Service tax liability

	₹
Total amount of freight paid	= 1,00,000
Less: Abatement of 75% on the value of freight (₹ 1,00,000 x 75%)	= (75,000)
Taxable Services	25,000

Service tax = ₹ 3,090 *(i.e.* ₹ 25,000 * 12.36/100)

Example 21: A Ltd. provided services valuing ₹ 8 lakhs during the financial year 2011-12. During 2012-2013, it has provided taxable services valuing ₹ 10 lakhs and has received payments towards payable services ₹ 8.5 lakhs. It has also received services in the nature of transport of goods by road on 1-4-2012, valuing ₹ 50,000 (exclusive of service tax), in respect of which it is the person liable to pay service tax. Freight has been paid on 10-6-2012. Compute the service tax, if any, payable by A Ltd. for the financial year 2012-2013. It is given that goods transport service is exempt to the extent of 75% of value thereof.

Answer :

Value of transport services received	=	₹ 50,000
Less: abatement 75% on ₹ 50,000	=	₹ 37,500
Taxable services		₹ 12,500
Service tax liability in the hands of A Ltd (2012-13)	=	₹ 1,545 (i.e. ₹ 12,500 x 12.36/100)

Note:

(i) The company is eligible for small service provider exemption during the financial year 2012-13, as the value of taxable services provided during financial year 2011-12 does not exceed ₹ 10 lakhs.

(ii) For the value of taxable services provided during the financial year 2012-13, no tax liability would arise, as the payments received or services provided do not exceed ₹ 10 lakhs. However, for goods transport agency services received, in respect of which M/s. A Ltd. is the person liable to pay service tax, the company cannot claim for small service provider exemption.

Interest

Example 22: Mr. X practicing Cost Accountant received ₹ 20,00,000 (exclusive of service tax)in the June 2012. He paid service tax on 25th July 2012 by way of GAR – 7 challan. Gross receipt in the year 2011-12 is ₹ 25 lakhs.

You are required to calculate Interest on delay payment of service tax.

Answer :

Service tax @12.36% on ₹ 20,00,000 = ₹ 2,47,200.
Due date of payment of service tax = 5th July, 2012.
No. of days delay = 20 days
Interest = ₹ 2,032 (i.e. ₹ 2,47,200 x 15/100 x 20/365)

6.11 NEGATIVE LIST, EXEMPTED SERVICES & MEGA EXEMPTIONS

6.11.1 Introduction

In terms of Section 66B of the Act, service tax will be leviable on all services provided in the taxable territory by a person to another for a consideration other than the services specified in the negative list. The services specified in the negative list therefore go out of the ambit of chargeability of service tax. The negative list of service is specified in the Act itself in Section 66 D. In all, there are seventeen heads of services that have been specified in the negative list. The scope and ambit of these is explained in paras below.

Services	Inclusion in Negative list (it means outside the scope of service tax)	Exclusion from Negative list (it means taxable unless exempted from service tax)	Remarks
1) Services provided by Govt. or local Authority	All services provided by Govt., in terms of their sovereign right to business entities. • Grant of mining licenses • Audit of Comptroller and Auditor General, etc.	• Speed post, Express Parcel post, Life insurance and agency services carried out on payment of commission • Services in relation to vessel or an aircraft • Transport of goods and passengers • Support services.	Reverse charge applicable in case of support services Examples: Adv. Service, Construction Works contract, Renting of movable or immovable property, Security Testing and analysis.
(2) Services provid ed by RESERVE BANK OF INDIA (RBI)	All type of services provided by RBI.	Services provided to RBI.	Services provided banks to RBI taxable.
(3) Services Provided by a foreign diplom-atic mission located in India	All type of services.	Nil.	Service provided to a foreign diplomatic mission located in india is exempt from service tax.
(4) Agriculture or agricultural produce	• Cultivation, harvesting, seed testing • Supply of farm labour • Trimming, sorting etc., thereby marketable in the primary market • Renting of agro machinery loading, unloading, packing, storage and warehousing of agricultural produce • Agricultural extention services • Services by any agriculrual Produce marketing committee	• Potato Chips or Tomoto Ketchup • Grinding, sterilizing extraction of packaging in retail packs of agricultural products.	

(5) Trading of goods	• Forward contracts in commodities • Commodity futures.	• Auxiliary services relating to future contracts or commodity futures provided by commodity exchanges, clearing houses or agents.	Exemptions: • Job work in relation to agriculture, printing or textile processing • Cut and polished diamonds, jewellery • E.D. paid by manufacturer • Job work charges Upto ₹ 150 Lacs in relation to parts of cycles or sewing machines provided P.Y. ≤ ₹ 150 Lacs.
(6) Process amounting to manufacture or production of goods	• Process for which Excise duty Exempted (i.e. Non-dutiable goods). • Excisable goods for which Central Excise Duty or State Excise are leviable.	Process do not amounting to manufacture.	
(7) Selling of space or time slots for advertisement Except advertisement broad-cast by ratio or television	Sale of space for advertisement in • Print media • Bill boards • Public places, • Cell phones • Automated teller machines, internet • Aerial advertising.	• Sale of space for adv. On radio or T.V. • Sale time slot by a broadcasting org.	
(8) Access to a road or a bridge on payment of toll charges	Toll charges collected to access to National Highways or State Highways.	The activity of toll collection outsourced to any third party agency who undertakes the work for consideration. **Example:** Intertoll India Consultants was under taken a sub-contract to collect toll on commission basis from Noida Toll Bridge Company (i.e. agency authorized to levy toll). Commission is subject to S.T.	

(9) Betting, gambling or lottery	Sale of lottery tickets [UOI v Martin Lottery Agencies Ltd (2009)]	Sale promotion or marketing of lottery tickets shall be liable for S.T. Distributor or selling agent has option to pay S.T. at composition scheme as per Rule 6(7C) of Service Tax Rules, 1994.	**EXEMPTION:** Services by selling or marketing agent of lottery tickets to a distributor or selling agent.
(10) admission to entertainment events or access to amusement facilities	Recreation Pastime Fun or enjoyment Cinematographic film, Pageants	Member ship of a club Auxiliary services provided by a person, like an event manager, for organizing an entertainment event or by an entertainer for providing the entertainment to an entertainment event organizer	
(11) Transmission or distribution of electricity	Services provided by • The Central Electricity Authority • A State Electricity Board • A State Transmission Utility	Charges collected by a developer or a housing society for distribution of electricity within a residential complex Installation of gensets	
	A Transmission licensee or distribution licensee under the Electricity Act,		
(12) Education services	Services by way of I. Pre-school education and education upto higher secondary school (i.e. XII standard) II. Education as a part of a curriculum for obtaining a qualification recognised by any an Indian law	• Qualifications recognised by a law of foreign country • Services provided to educational institutions • Private tuitions • Services by educational institutions for campus recruitments	
	III. Vocational education course approved by National Council for Vocational Training (NCVT) or National Skill Development Corporation (NSDC)	Exemption from S.T: • Training relating to arts, culture or sports • Auxiliary educational services	

(13) Renting of Residential dwelling for use as residence	I. Govt. Deptt. Allots houses to its employees and charges a license fee II. Flats given on rent for residential purposes	• Residential house taken on rent for commercial purposes • House is given on rent and the same is used as a hotel or a lodge • Rooms in a hotel or a lodge are let out	
(14) Banking, financial and insurance services	I. Extending deposits, loans, or advances in so far as the consideration is represented by way of interest or discount II. Foreign currency exchange amongst banks or authorized dealers	• Interest portion of leasing or hire purchase after claiming an abatement @90%. • All other services of a banker or financial and insurance services **Exemption:** • Mutual fund broker services to Mutual fund company exempted from S.T.	
(15) Services relating to transportation of passengers	**Services by** • A stage carriage • Railways in a class other than first class or ac coach • Metro, monorail or tramway • Inland waterways • Public transport (other than tourism purpose) in a vessel between places located in india and • Metered cabs, radio taxis, auto rickshaws	Public transport predominantly for tourism Exemption: Giving on hire of motor vehicles to State Transport, No S.T.	
(16) Services relating to transportation of goods	I. By road (except GTA and courier angency) II. By aircraft or vessel from a place outside india up to the customs station III. By inland waterways	• Goods Transport Agency (GTA) • COURIER • ANGADIA	
(17) Funeral, burial, crematorium or mortuary services including transportation of the deceased.	All relevant services	—	

Chapter V of the Finance Act, 1994, is being amended vide Finance Act 2013:

(i) Definition of 'approved vocational education course' provided in section 65B(11) is being amended: firstly the word , or, State Council of Vocational Training' (SCVT) is being inserted in (i), and secondly, entry at item serial number(iii) is being omitted, for NSDC is not an affiliating body.

After the proposed amendment takes effect, a course run by an industrial training institute or an industrial training centre affiliated to the National Council for vocational training or State Council for vocational training offering courses in designated trades notified under the Apprentices Act, 1961.

(ii) Definition of "process amounting to manufacture or Production of goods'', in section 65B(40) being amended to include processes on which duties of excise are leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

(iii) Maximum penalty imposable for failure to obtain registration will be ten thousand rupee only.

(iv) Section 78A is being introduced, to make provision for imposition of penalty on director, manager, secretary or other officer of the company, who at the time of specified contravention was in charge of and responsible for the conduct of busines of company was knowingly concerned with such contravention.

(v) Section 89 is being amended; (i) in the case of an offence specified in clause (a), (b) and (c) of sub section (1) where the amount exceeds fifty lakh rupees, punishment shall be for a term which may extend to three years, but shall not, in any case, be less than six months; (ii) in the case of failure to pay service tax collected, to the credit of Central Government within six months, an offence specified in section 89(1)(d), if such non-payment exceeds fifty lakh rupees, punishment shall be imprisonment for a term which may extend upto seven years but not less than six months; (iii) in the case of any other offence, the punishment shall be imprisonment for a term which may extend to one year.

(vi) Retrospective exemption is being extended to the Indian Railways on the service tax leviable on various taxable services provided by them during the period prior to the 1st day of July 2012, to the extend show cause notices have been issued upto the 28th day of February 2013. Section 99 is being added for this purpose, in chapter V of the Finance Act, 1994.

(vii) Rationalization of Abatement

At present taxable portion for service tax purpose is prescribed as 25% uniform for constructions where value of land is included in the amount charged from the service recipient. This is being rationalized. Accordingly, where the carpet area of residential unit is upto 2000 square feet or the amount charged is less than One Crore Rupees, in the case 'Construction of complex, building or civil structure, or a part thereof, intended for sale to a buyer, wholly or partly except where the entire consideration is received after issuance of completion certificate by the competent authority', taxable portion for service tax purpose will remain as 25%, in all other cases taxable portion for service tax purpose will be 30% . This change will come into effect from the 1st day of March,2013.

(viii) Review of Exemptions (too take effect from 1st day of April,2013)

(A) The following exemption are being rationalized:

- Rationalization of exemption limit prescribed for charitable organosations, provided service towards any other object of general public utility. So far, the limit was 25 Lakh Rupees per annum. Now, they will be covered by the threshold exemption.
- Exemption provided to restaurant other than those having (i) air-conditioning and (ii) license to serve liquor, is being rationalized; condition regarding 'license to serve liquor, is being omitted. Therefore, with effect from 1st April 2013, service tax will be leviable on taxable service provided in restaurants with air-conditioning or central air heating in any part of the establishment at any time during the year.
- Rationalization of exemption to transport of goods by road and rail/vessel.

6.11.2 Exempted Services

The need for exemptions is not obviated with the introduction of negative list. While some existing exemptions have been built into the negative list, others, wherever necessary, have been retained as exemptions. In addition some new exemptions are also introduced. For ease of reference and simplicity most of the exemptions are now a part of one single mega exemption notification 25/2012-ST dated 20/6/12. These exemptions have been explained below:

There are broadly two types of exemptions namely general exemptions and mega exemption from service tax levy.

(A) General Exemptions:

(i) Small service provider

A service provider whose previous year taxable services are less than or equal to ₹ 10 Lakhs, in the current year such service provider is called as small service provider. A person who is newly started business or office for the first time is also be called as small service provider if in the current year his taxable services does not exceeds ₹ 10 Lakhs.

The service provider should however satisfy certain conditions in order to avail the benefit of this exemption. The conditions to be noted here are as follows –

- Taxable services provided by a person under a brand name or a trade name (whether registered or not) of another person would **NOT** be eligible for this exemption
- A receiver of services who is liable to pay service tax on the services he has received by virtue of section 68(2) cannot avail the benefit of this exemption with regard to such payments. More commonly this is relevant for recipient of GTA Services or in case of import of services where no exemption is entitled.
- Once an option is exercised in regard to this exemption during a financial year, it cannot be changed in the same financial year. [This however does not mean that the claiming of the exemption makes it compulsory to claim for the whole year. In between even without reaching ₹10 lakhs the option to pay can be made.]
- No cenvat credit can be availed on inputs or input services used in providing such output service for which exemption is being claimed.
- Cenvat credit cannot be availed on capital goods received in the premises of provider of such service during the exemption period.
- The service provider shall pay an amount equivalent to the cenvat credit taken by him in respect of inputs lying in stock or in process on the date of availment of exemption. After paying such an amount, if there is any balance of cenvat credit remaining unutilized, such balance would lapse.
- The exemption shall apply in respect of the aggregate value of all taxable services provided by the service provider (even if from more than one premises) and not individually.
- Exempted services shall be outside the purview of the exemption of this notification. In other words, the value for ascertaining the limit of Rs. 10 Lakhs would be that of taxable services alone on which service tax is payable.
- The aggregate value of such services provided in the preceding financial year should not exceed the aforesaid exemption limit.

The Small Service Provider whose turnover of all taxable services from one or more premises does not exceeds ₹ 10,00,000 during the previous year, then no service tax in the current year upto ₹ 10,00,000.

How to compute aggregate value (i.e. exemption limit) of ₹ 10,00,000: W.e.f. 1-4-2012 it has been provided that the exemption to the small service provider shall be on the basis of the value of invoice in a financial year and not on the basis of payment received in that year.

As per the amendment, Aggregate value means the sum total of value of taxable services charged in the first consecutive invoices issued or required to be issued, as the case may be, during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon under section 66 of the Finance Act, 1994

Example 23: M/s X Pvt. Ltd is provider of taxable services namely Construction of Commercial Complexes. The taxable services in the financial year 2011-12 were ₹ 9,50,000. In the current financial year 2012-13 the following services provided and also opted the small service provider exemption.

Invoice Dt.	Particulars	Value in (₹) (exclusive of service tax)	Abatement	Small Service Provider Exemption limit	Remarks
10-4-2012	Construction of one shop	12,00,000	67%	Applicable for the portion of ₹ 3,96,000 (i.e. ₹ 12 lakhs x 33%)	Exemption limit of ₹ 10 lakhs applicable only for the portion of invoice which is non-exempted from service tax. Therefore, ₹ 3,96,000 exempted from service tax
	Payment received against the previous year bills (2011-1 2).	9,50,000	Nil	Not applicable.	Exemption to the the small service provider shall be on the basis of the value of invoice in a financial year and not on the basis of payment received in that year.
15-4-2012	Advance received (i.e. services to be provided in May 2012)	28,00,000 (includes ₹ 18 lakhs services provided in the state of Jammu & Kashmir	75%	Applicable for the portion of ₹ 2,50,000. Therefore, fully exempt from service tax	Exempted services, any how exempted from service tax. Therefore, exempted services should not be adjusted against exemption limit of ₹ 10 lakhs.
30-4-2012	Construction of super market	15,00,000	67%	Applicable for the portion of ₹ 3,54,000.	Over and above ₹ 10 lakhs of exemption limit is fully taxable @12.36%. therefore service tax is ₹ 17,428.

Exemption limit of ₹ 10,00,000 not applicable in the following cases

(a) Previous year taxable turnover of a service provider exceeds ₹ 10 Lacs.

(b) Service recipient is liable to pay service tax (i.e. Reverse Charge).

(c) Provider of services under the brand name of others.

(ii) Services provided to United Nations or an International Organization

Services provided to the agencies of the United Nations and to the employees of the United Nations, whether for official or personal purpose. Services rendered to an approved international organization, service tax is exempted.

(iii) Special Economic Zone (SEZ)

(Vide Notification No. 17/2011-ST dt. 1-3-2011, w.e.f. 1-3-2011)

Taxable services provided to a unit of SEZ or a SEZ developer by the service provider is exempted from payment of service tax, if the services are wholly consumed within SEZ. If services are not consumed wholly within SEZ, such services are taxable in the hands of service provider. However, the exemption is available by way of refund of service tax paid on the specified services received for the authorized operations in a SEZ.

Wholly consumed within SEZ

Where the *specified services* has been received and used for authorized operation by a unit of Special Economic Zones (or) SEZ developer will be exempt if the services are "*wholly consumed*" within SEZ, including services liable to tax on reverse charge basis under Section 66A of the Finance Act, 1994.

It has also been specified that all services received by an entity in a SEZ, which does not have any other Domestic Tariff Area (DTA) operations, will constitute "wholly consumed" services w.e.f. 1-3-2011. A service provider shall provide the services wholly consumed within the SEZ, without payment of service tax on obtaining from developer or the unit of SEZ for authorized operation the following documents

(a) List of taxable services for authorized operations approved by the approval committee (i.e. specified services) of the concerned SEZ.

(b) A declaration, where applicable in Form No. A-1 duly verified by the specified officer of SEZ. Since, no service tax has been paid by a unit of SEZ or SEZ developer, refund of service tax does not arise.

Meaning of Service wholly consumed within the SEZ

The concept of wholly consumed has been borrowed from the Export of Services Rules, 2005. The expression "wholly Consumed" refer to following taxable services, received by a Developer or Unit of a SEZ, for the authorized operations, namely:-

(a) Services listed in Rule 3(1) (i) of the Export of Services Rules, 2005, in relation to an immovable property situated within the SEZ; or

(b) Services listed in Rule 3(1)(ii) of the Export of Services Rules, 2005, as are wholly performed within the SEZ; or Services listed in Rule 3(1)(iii) of the Export of Services Rules, 2005, provided to a Developer or Unit of SEZ, who does not own or carry on any business other than the operations in the SEZ.

SEZ units providing taxable service to any person for consumption in Domestic Tariff Area (DTA) is subject to service tax.

***Not wholly* Consumed within SEZ**

Where the *specified services are* provided to a unit of Special Economic Zone (or) SEZ developer will be taxable in the hands of service provider, if the services are not "*wholly consumed*" within SEZ (i.e. shared between authorized operations in SEZ unit and Domestic Tariff Area (DTA) unit). However, a unit of SEZ or SEZ developer can claim refund of service tax paid on the specified services received for the authorized operations in a SEZ.

The refund shall be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates.

(iv) Exemption to the extent of R & D Cess paid

The Government has exempted the taxable services provided by a consulting engineer to any person on transfer of technology to the amount of Cess paid (i.e. 5%).

Service Tax Payable	=	XXXX
Less: 5% Cess Paid	=	(XXX)
Net Service Tax Liability	=	XXXX

Example 24: The value of service provided by a consulting engineer is ₹ 10,00,000. He has paid ₹ 50,000 as cess under section 3 of the Research and Development Cess Act, 1986. What is the amount of service tax payable by him?

Answer:

Value of taxable services = ₹ 10,00,000

Service tax @ 12.36% = ₹ 1,23,600 less cess paid ₹ 50,000, Net service tax payable = ₹ 73,600

6.11.3 Mega Exemptions:

(1) Services provided to all international organizations:

Services to only specified international organisations are exempt. 'Specified international organisation' has been defined in the notification and means an international organization declared by the Central Government in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 to which the provisions of the Schedule to the said Act apply.

Illustrative list of specified international organisations are as follows:

(a) International Civil Aviation Organisation

(b) World Health Organisation

(c) International Labor Organisation

(d) Food and Agriculture Organisation of the United Nations

(e) UN Educational, Scientific and Cultural Organisation (UNESCO)

(f) International Monetary Fund (IMF)

(g) International Bank for Reconstruction and Development

(h) Universal Postal Union

(i) International Telecommunication Union

(j) World Meteorological Organisation

(k) Permanent Central Opium Board

(l) International Hydrographic Bureau

(m) Commissioner for Indus Waters, Government of Pakistan and his advisers and assistants

(n) Asian African Legal Consultative Committee

(o) Commonwealth Asia Pacific Youth Development Centre, Chandigarh

(p) Delegation of Commission of European Community

(q) Customs Co-operation Council

(r) Asia Pacific Telecommunity

(s) International Centre of Public Enterprises in Developing Countries, Ljubljana (Yugoslavia)

(t) International Centre for Genetic Engineering and Biotechnology

(u) Asian Development Bank

(v) South Asian Association for Regional Co-operation

(w) International Jute Organisation, Dhaka, Bangladesh

(2) Health Care Services

Services in recognized systems of medicines in India are exempt. In terms of the Clause (h) of section 2 of the Clinical Establishments Act, 2010, the following systems of medicines are recognized systems of medicines:

i. Allopathy

ii. Yoga

iii. Naturopathy

iv. Ayurveda

v. Homeopathy

vi. Siddha

vii. Unani

viii. Any other system of medicine that may be recognized by central government

Paramedic Services also exempted:

Services like nursing staff, physiotherapists, technicians, lab assistants etc are called as paramedic services which are exempt from service tax. Services by them in a clinical establishment would be in the capacity of employee and not provided in independent capacity and will thus be considered as services by such clinical establishment. Similar services in independent capacity are also exempted.

However, the following services even if provided by Doctors or Hospitals shall be taxable:

(a) hair transplant or

(b) cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or function of body affected due to congenital defects, developmental abnormalities, injury or trauma.

(3) Services by a Veterinary Clinic in relation to health care of animals or birds are exempted from service tax.

(4) Services provided to or by a governmental authority

The following conditions should be satisfied for a board, body or an authority to be called as a governmental authority:

i. set up by an act of the Parliament or a State Legislature;

ii. established with 90% or more participation by way of equity or control by Government; and

iii. carriers out any of the functions entrusted to a municipality under article 243W of the Constitution.

(A) Are all services provided by a governmental authority exempt from service tax?

No. All services are not exempt. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution are exempt. All other services are subjected to service tax if they are not otherwise exempt.

(B) Are all services provided to a governmental authority exempt from service tax?

No. A governmental authority enjoys same benefits as the Government or a local authority in respect of receipt of services. The following services when provided to a governmental authority are exempt:

a) Specified services as listed in Sr. no. 12 of Exhibit A3 relating to construction.

b) Services in relation to any function ordinarily entrusted to a municipality in relation to water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation.

c) Services received from a service provider located in a non- taxable territory by such authorities in relation to any purpose other than commerce, industry or any other business or profession.

(C) Services by an entity registered under section 12AA of the Income tax Act, 1961: by way of charitable activities; service provider carry out one or more of the specified charitable activities are exempted from service tax.

Following are the specified charitable activities:-

a) public health by way of –

(I) care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons afflicted with HIV or AIDS, or (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or

(II) public awareness of preventive health, family planning or prevention of HIV infection;

b) advancement of religion or spirituality;

c) advancement of educational programmes or skill development relating to,-

(i) abandoned, orphaned or homeless children;

(ii) physically or mentally abused and traumatized persons;

(iii) prisoners; or

(iv) persons over the age of 65 years residing in a rural area;

d) preservation of environment including watershed, forests and wildlife; or

(5) Renting of religious place or conducting religious ceremony:

Services by a person by way of

(a) renting of precints of a religious place meant for general public or

(b) conduct of any religious ceremony is also exempted from service tax.

(6) Services by an Arbitral Tribunal and Advocates:

Services provided by-

(a) an arbitral tribunal to -

(i) any person other than a business entity; or

(ii) a business entity with a turnover up to rupees ten lakh in the preceding financial year;

(b) an individual as an advocate or a partnership firm of advocates by way of legal services to,-

(i) an advocate or partnership firm of advocates providing legal services ;

(ii) any person other than a business entity; or

(iii) a business entity with a turnover up to rupees ten lakh in the preceding financial year; or

(c) a person represented on an arbitral tribunal to an arbitral tribunal;

However, in respect of services provided to business entities, with a turnover exceeding ₹10 lakh in the preceding financial year, tax is required to be paid on reverse charge by the

business entities. Business entity is defined in section 65B of the Finance Act, 1994 as 'any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession'. Thus it includes sole proprietors as well. The business entity can, however, take input tax credit of such tax paid in terms of Cenvat Credit Rules, 2004, if otherwise eligible. The provisions relating to arbitral tribunal are also on similar lines.

(7) Exemption to clinical research organisation:

Services by way of technical testing or analysis of newly developed drugs, including vaccines and herbal remedies, on human participants by a clinical research organisation approved to conduct clinical trials by the Drug Controller General of India;

(8) Exemption for Recreational coaching or training:

There is exemption from service tax to training or coaching in recreational activities relating to arts, culture or sports. The benefit is available to coaching or training relating to all forms of dance, music, painting, sculpture making, theatre and sports etc.

(9) Exemption for services provided to an educational institution:

Services provided to an educational institution in respect of education exempted from service tax, by way of,-

(a) auxiliary educational services; or

(b) renting of immovable property

(10) Services provided to recognised sport body: Services provided to a recognised sports body by-

(a) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body;

(b) another recognised sports body; are exempted from service tax. However, services by individuals such as selectors, commentators, curators, technical experts are taxable.

Services of an individual as a player, umpire in a premier league is taxable. The service of a player to a franchisee which is not a recognized sports body is taxable.

However, services of an individual as umpire, referee when provided directly to a recognized sports body shall be exempt.

(11) Services in relation to sponship of sporting events organised: Services by way of sponsorship of sporting events organised,-

(a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, state or zone;

(b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat;

(c) by Central Civil Services Cultural and Sports Board;

(d) as part of national games, by Indian Olympic Association; or

(e) under Panchayat Yuva Kreeda Aur Khel Abhiyaan (PYKKA) Scheme; are exempted from service tax.

(12) Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration:

Exemption is available to the services by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of:

A. a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession

B. a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under Ancient Monuments and Archaeological Sites and Remains Act, 1958

C. a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment

D. canal, dam or other irrigation works

E. pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal

F. a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the of a religious building

The exemption is available for a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. The significance of the word predominantly is that benefit of exemption will not be denied if the building is also incidentally used for some other purposes if it is used primarily for commerce, industry, or any other business or profession.

Construction of roads for use by general public is exempt from service tax. Construction of roads which are not for general public use e.g. construction of roads in a factory, residential complex would be taxable.

Service tax is exempt on construction of a building owned by an entity registered under section 12 AA of the Income tax Act, 1961 and meant predominantly for religious use by general public.

A constructed service provided to a client is other than the Government, a local authority or a governmental authority, service tax required to pay. However, exemption is available for services provided to the Government, a local authority or a governmental authority by way of construction of a residential complex predominantly meant for self-use or the use of their employees.

Service tax is payable on construction of a residential complex having more than one single residential unit. Single residential unit is defined in the notification and means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family. If each of the floors of a house is a single residential unit in terms of the definition, the contractor is liable to pay service tax. If the title of each of floors is capable of being transferred to another person by mutation in land/ municipal records, both the floors may be considered as separate single residential units.

(13) Services provided by way of construction, erection, commissioning, etc, :

Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) A road, bridge, tunnel, or terminal for road transportation for use by general public;

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

(c) a building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;

(d) a pollution control or effluent treatment plant, except located as a part of a factory; or

(e) a structure meant for funeral, burial or cremation of deceased are exempted from service tax.

(14) Services by way of construction, errection, commissioning or installation of original works:

Services by way of construction, erection, commissioning, or installation of original works are exempted if these services pertaining to,-

(a) an airport, port or railways, including monorail or metro;

(b) a single residential unit otherwise than as a part of a residential complex;

(c) low- cost houses up to a carpet area of 60 square meters per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

(d) post- harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or

(e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;

(15) Services in relation to temporary transfer or permitting the use or enjoyment of a copyright :

Temporary transfer of a copyright relating to original literary, dramatic, musical, artistic work or cinematographic film (restricted to exhibition of cinematography films in a cinema hall or a cinema theatres) falling under clause (a) and (b) of sub-section (1) of section 13 of the Indian Copyright Act, 1957 is exempt.

However, a music company would be required to pay service tax as the copyright relating to sound recording falls under clause (c) of sub-section (1) of section 13 of the Indian Copyright Act, 1957.

Example 25: Mr. X a composer of a song having the copyright for his song. When he allow the recording of the song on payment of some royalty by a music company for further distribution, if so Mr. X is required to pay service tax on the royalty amount received from a music company?

Answer:

No, as the copyright relating to original work of composing song falls under clause (a) of subsection (1) of section 13 of the Indian Copyright Act, 1957 which is exempt from service tax.

Similarly an author having copy right of a book written by him would not be required to pay service tax on royalty amount received from the publisher for publishing the book. A person having the copyright of a cinematographic film would also not be required to pay service tax on the amount received from the film exhibitors for exhibiting the cinematographic film in cinema theatres.

(16) Services by artist in relation to folk or classical art

The following services are exempted from service tax if provided by a performing artist in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre, excluding services provided by such artist as a brand ambassador;

The activities by a performing artist in folk or classical art forms of music, dance, or theatre are not subjected to service tax. All other activities by an artist in other art forms e.g. western music or dance, modern theatres, performance of actors in films or television serials would be taxable. Similarly activities of artists in still art forms e.g. painting, sculpture making etc. are taxable.

(17) Services in relation to collecting or providing of News

Services by way of collecting or providing news by an independent journalist, Press Trust of India or United News of India; are exempted from service tax.

(18) Services in relation to renting of hotel, inn, guest house, club etc.

Services by way of renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent;

Declared tariff is includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air-conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit. Its relevance is in determining the liability to pay service tax on renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes as exemption is available where declared tariff of a unit of accommodation is below rupees one thousand per day or equivalent. However, the tax will be liable to be paid on the amount actually charged i.e. declared tariff minus any discount offered.

Thus if the declared tariff is ₹ 1200/-, but actual room rent charged is ₹ 900/-, tax will be required to be paid on ₹ 900/-.

When the declared tariff is revised as per the tourist season, the liability to pay tax shall be only on the declared tariff for the accommodation where the published/printed tariff is above Rupees 1000/-. However, the revision in tariff should be made uniformly applicable to all customers and declared when such change takes place.

(19) Services provided by Restaurant

Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages; are exempted from service tax.

(20) Exemption for transportation of certain goods, by rail or a vessel:

Services by way of transportation by rail or a vessel from one place in India to another of the following goods are exempted from service tax; -

(b) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap

(c) defence or military equipments;

(f) newspaper or magazines registered with the Registrar of Newspapers;

(g) railway equipments or materials;

(h) agricultural produce;

(i) foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages; or

(j) chemical fertilizer and oilcakes;

(21) Services by transport of essential goods etc by Goods Transport Agency (GTA) & Rail/vessel: Services provided by a goods transport agency by way of transportation of -

(a) Agriculture produce;

(b) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or

(c) goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty;

(d) Food staff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages;

(e) Chemical fertilizer and oilcakes;

(f) Newspaper or magazines registered with the registrar of news papers;

(g) Relief materials for disasters, clamaties, accidents or mishap victims;

(h) Defense or military equipments

(22) Services by hiring of vehicle: Services by way of giving on hire -

(a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or

(b) to a goods transport agency, a means of transportation of goods;

Giving on hire a bus to a state transport undertaking is exempt from service tax. If the bus is given on hire to a person other than a state transport undertaking, it will be taxed.

Transport of passengers in a contract carriage for the transportation of passengers, for tourism, conducted tour, charter or hire is taxable.

(23) Services of transport of passengers by different mode of transportation: Transport of passengers, with or without accompanied belongings, by -

(a) air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal;

(b) a contract carriage for the transportation of passengers, excluding tourism, conducted tour, charter or hire; or

(c) ropeway, cable car or aerial tramway; are exempted from service tax.

(25) Specified services to Government, a local authority or a governmental authority: Services provided to Government, a local authority or a governmental authority by way of -

(a) carrying out any activity in relation to any function ordinarily entrusted to a municipality in relation to water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation; or

(b) repair or maintenance of a vessel.

(26) Services of General insurance Business under the specified scheme:

Services of general insurance business provided under following schemes are exempted from service tax:

(a) Hut Insurance Scheme;

(b) Cattle Insurance under Swarnajaynti Gram Swarozgar Yojna (earlier known as Integrated Rural Development Programme);

(c) Scheme for Insurance of Tribals;

(d) Janata Personal Accident Policy and Gramin Accident Policy;

(e) Group Personal Accident Policy for Self-Employed Women;

(f) Agricultural Pumpset and Failed Well Insurance;

(g) premia collected on export credit insurance;

(h) Weather Based Crop Insurance Scheme or the Modified National Agricultural Insurance Scheme approved by the Government of India and implemented by the Ministry of Agriculture;

(i) Jan Arogya Bima Policy;

(j) National Agricultural Insurance Scheme (Rashtriya Krishi Bima Yojana);

(k) Pilot Scheme on Seed Crop Insurance;

(l) Central Sector Scheme on Cattle Insurance;

(m) Universal Health Insurance Scheme;

(n) Rashtriya Swasthya Bima Yojana; or

(o) Coconut Palm Insurance Scheme;

(26A) Service of Life Insurance business provided under following schemes:

(a) Janashree Bima Yojana (JBY); or

(b) Aam Aadmi Bima Yojana (AABY).

(27) Services provided by an incubatee:

Services provided by an incubatee up to a total turnover of fifty lakh rupees in a financial year subject to the following conditions, namely:-

(a) the total turnover had not exceeded fifty lakh rupees during the preceding financial year;and

(b) a period of three years has not been elapsed from the date of entering into an agreement as an incubatee;

(28) Services by an Non-Profit Making Organisation/unincorporated body :

Service by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution -

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of service tax; or

(c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

Where Residential Welfare Association (RWA) is working as a pure agent of its members for sourcing of goods or services from a third person, amount collected by RWA from its members may be excluded from the value of taxable service in terms of Rule 5(2) 0f Service Tax (Determination of Value) Rules, 2006 subject to compliance with the specified conditions.

(29) Services by the specified persons in respective categories are exempted from service tax:

Services by the following persons in respective capacities -

(a) sub-broker or an authorised person to a stock broker;

(b) authorised person to a member of a commodity exchange;

(c) mutual fund agent to a mutual fund or asset management company;

(d) distributor to a mutual fund or asset management company;

(e) selling or marketing agent of lottery tickets to a distributer or a selling agent;

(f) selling agent or a distributer of SIM cards or recharge coupon vouchers;

(g) business facilitator or a business correspondent to a banking company or an insurance company, in a rural area; or

(h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;

(30) Services by way of job work:

Carrying out an intermediate production process as job work exempted from service tax if these services are in relation to -

(a) agriculture, printing or textile processing;

(b) cut and polished diamonds and gemstones; or plain and studded jewellery of gold and other precious metals, falling under Chapter 71 of the Central Excise Tariff Act ,1 985 (5 of 1986);

(c) any goods on which appropriate duty is payable by the principal manufacturer; or

(d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of one hundred and fifty lakh rupees in a financial year subject to the condition that such aggregate value had not exceeded one hundred and fifty lakh rupees during the preceding financial year;

(31) Services in relation to business exhibition:

Services by an organiser to any person in respect of a business exhibition held outside India are exempted from service tax.

(32) Services by making telephone calls:

Services by way of making telephone calls from -

(a) departmentally run public telephone;

(b) guaranteed public telephone operating only for local calls; or

(c) free telephone at airport and hospital where no bills are being issued;

(33) Services by way of slaughtering of animals;

(34) Services by a person located in non-taxable territory:

Services received from a provider of service located in a non- taxable territory by-

(a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;

(b) an entity registered under section 1 2AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or

(c) a person located in a non-taxable territory;

(35) Services by public libraries:

Services of public libraries by way of lending of books, publications or any other knowledge-enhancing content or material; are exempted from service tax.

(36) Services by Employee's State Insurance (ESI) Corporation:

Services by Employees' State Insurance Corporation to persons governed under the Employees' Insurance Act, 1948 (34 of 1948) are exempted from service tax.

(37) Services by way of transfer of a going concern:

Services by way of transfer of a going concern, as a whole or an independent part thereof; exempted from service tax.

(38) Services by way of public convenience:

Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets; are exempted from service tax.

(39) Services by a governmental authority:

Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution exempted from service tax.

The following definitions are useful to understand the various terms used in the above:

(a) "Advocate" has the meaning assigned to it in clause (a) of sub-section (1) of section 2 of the Advocates Act, 1961 (25 of 1961);

(b) "appropriate duty" means duty payable on manufacture or production under a Central Act or a State Act, but shall not include 'Nil' rate of duty or duty wholly exempt;

(c) "arbitral tribunal" has the meaning assigned to it in clause (d) of section 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996);

(d) "authorised medical practitioner" means a medical practitioner registered with any of the councils of the recognised system of medicines established or recognized by law in India and includes a medical professional having the requisite qualification to practice in any recognised system of medicines in India as per any law for the time being in force;

(e) "authorised person" means any person who is appointed as such either by a stock broker (including trading member) or by a member of a commodity exchange and who provides access to trading platform of a stock exchange or a commodity exchange as an agent of such stock broker or member of a commodity exchange;

(f) "auxiliary educational services" means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge – enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution;

(g) "banking company" has the meaning assigned to it in clause (a) of section 45A of the Reserve Bank of India Act,1 934(2 of 1934);

(h) "brand ambassador" means a person engaged for promotion or marketing of a brand of goods, service, property or actionable claim, event or endorsement of name, including a trade name, logo or house mark of any person;

(i) "business facilitator or business correspondent" means an intermediary appointed under the business facilitator model or the business correspondent model by a banking company or an insurance company under the guidelines issued by Reserve Bank of India;

(j) "clinical establishment" means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases;

(k) "charitable activities" means activities relating to –

  (i) public health by way of -

    (a) care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons afflicted with HIV or AIDS, or (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or

    (b) public awareness of preventive health, family planning or prevention of HIV infection;

  (ii) advancement of religion or spirituality;

  (iii) advancement of educational programmes or skill development relating to,-

    (a) abandoned, orphaned or homeless children;

(b) physically or mentally abused and traumatized persons;

(c) prisoners; or

(d) persons over the age of 65 years residing in a rural area;

(iv) preservation of environment including watershed, forests and wildlife; or

(l) "commodity exchange" means an association as defined in section 2 (j) and recognized under section 6 of the Forward Contracts (Regulation) Act,1 952 (74 of 1952);

(m) "contract carriage" has the meaning assigned to it in clause (7) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);

(n) "declared tariff" includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air-conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit;

(o) "distributor or selling agent" has the meaning assigned to them in clause (c) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), vide number G.S.R. 278(E), dated the 1st April, 2010 and shall include distributor or selling agent authorised by the lottery- organising State;

(p) "general insurance business" has the meaning assigned to it in clause (g) of section 3 of General Insurance Business (Nationalisation) Act, 1972 (57 of 1972);

(q) "general public" means the body of people at large sufficiently defined by some common quality of public or impersonal nature;

(r) "goods carriage" has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);

(s) "governmental authority'' means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;

(t) "health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma;

(u) "incubatee" means an entrepreneur located within the premises of a Technology Business Incubator (TBI) or Science and Technology Entrepreneurship Park (STEP) recognised by the National Science and Technology Entrepreneurship Development Board (NSTEDB) of the Department of Science and Technology, Government of India and who has entered into an agreement with the TBI or the STEP to enable himself to develop and produce hi-tech and innovative products;

(v) "insurance company" means a company carrying on life insurance business or general insurance business;

(w) "legal service" means any service provided in relation to advice, consultancy or assistance 230 l in any branch of law, in any manner and includes representational services before any court, tribunal or authority;

(x) "life insurance business" has the meaning assigned to it in clause (11) of section 2 of the Insurance Act, 1938 (4 of 1938);

(y) "original works" means has the meaning assigned to it in Rule 2A of the Service Tax (Determination of Value) Rules, 2006;

(z) "principal manufacturer" means any person who gets goods manufactured or processed on his account from another person;

(za) "recognized sports body" means - (i) the Indian Olympic Association, (ii) Sports Authority of India, (iii) a national sports federation recognized by the Ministry of Sports and Youth Affairs of the Central Government, and its affiliate federations, (iv) national sports promotion organisations recognized by the Ministry of Sports and Youth Affairs of the Central Government, (v) the International Olympic Association or a federation recognized by the International Olympic Association or (vi) a federation or a body which regulates a sport at international level and its affiliated federations or bodies regulating a sport in India;

(zb) "religious place" means a place which is primarily meant for conduct of prayers or worship pertaining to a religion, meditation, or spirituality;

(zc) "residential complex" means any complex comprising of a building or buildings, having more than one single residential unit;

(zd) "rural area" means the area comprised in a village as defined in land revenue records, excluding the area under any municipal committee, municipal corporation, town area committee, cantonment board or notified area committee; or any area that may be notified as an urban area by the Central Government or a State Government;

(ze) "single residential unit" means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family;

(zf) "specified international organization" means an international organization declared by the Central Government in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), to which the provisions of the Schedule to the said Act apply;

(zg) "state transport undertaking" has the meaning assigned to it in clause (42) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);

(zh) "sub-broker" has the meaning assigned to it in sub-clause (gc) of clause 2 of the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992;

(zi) "trade union" has the meaning assigned to it in clause (h) of section 2 of the Trade Unions Act, 1926 (16 of 1926).

6.12 POINT OF TAXATION

Introduction

We must thoroughly understand terms "Point of Taxation", "taxable event" and "value of taxable services" for the following reasons:

i. The amount of service tax is based on the Point of Taxation.

ii. Service tax is payable on the basis of provision of service instead of realization of value of taxable service except in the case of individuals/firms/limited liability partnership firms (LLP's) w.e.f. 1-4-201 2.

iii. If money is received in advance, ahead of completion or rendering of service, service tax is payable as soon as the advance is received.

The point of taxation defines the point in time when a service shall be deemed to have been provided. It has impact on determination of rate of tax, as normally the rate of tax shall apply as prevailing on the date when service shall be deemed to have been provided.

The Government of India has introduced the Point of Taxation Rules, 2011 to remove the disputes about applicability of the rate of tax and for ascertainment of the Point of Taxation. These rules have been explained with the help of examples are as follows:

Rule 1: These rules shall be called the Point of Taxation Rules, 2011

Rule 2: Definitions

Rule 2(a) "Act" means the Finance Act, 1 994;Rule 2(b) **"associated enterprises"** shall have the meaning assigned to it in section 92A of the Income Tax Act, 1961;

Rule 2(ba) **"change in effective rate of tax"** shall include a change in the portion of value on which tax is payable in terms of a notification issued in the Official Gazette under the provisions of the Act, or rules made there under (w.e.f. 1.4.201 2).

Rule 2(c) "**continuous supply of service"** means any service which is provided, or to be provided continuously or on recurrent basis, under a contract, for a period ***exceeding three*** months with the obligation for payment periodically or from time to time or where the Central Govt. by notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition.

Rule 2(d) **"invoice"** means the invoice referred to in rule 4A of the Service Tax Rules, 1994 and shall include any document as referred to in the said rule;

Rule 2(e) **"point of taxation"** means the point in time when a service shall be deemed to have been provided;

Rule 2(f) "taxable service" (omitted w.e.f. 1-7-201 2)

Rule 2A: Date of payment (w.e.f.1 -4-2012):

When change in effective rate of tax or new levy between date of book entry or credited to bank

Date of payment shall be the earlier of the dates on which the payment is entered in the books of accounts or is credited to the bank account of the person liable to pay tax:

Example 26: (a) Payment was credited in the books of accounts on 7.6.2012 Payment was credited in the bank account on 10.6.2012

Date of change in effective rate of tax is on 8.6.2012

Answer:

Date of payment is 7.6.2012

Date of payment shall be the date of credit in the bank account.

(b) Payment was credited in the books of accounts on 1.6.2012 Payment was credited in the bank account on 10.6.2012

Date of change in effective rate of tax is on 5.6.2012

Answer:

DATE OF PAYMENT IS 10.6.2012

Rule 3: Determination of point of taxation:

(a) Date of invoice or payment, whichever is earlier, if the invoice is issued within the prescribed period of 30 days from the date of completion of the provision of service (w.e.f. 1-4-2012).

(b) Date of completion of the provision of service or payment, whichever is earlier if the invoice is not issued within the prescribed period as state in rule 4A of the Service Tax Rules, 1994.

w.e.f. 1-4-2012, in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

Example 27: In the case of construction services if the payments are linked to stage-by-stage completion of construction, the provision of service shall be deemed to be completed in part when each stage of construction is completed.

Wherever the provider of taxable service receives a payment up to ₹ 1,000 in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be the date of receipt of such amount.

Example 28: M/s X Pvt. Ltd. provided services for ₹ 1,00,000 and service tax charged separately @12.36% vide invoice dated 1-4-2012. Payment received ₹ 1,13,260 on 1st July 2012. It means excess payment received is ₹ 900. Hence, no need to issue separate invoice for the same. Hence, the point of taxation for the invoice value is 1-4-2012, whereas for ₹ 900 the point of taxation is 1st July 2012.

POT = Point of Taxation

Example 29: The applicability of the rule will be clear from the following table:

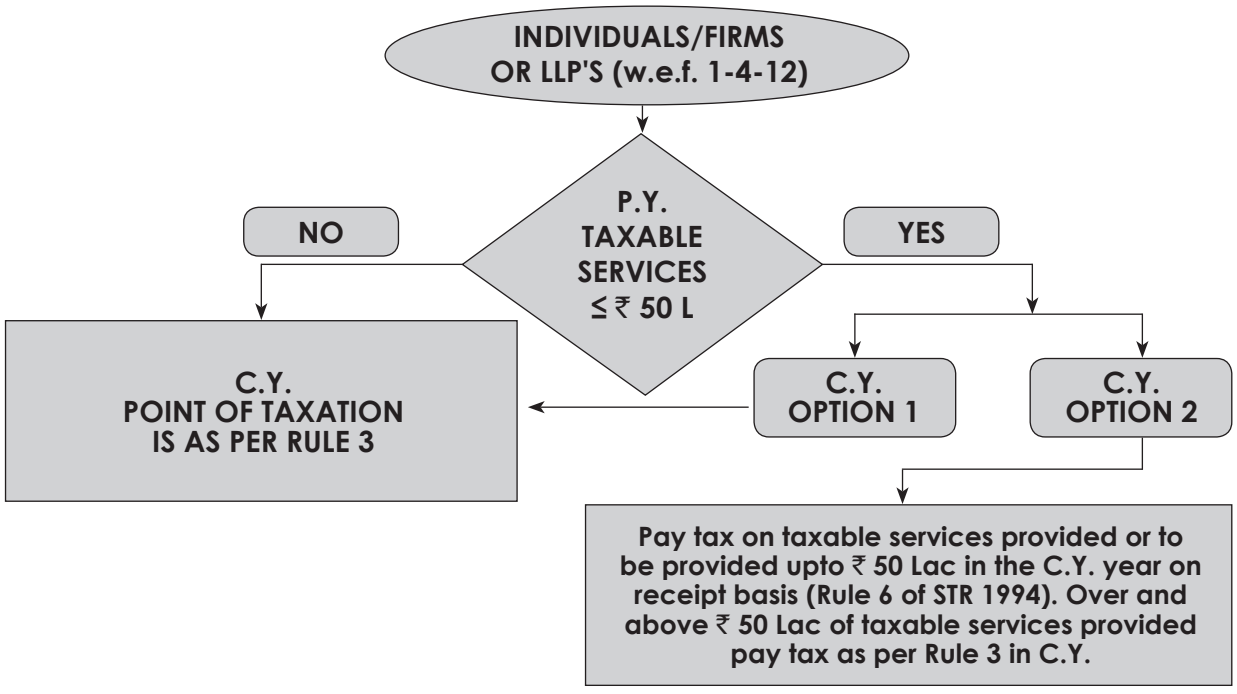
M/s X Pvt. Ltd. is provider of service.

SL. No.	Date of completion of service	Date of invoice	Date on which payment recd.	Point of Taxation	Due date of payment (manual payment)	Remarks
1.	April 10, 2012	April 20, 2012	June 30, 2012	April 20, 2012	5th May 2012	Invoice issued in 30 days from the date of completion of service. Dt. of invoice or Dt. of payment whichever is earlier
2.	April 10, 2012	May 26, 2012	June 30, 2012	April 10, 2012	5th May 2012	Invoice not issued within 30 days and payment received after completion of service
3.	May 10, 2012	May 20, 2012	April 15, 2012	April 15, 2012	5th May 2012	Invoice issued in 30 days but payment received before invoice
4.	April 10, 2012	May 26, 2012	April 5, 2012 (part) and May 25, 2012 (remaining)	April 5, 2012 And April 10, 2012 for respective amounts	5th May 2012	Invoice not issued in 30 days. Part payment before completion, remaining later

Service Tax liability on receipt basis for Individuals and Partnership Firms including LLP's (w.e.f. 1-4-2012)

It is pertinent to note point of taxation in case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is ₹ 50 lakhs or less in the previous financial year, the service provider shall have the option to pay tax on taxable services provided or to

be provided by him up to a total of ₹ 50 lakhs in the current financial year, by the dates specified in the Rule 6 of Service Tax Rules, 1994, with respect to the relevant quarter, in which payment is received.



P.Y = Previous Year, C.Y= Current Year.

Example 30: Mr. C, Practicing C.A. started profession in the year 2012-13 (₹ in lakhs) has been chosen the option to pay service tax on receipt basis in the current year.

₹ in lakhs

Particulars	**1st qtr.**	**2nd qtr.**
services provided	20	2
services to be provided (i.e. advance)	35	NIL
TOTAL	55	2
S.T. @12.36% Note: small service provider exemption not availed	4.326	0.2472

Note:

Services provided or to be provided exceeds ₹ 50 lakhs in the 1st quarter itself. Entire value of ₹ 35 lakhs is taxable on receipt basis as per point of taxation rule 3.

Services provided in the 1st quarter for ₹ 20 lakhs will be taxable on receipt basis.

Service provided or to be provided in the 2nd quarter fully taxable as per Point of Taxation Rule 3.

Example 31: Mr. C, Practicing C.A. started profession in the year 2012-13 (rupees in lakhs) has been chosen the option to pay service tax on receipt basis in the current year.

₹ in lakhs

Particulars	1st qtr.	2nd qtr.
services provided	55	2
services to be provided (i.e. advance)	NIL	NIL
TOTAL	55	2
S.T. @12.36%	6.798	0.2472

Note 1:

i) small service provider exemption not availed

ii) Since, ₹ 50 lakhs exceeds in the 1st quarter, services provided over and above ₹ 50 lakhs is taxable as per point of taxation rule 3.

Service tax is payable on ₹ 5 lakhs on provisional basis and balance ₹ 50 lakhs will be taxable on receipt basis.

From 2nd quarter onwards services are taxable based on point of taxation rule 3

Example 32: Mr. C, Practicing C.A. started profession in the year 2012-13 (₹ in lakhs) has been chosen the option to pay service tax on receipt basis in the current year.

₹ in lakhs

Particulars	1st qtr.	2nd qtr.
services provided	NIL	2
services to be provided (i.e. advance)	55	NIL
TOTAL	55	2
S.T. @12.36%	6.798	0.2472

Note:

(i) small service provider exemption not availed

(ii) Since, in the 1st quarter services to be provided for which advance received exceeds ₹ 50 lakhs, then the entire value on receipt basis taxable, and subsequently service provider is liable to pay service tax as per Point of Taxation Rule 3.

Rule 4: Determination of point of taxation in case of change in effective rate of tax:

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

(a) in case a taxable service has been provided before the change in effective rate,—

(i) where the invoice for the same has been issued and the payment received after the *change in effective rate,* the point of taxation shall be date of payment or issuing of invoice, whichever is earlier; or

(ii) where the invoice has also been issued prior to *change in effective rate* but the payment is received after the change in effective rate, the point of taxation shall be the date of issuing of invoice; or

(iii) where the payment is also received before the *change in effective rate,* but the invoice for the same has been issued after the *change in effective rate,* the point of taxation shall be the date of payment;

Example 33: (a) The applicability of the rule will be clear from the illustrations in the following table:

Sl.No.	Date of provision of service	Date of Invoice	Date on which payment received	Point of taxation
(i)	Before change	After change	After change	Date of payment or invoice, whichever is earlier
(ii)	Before change	Before change	After change	Date of invoice
(iii)	Before change	After change	Before change	Date of payment

(b) In case a taxable service has been provided after the change in effective rate,-

(i) where the payment for the invoice is also made after the change in effective rate but the invoice has been issued prior to the change in effective rate, the point of taxation shall be the date of payment; or

(ii) where the invoice has been issued and the payment for the invoice received before the change in effective rate, the point of taxation shall be the date of receipt of payment or date of issuance of invoice, whichever is earlier; or

(iii) where the invoice has also been raised after the change in effective rate but the payment has been received before the change in effective rate, the point of taxation shall be date of issuing of invoice.

Example 34: The applicability of the rule will be clear from the illustrations in the following table:

S. No.	Date of provision of service	Date of Invoice	Date on which payment received	Point of taxation
(i)	After change	Before change	After change	Date of payment
(ii)	After change	Before change	Before change	Date of payment or invoice, whichever is earlier
(iii)	After change	After change	Before change	Date of invoice

Explanation: For the purposes of this rule, "change in effective rate of tax" shall include a change in the portion of value on which tax is payable in terms of a notification issued under the provisions of Finance Act, 1994 or rules made thereunder.

Alternative: there are three voters namely date of provision of service, date of invoice and date of payment received and two candidates'namely new rate of tax and old rate of tax. Hence, majority wins.

Example 35:

S.No.	Date of provision of service	Date of Invoice	Date on which payment received	Effective rate of S.T.
(i)	Before change	After change	After change	New Rate
(ii)	Before change	Before change	After change	Old Rate
(iii)	Before change	After change	Before change	Old Rate
(iv)	After change	Before change	After change	New Rate
(v)	After change	Before change	Before change	Old Rate
(vi)	After change	After change	Before change	New Rate

Rule 5: Payment of tax in cases of new services:

Where a service, not being a service covered by rule 6, is taxed for the first time, then,—

(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;

Example: Food King Pvt. Ltd., provider of restaurant services having facility of air conditioning and license to serve alcoholic beverages in relation to serving of food or beverage. These services are taxable w.e.f. 1-5-2011. Payment received and invoice raised prior to 1-5-2011 are not taxable.

b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within 14 days of the date when the service is taxed for the first time (w.e.f. 1-4-2012).

Example 36: Queen Pvt. Ltd., provider of taxable services. These services are taxable w.e.f. 1-5-2012. Payment was received from a customer for ₹ 5,00,000 on 20-4-2012. The invoice has been issued on 4-5-2012 (i.e. within 14 days of the date when the service is taxed for the first time). Hence, service provider not liable to pay service tax on the entire value of ₹ 5,00,000.

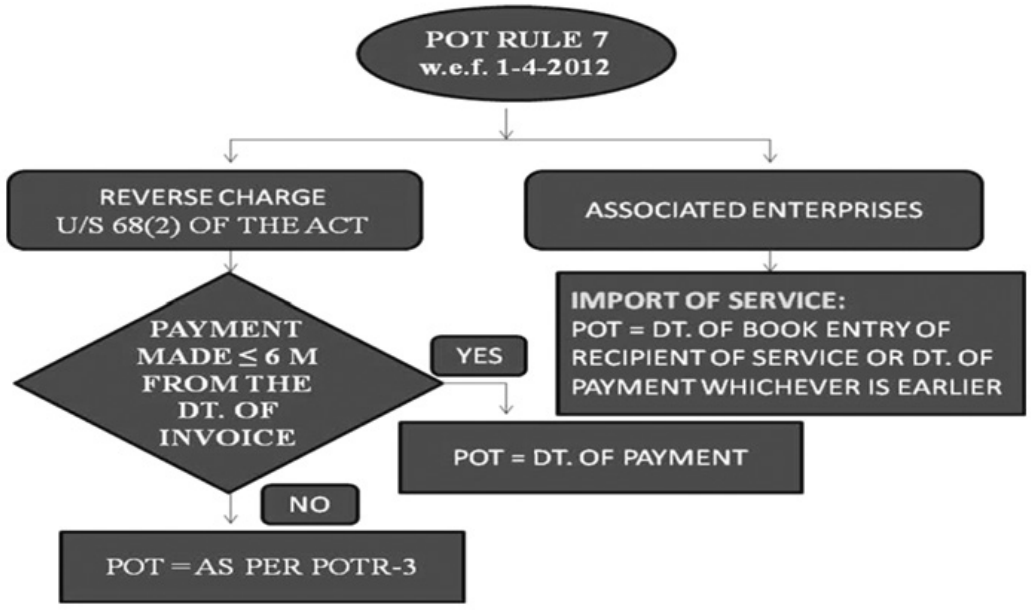
Rule 6: Determination of point of taxation in case of continuous supply of service (Omitted w.e.f. 1-4-2012)

Rule 7: Determination of point of taxation in case of specified services or persons (w.e.f. 1-4-2012)

The Point of Taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under section 68(2) of the Finance Act, 1994 shall be the date on which payment is made; provided that, where the payment is made within a period of six months of the date of invoice.

In case the recipient of services failed to make the payment within a period of 6 months of the date of invoice, the point of taxation shall be determined as if this rule does not exist. It means if the recipient of service is not making the payment within 6 months, the point of taxation shall shift from the date of making payment to the condition specified under rule 3 of these rules.

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



Rule 8: Determination of point of taxation in case of copyrights, etc.

In respect of royalties and payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and the payment for the benefit of such service is made subsequently. In

this case, point of taxation will be each time when the payment received or the date when the invoice is issued by the provider of service, whichever is earlier.

Rule 8A: Determination of point of taxation in case of copyrights, etc. (w.e.f 1-4-2012):

For determination of POT in other cases whereby in the cases where date of invoice or date of payment is not available, the C.E.O. (Central Excise Officer) can conduct best judgment assessment to determine the point of taxation.

Rule 9: Transitional Provisions:

Nothing contained in these rules shall be applicable

(i) where the provision of service is completed; or

(ii) where invoices are issued

prior to the date on which these rules come into force.

6.13 TAXABLE EVENT IN SERVICE TAX

Taxable event and tax liability do not happen at the same time. Taxable event happens when a taxable service is rendered. Tax liability is required to pay as per Point of Taxation Rules, 2011 (w.e.f. 1-4-2011).

6.13.1 Point of Taxation as per the Point of Taxation Rules, 2011,

- Date of Invoice (or)
- Payment received (or)
- Completion of the provision of service

Whichever is earlier.

As per the Point of Taxation Rules, discussed above, different points of time have been chosen when a service shall be deemed to have been provided, whereas the rules has made by introducing a deeming fiction when a service shall be deemed to have been provided, but no such provisions have been made in the Finance Act, 1994.

However, the said provision is not applicable for those service providers named under Rule 7 of the Point of Taxation Rules, 2011 namely determination of point of taxation in case of specified services or persons. For them taxable event is rendering of taxable service only.

6.13.2 When Service Provider Receives an Advance

Payment may be received in advance (i.e. ahead of rendering of complete service) or in arrears (i.e. after rendering of service).

When the service provider receives an advance payment in respect of a taxable service being rendered by him, the liability to pay service tax arises as soon as he receives the advance.

When the service provider receives an advance payment in respect of a non-taxable service which is not taxable at the time the advance is being received, there will be service tax liability if the services are taxable at the time of rendering the services.

Service tax is payable on value of taxable service actually billed, even though the value of taxable services yet to be received.

If the amount of invoice is renegotiated due to deficient provision or in any other way changed in terms of conditions of the contract (e.g. contingent on the happening or non-happening of a future event), the tax will be payable on the revised amount provided the excess amount is either refunded or a suitable credit is issued to the service receiver.

6.13.3 Concession is not available for bad debts

If an assessee issues invoice, say for ₹ 5,00,000 and realized only ₹ 4,80,000 from his client and ₹ 20,000 becomes bad debt, then he cannot claim that he has paid excess tax for ₹ 20,000 and in such a situation, he shall not be entitled to make any adjustment of tax paid in respect of ₹ 20,000, which has become a bad debt.

Example 37: The service provider, a chartered accountant whose previous year (2011-12) turnover less than ₹ 50 lakhs, received an amount of ₹ 1,00,000 in April 2012, for a consulting engagement worth ₹ 5,00,000 which he completes in the month of July 2012 and for which balance payment is received on August 2012. Service tax is payable on ₹ 1,00,000 for the quarter April to June on or before 5th July 2012. Service tax liability for the balance of ₹ 4,00,000 for the quarter July to September, on or before 5th October 2012. Service provider is liable to pay service tax on payment receipt basis as per rule 3 of the Point of Taxation Rules, 2011 read with rule 6 of Service Tax Rules, 1994 (w.e.f. 1-4-201 2).

Example 38: Information technology software services provided by X Ltd. for ₹ 25,00,000 lakhs and an invoice issued on 1st July 2012. Service provider has not been received consideration upto the end of 31st July, 2012. As per rule 3 of the Point of Taxation Rules, 2011 service provider is liable to pay service tax on the value of invoice on or before 5th August, 2012.

Example 39: A Ltd., being an interior decorator received the advance money from his customer of ₹ 30,000 in the month of July 2012, for which he is going to work in the month of September, 2012. A Ltd. being service provider is liable to pay the service tax @ 12.36% on ₹ 30,000 for the month of July, 2012 on or before 5th August, 2012. The order has been cancelled on 25th August, 2012. Hence, A Ltd. can file refund for the amount paid as service tax. Alternatively he can adjust the same against any taxable output services.

Example 40: X Ltd. provided cargo handling services for ₹ 15,00,000 in the month of 15th May, 2012. Invoice issued on 1st July 2012. 50% has been received on 1st April, 2012 and balance on 5th July, 2012.

You are required to find out due dates of payment of service tax.

Answer:

As per rule 3 of the Point of Taxation Rules, 2011, point of taxation for the first 50% of receipt is 1st April, 2012 (i.e. date of completion of service or date of receipt of payment whichever is earlier, since, invoice has not been issued within 30 days of completion of service).

Therefore, due date of payment of service tax is 5th May, 2012.

Point of taxation for the balance 50% is 15th May, 2012 (i.e. date of completion of service or date of receipt of payment whichever is earlier, since, invoice has not been issued within 30 days of completion of service).

Therefore, due date of payment of service tax is 5th June, 2012.

Example 41: A provider (X Ltd.) of information technology software services received an advance of ₹ 10 lakhs on 21st July 2012 and the balance ₹ 40 lakhs on 1st October 2012. Information technology software service was listed as a taxable service w.e.f. 16-5-2008. Services actually rendered on 1st August 2012 and invoice issued on 10th August 2012. There will be service tax liability @12.36% on ₹ 10 lakhs for the month of July 2012, and on ₹ 40 lakhs for the month of August 2012.

6.14 PLACE OF PROVISION OF SERVICE RULES

The 'Place of Provision of Services Rules, 2012' specifies the manner to determine the taxing jurisdiction for a service. Hitherto, the task of identifying the taxing jurisdiction was largely limited in the context of import or export of services. For this purpose rules were formulated which handled the subject of place of provision of services somewhat indirectly, confining to define the circumstances in which a provision

of service would constitute import or export.

These rules are primarily meant for persons who deal in cross-border services. They will also be equally applicable for those who have operations with suppliers or customers in the state of Jammu and Kashmir.

Additionally service providers operating within India from multiple locations, without having centralized registration will find them useful in determining the precise taxable jurisdiction applicable to their operations. The rules will be equally relevant for determining services that are wholly consumed within a SPEICAL ECONOMIC ZONE (SEZ), to avail the outright exemption.

Rule 1: place of provision of services rules, 2012 (w.e.f. 1-7-2012) Definitions.- In these rules, unless the context otherwise requires,-

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(c) "banking company" has the meaning assigned to it in clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);

(d) "continuous journey" means a journey for which a single or more than one ticket or invoice is issued at the same time, either by one service provider or through one agent acting on behalf of more than one service provider, and which involves no stopover between any of the legs of the journey for which one or more separate tickets or invoices are issued;

(e) "financial institution" has the meaning assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act,1 934 (2 of 1934);

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.;

(g) "leg of journey" means a part of the journey that begins where passengers embark or disembark the conveyance, or where it is stopped to allow for its servicing or refueling, and ends where it is next stopped for any of those purposes;

(h) "location of the service provider" means-

  (a) where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;

  (b) where the service provider is not covered under sub-clause (a):

    (i) the location of his business establishment; or

    (ii) where the services are provided from a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or

    (iii) where services are provided from more than one establishment, whether business or fixed, the establishment most directly concerned with the provision of the service; and

    (iv) in the absence of such places, the usual place of residence of the service provider.

(i) "location of the service receiver" means:-

  (a) where the recipient of service has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;

  (b) where the recipient of service is not covered under sub-clause (a):

    (i) the location of his business establishment; or

(ii) where services are used at a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or

(iii) where services are used at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service; and

(iv) in the absence of such places, the usual place of residence of the recipient of service.

Explanation:-. For the purposes of clauses (h) and (i), "usual place of residence" in case of a body corporate means the place where it is incorporated or otherwise legally constituted.

Explanation 2:-. For the purpose of clause (i), in the case of telecommunication service, the usual place of residence shall be the billing address.

(j) "means of transport" means any conveyance designed to transport goods or persons from one place to another;

(k) "non-banking financial company" means137

(i) a financial institution which is a company; or

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette specify;

(l) "online information and database access or retrieval services" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;

(m) "person liable to pay tax" shall mean the person liable to pay service tax under section 68 of the Act or under sub-clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994;

(n) "provided" includes the expression "to be provided";

(o) "received" includes the expression "to be received";

(p) "registration" means the registration under rule 4 of the Service Tax Rules, 1994;

(q) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.

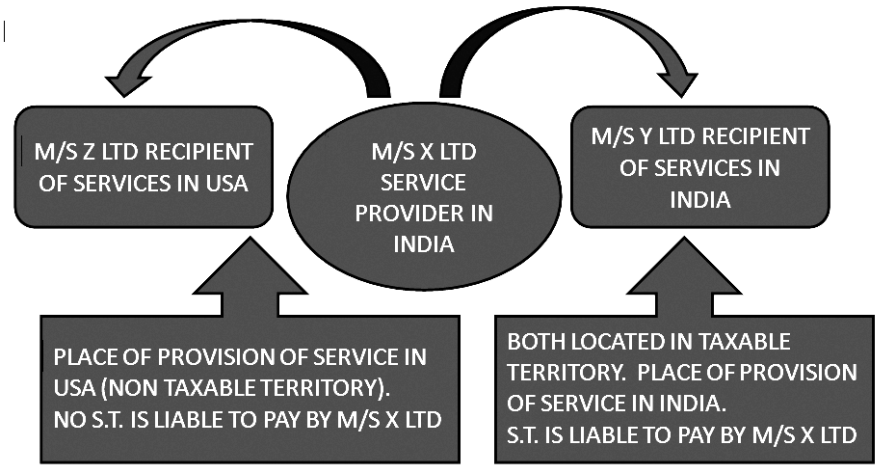
(r) words and expressions used in these rules and not defined, but defined in the Act, shall have the meanings respectively assigned to them in the Act.

Rule 3: Location of the receiver:

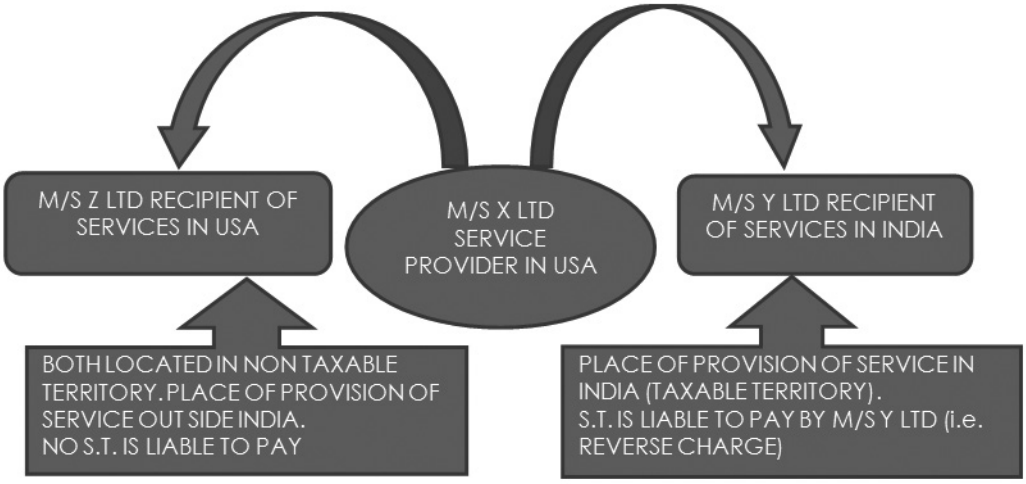
The place of provision of a service shall be the location of the recipient of service:

Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

Example 42:



Example 43:



Rule 4: Performance based Services:

Place of provision of service shall be the location where the services are actually performed. However services provided by way of electronic means in relation to tangible goods, the place of provision of service shall be the actual location of goods:

Rule 4(a): services that are provided "in respect of goods that are made physically available, by the receiver to the service provider in order to provide the service"	Rule 4(a): not covers where supply of goods by the receiver is not material to the rendering of services
i. Repair or reconditioning or any other job work on goods (not amounting to manufacture) ii. Storage and warehousing iii. Courier services iv. Cargo handling services v. Technical testing /inspection/certification/analysis of goods vi. Dry cleaning etc.,	i. Consultancy report commissioned by a person is given on pen drive belonging to the customer ii. Market research service etc.,

Place of provision of service shall be the location where the services are actually performed:

Rule 4(b): services that are provided "to an individual which required the physical presence of the receiver with the provider for provision of the service" and includes a person acting on behalf of the receiver.	Rule 4(b): not covers where physical presence of an individual is not required being recipient of service
i. Cosmetic or plastic surgery, ii. Beauty treatment services iii. Personal security services iv. Class room teaching v. Photographic services vi. Internet café services	i. Auditing ii. Interior decoration etc.,

Rule 5: Location of Immovable Property:

Place of provision of service is where the immovable property is located or intended to be located:

The place of provision of services relating to immovable property located in the taxable territory includes:	The place of provision of services relating to immovable property located in the taxable territory does not includes:
i. Lease or a right to use, occupation enjoyment or provision of hotel accommodation by a hotel, guest house, club ii. Construction service iii. Architects iv. Interior decorators v. Renting of immovable property etc.,	i. Repair and maintenance of machinery ii. Advice relating to land prices iii. Real estate feasibility studies iv. Services of an agent who arranges finance v. Legal opinion vi. Computation of tax for rent of immovable property

Rule 6: Services relating to Events:

Place of provision of service shall be the place where the event is actually held:

The place of provision of services relating to events in the taxable territory includes:	The place of provision of services relating to events does not includes:
Services in relation to admission as well as organisation of events such as conventions, i. Conferences, exhibitions, fairs, ii. Seminars, iii. Workshops, iv. Weddings, v. Sports and cultural events , vi. Artistic vii. Scientific, educational, viii. Entertainment events ix. Services ancillary to such admission	i. A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event

Rule 7: Part Performance of a Service at Different Locations:

Place of provision of service will be the place in the taxable territory where the greatest proportion of services is provided (i.e. Kerala).

Where any service stated in rules 4, 5, or 6 is provided at more than one location, including a location of taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided

Rule 8: Service Provider and Receiver in Taxable Territory:

The place of provision of service will be the location of the receiver, notwithstanding the earlier rules (i.e. 4 to 6).

Rule 9: Specified Services:

Place of provision is location of the service provider.

SPECIFIED SERVICES INCLUDES:

(i) Services provided by a banking company, or financial company, or a NBFC to account holders

(ii) Online information and database access or retrieval services

(iii) Intermediary services (i.e. travel agent, tour operator, commission agent etc)

(iv) Services consisting of hiring of means of transport, upto a period of one month

Rule 10: Place of Provision of a Service of Transportation of Goods:

Place of provision of service of transportation of goods is the place of destination of goods, except in the case of services provided by a G.T.A (in case of GOODS TRANSPORT AGENCY the place of provision of service is the location of the person liable to pay service tax).

Covered under rule 10	Not covered under rule 10
Goods transported by • Air • Vessel • Rail • Road	Goods transported by • Courier • Mail

Rule 11: Passenger Transportation Services:

The place of provision of a passenger transportation service is the place where the passenger embarks on the conveyance for a continuous journey.

Rule 12: Services Provided on Board Conveyances:

Any service provided on board a conveyance (air craft, vessel, rail, or rodways bus) will be covered here. The place of provision of service is the first scheduled point of departure of that conveyance for the journey.

Example 44: A video game or a movie on demand is provided as on board entertainment during the Kolkata – Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory) and hence not taxable,

Rule 13: Power to Notify Services or Circumstances:

In order to prevent double taxation or non-taxation of the provision of a service or for the uniform application of rules.

Rule 14: Order of Application of Rules:

When two or more rules may appear equally applicable then rule that occurs later among the rules preferable.

Place of Provision of Services Rules, 2012

(adopted from Educational Guide issued by TRU, CBE&C, MoF, GoI)

Rules at a glance:

Rule 3	**Location of the Receiver**
Rule 4	**Performance based Services**
Rule 5	**Location of Immovable Property**
Rule 6	**Services relating to Events**
Rule 7	**Part performance of a service at different locations**
Rule 8	**Services where the Provider as well as Receiver is located in Taxable Territory**
Rule 9	**Specified services- Place of provision is location of the service provider**
Rule 10	**Place of Provision of a service of transportation of goods**
Rule 11	**Passenger Transportation Services**
Rule 12	**Services provided on board conveyances**
Rule 13	**Power to notify services or circumstances**
Rule 14	**Order of application of Rules**

Rule 3- Location of the Receiver

6.14.1 What is the implication of this Rule?

The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located.

The main rule is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules- see para 5.14 of this guidance paper). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory.

The principal effect of the Main Rule is that:-

A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.

B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service.

6.14.2. If the place of provision of a taxable service is the location of service receiver, who is the person liable to pay tax on the transaction?

Service tax is normally required to be paid by the provider of a service, except where he is located outside the taxable territory and the place of provision of service is in the taxable territory.

Where the provider of a service is located outside the taxable territory, the person liable to pay service tax is the receiver of the service in the taxable territory, unless of course, the service is otherwise exempted.

Following illustration will make this clear:-

A company ABC provides a service to a receiver PQR, both located in the taxable territory.
Since the location of the receiver is in the taxable territory, the service is taxable. Service tax liability will be discharged by ABC, being the service provider and being located in taxable territory.

However, if ABC were to supply the same service to a recipient DEF located in non-taxable territory, the provision of such service is not taxable, since the receiver is located outside the taxable territory.

If the same service were to be provided to PQR (located in taxable territory) by an overseas provider XYZ (located in non-taxable territory), the service would be taxable, since the recipient is located in the taxable territory. However, since the service provider is located in a nontaxable territory, the tax liability would be discharged by the receiver, under the reverse charge principle (also referred to as "tax shift").

6.14.3 Who is the service receiver?
Normally, the person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf.

Illustration 1:
A lady leaves her car at a service station for the purpose of servicing. She asks her chauffer to collect the car from the service station later in the day, after the servicing is over. The chauffer makes the payment on behalf of the lady owner and collects the car.
Here the lady is the 'person obliged to make the payment' towards servicing charges, and therefore, she is the receiver of the service.

6.14.4 What would be the situation where the payment for a service is made at one location (say by the headquarters of a business) but the actual rendering of the service is elsewhere (i.e. a fixed establishment)?

Occasionally, a person may be the person liable to make payment for the service provided on his behalf to another person. For instance, the provision of a service may be negotiated at the headquarters of an entity by way of centralized sourcing of services whereas the actual provision is made at various locations in different taxing jurisdictions (in the case of what is commonly referred to as a multi-locational entity or MLE). Here, the central office may act only as a facilitator to negotiate the contract on behalf of various geographical establishments.

Each of the geographical establishments receives the service and is obligated to make the payment either through headquarters or sometimes directly. When the payment is made directly, there is no confusion. In other situations, where the payment is settled either by cash or through debit and credit note between the business and fixed establishments, it is clear that the payment is being made by a geographical location. Wherever a fixed establishment bears the cost of acquiring, or using or consuming a service through any internal arrangement (normally referred to as a "recharge", "reallocation", or a "settlement"), these are generally made in accordance with corporate tax or other statutory requirements. These accounting arrangements also invariably aid the MLE's management in budgeting and financial performance measurement.

Various accounting and business management systems are generally employed to manage, monitor and document the entire purchasing cycle of goods and services (such as the ERP Enterprise Resource Planning System). These systems support and document the company processes, including the financial and accounting process, and purchasing process.
Normally, these systems will provide the required information and audit trail to identify the establishment that uses or consumes a service.

It should be noted that in terms of proviso to section 66B, the establishments in a taxable and non-taxable territory are to be treated as distinct persons. Moreover, the definition of "location of the receiver" clearly states that "where the services are "used" at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service" will be the location. Thus, the taxing jurisdiction of service, which is provided under a 'global framework agreement' between two multinational companies with the business establishment located outside the taxable territory, but which is used or consumed by a fixed establishment located in the taxable territory, will be the taxable territory.

6.14.5 What is the place of provision where the location of receiver is not ascertainable in the ordinary course of business?

Generally, in case of a service provided to a person who is in business, the provider of the service will have the location of the recipient's registered location, or his business establishment, or his fixed establishment etc, as the case may be. However, in case of certain services (which are not covered by the exceptions to the main rule), the service provider may not have the location of the service receiver, in the ordinary course of his business. This will also be the case where a service is provided to an individual customer who comes to the premises of the service provider for availing the service and the provider has to, more often than not, rely on the declared location of the customer. In such cases the place of provision will be the location of the service provider. It may be noted that the service provider is not required to make any extraordinary efforts to trace the address of the service receiver. The address should be available in the ordinary course of business.

In case of certain specified categories of services, the place of provision shall be the place where the services are actually performed. These are discussed in the following paragraphs.

Rule 4- Performance based Services

6.14.6 What are the services that are provided "in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service"?- sub-rule (1):

Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/ inspection/certification/ analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys.

6.14.7 What is the implication of the proviso to sub-rule (1)?

The proviso to this rule states as follows:-
"Provided further that where such services are provided from a remote location by way of electronic means, the place of provision shall be the location where goods are situated at the time of provision of service."

In the field of information technology, it is not uncommon to provide services in relation to tangible goods located distantly from a remote location. Thus the actual place of performance of the service could be quite different from the actual location of the tangible goods. This proviso requires that the place of provision shall be the actual location of the goods and not the place of performance, which in normal situations is one and the same.

6.14.8 What are the services that are provided "to an individual … which require the physical presence of the receiver … with the provider for provision of the service."?- sub-rule (2)

Certain services like cosmetic or plastic surgery, beauty treatment services, personal security service, health and fitness services, photography service (to individuals), internet café service, classroom teaching, are examples of services that require the presence of the individual receiver for their provision. As would be evident from these examples, the nature of services covered here is such as are rendered in person and in the receiver's physical presence.
Though these are generally rendered at the service provider's premises (at a cosmetic or plastic surgery clinic, or beauty parlor, or health and fitness centre, or internet café), they could also be provided at the customer's premises, or occasionally while the receiver is on the move (say, a personal security service; or a beauty treatment on board an aircraft).

6.14.9 What is the significance of "..in the physical presence of an individual, whether represented either as the service receiver or a person acting on behalf of the receiver" in this rule?
This implies that while a service in this category is capable of being rendered only in the presence of an individual, it will not matter if, in terms of the contractual arrangement between the provider and the receiver (formal or informal, written or oral), the service is actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver.

Illustration 2:
A modelling agency contracts with a beauty parlour for beauty treatment of say, 20 models. Here again is a situation where the modelling agency is the receiver of the service, but the service is rendered to the models, who are receiving the beauty treatment service on behalf of the modelling agency. Hence, notwithstanding that the modelling agency does not qualify as the individual receiver in whose presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule.

Rule 5- Location of Immovable Property
In the case of a service that is 'directly in relation to immovable property', the place of provision is where the immovable property (land or building) is located, irrespective of where the provider or receiver is located.

6.14.10 What is "immovable property"?
"Immovable Property" has not been defined in the Finance Act, 1994. However, in terms of section 4 of the General Clauses Act, 1897, the definition of immovable property provided in sub-section 3 (26) of the General Clauses Act will apply, which states as under:

"Immovable Property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

It may be noted that the definition is inclusive and thus properties such as buildings and fixed structures on land would be covered by the definition of immovable property. The property must be attached to some part of earth even if underwater.

6.14.11 What are the criteria to determine if a service is 'directly in relation to' immovable property located in taxable territory?

Generally, the following criteria will be used to determine if a service is in respect of immovable property located in the taxable territory:

i) The service consists of lease, or a right of use, occupation, enjoyment or exploitation of an immovable property;

ii) the service is physically performed or agreed to be performed on an immovable property (e.g. maintenance) or property to come into existence (e.g. construction);

iii) the direct object of the service is the immovable property in the sense that the service enhances the value of the property, affects the nature of the property, relates to preparing the property for development or redevelopment or the environment within the limits of the property (e.g. engineering, architectural services, surveying and sub-dividing, management services, security services etc);

iv) the purpose of the service is:

   a) the transfer or conveyance of the property or the proposed transfer or conveyance of the property (e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of property as a result of a will or testament);

   b) the determination of the title to the property.

   There must be more than a mere indirect or incidental connection between a service provided in relation to an immovable property, and the underlying immovable property. For example, a legal firm's general opinion with respect to the capital gains tax liability arising from the sale of a commercial property in India is basically advice on taxation legislation in general even though it relates to the subject of an immovable property. This will not be treated as a service in respect of the immovable property.

6.14.12 Examples of land-related services

i) Services supplied in the course of construction, reconstruction, alteration, demolition, repair or maintenance (including painting and decorating) of any building or civil engineering work;

ii) Renting of immovable property;

iii) Services of real estate agents, auctioneers, architects, engineers and similar experts or professional people, relating to land, buildings or civil engineering works. This includes the management, survey or valuation of property by a solicitor, surveyor or loss adjuster;

iv) Services connected with oil/gas/mineral exploration or exploitation relating to specific sites of land or the seabed;

v) The surveying (such as seismic, geological or geomagnetic) of land or seabed;

vi) Legal services such as dealing with applications for planning permission;

vii) Packages of property management services which may include rent collection, arranging repairs and the maintenance of financial accounts;

viii) The supply of hotel accommodation or warehouse space.

6.14.13 What if a service is not directly related to immovable property?

The place of provision of services rule applies only to services which relate directly to specific sites of land or property. In other words, the immovable property must be clearly identifiable to be the one

from where, or in respect of which, a service is being provided. Thus, there needs to be a very close link or association between the service and the immovable property.
Needless to say, this rule does not apply if a provision of service has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.

For example, the services of an architect contracted to design the landscaping of a particular resort hotel in Goa would be land-related. However, if an interior decorator is engaged by a retail chain to design a common décor for all its stores in India, this service would not be land related.

The default rule i.e. Rule 3 will apply in this case.

6.14.14. Examples of services which are not land-related

i) Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.

ii) Advice or information relating to land prices or property markets because they do not relate to specific sites.

iii) Land or Real Estate Feasibility studies, say in respect of the investment potential of a developing suburb, since this service does not relate to a specific property or site.

iv) Services of a Tax Return Preparer in simply calculating a tax return from figures provided by a business in respect of rental income from commercial property.

v) Services of an agent who arranges finance for the purchase of a property.

Rule 6- Services relating to Events

6.14.15. What is the place of provision of services relating to events?

Place of provision of services provided by way of admission to, or organization of a cultural, artistic, sporting, scientific, educational, entertainment event, or a celebration, conference, fair, exhibition, or any other similar event and of services ancillary to such admission, shall be the place where the event is held.

6.14.16. What are the services that will be covered in this category?
Services in relation to admission as well as organization of events such as conventions, conferences, exhibitions, fairs, seminars, workshops, weddings, sports and cultural events
are covered under this Rule.

Illustration 3:
A management school located in USA intends to organize a road show in Mumbai and New Delhi for prospective students. Any service provided by an event manager, or the right to entry (participation fee for prospective students, say) will be taxable in India.

Illustration 4:
An Indian fashion design firm hosts a show at Toronto, Canada. The firm receives the services of a Canadian event organizer. The place of provision of this service is the location of the event, which is outside the taxable territory. Any service provided in relation to this event, including the right to entry, will be non-taxable.

6.14.17. What is a service ancillary organization or admission to an event?
Provision of sound engineering for an artistic event is a prerequisite for staging of that event and should be regarded as a service ancillary to its organization. A service of hiring a specific equipment to enjoy

the event at the venue (against a charge that is not included in the price of entry ticket) is an example of a service that is ancillary to admission.

6.14.18. What are event-related services that would be treated as not ancillary to admission to an event?

A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event.

Rule 7- Part performance of a service at different locations

6.14.19. What does this Rule imply?

This Rule covers situations where the actual performance of a service is at more than one location, and occasionally one (or more) such locations may be outside the taxable territory.

This Rule states as follows:-

"Where any service stated in rules 4, 5, or 6 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided".

The following example illustrates the application of this Rule:-

Illustration 5:

An Indian firm provides a 'technical inspection and certification service' for a newly developed product of an overseas firm (say, for a newly launched motorbike which has to meet emission standards in different states or countries). Say, the testing is carried out in Maharashtra (20%), Kerala (25%), and an international location (say, Colombo 55%).

Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, in this case Kerala.

This rule is, however, not intended to capture insignificant portion of a service rendered in any part of the taxable territory like mere issue of invoice, processing of purchase order or recovery, which are not by way of service actually performed on goods.

It is clarified that this rule is applicable in performance-based services or location-specific services (immovable property related or event-linked). Normally, such services when provided in a non-taxable territory would require the presence of separate establishments in such territories. By virtue of an explanation of sub-clause (44) of section 65B, they would constitute distinct persons and thus it would be legitimate to invoice the services rendered individually in the two territories.

Rule 8- Services where the Provider as well as Receiver is located in Taxable Territory

6.14.20 What is the place of provision of a service where the location of the service provider and that of the service receiver is in the taxable territory?

The place of provision of a service, which is provided by a provider located in the taxable territory to a receiver who is also in the taxable territory, will be the location of the receiver.

6.14.21 What is the implication of this Rule?

This Rule covers situations where the place of provision of a service provided in the taxable territory may be determinable to be outside the taxable territory, in terms of the application of one of the earlier Rules i.e. Rule 4 to 6, but the service provider, as well as the service receiver, are located in the taxable territory.

The implication of this Rule is that in all such cases, the place of provision will be deemed to be in the taxable territory, notwithstanding the earlier rules. The presence of both the service provider and the service receiver in the taxable territory indicates that the place of consumption of the service is in the taxable territory. Services rendered, where both the provider and receiver of the service are located outside the taxable territory, are now covered by the mega exemption.

Illustration 6:

A helicopter of Pawan Hans Ltd (India based) develops a technical snag in Nepal. Say, engineers are deputed by Hindustan Aeronautics Ltd, Bangalore, to undertake repairs at the site in Nepal. But for this rule, Rule 4, sub-rule (1) would apply in this case, and the place of provision would be Nepal i.e. outside the taxable territory. However, by application of Rule 7, since the service provider, as well as the receiver, are located in the taxable territory, the place of provision of this service will be within the taxable territory.

Rule 9- Specified services- Place of provision is location of the service provider

6.14.22. What are the specified services where the place of provision is the location of the service provider?

Following are the specified services where the place of provision is the location of the service

provider:-

i) Services provided by a banking company, or a financial company, or a non-banking financial company to account holders;

ii) Online information and database access or retrieval services;

iii) Intermediary services;

iv) Service consisting of hiring of means of transport, up to a period of one month.

6.14.23. What is the meaning of "account holder"? Which accounts are not covered by this rule?

"Account" has been defined in the rules to mean an account which bears an interest to the depositor. Services provided to holders of demand deposits, term deposits, NRE (non-resident external) accounts and NRO (non-resident ordinary) accounts will be covered under this rule. Banking services provided to persons other than account holders will be covered under the main rule (Rule 3- location of receiver).

6.14.24. What are the services that are provided by a banking company to an account holder (holder of an account bearing interest to the depositor)?

Following are examples of services that are provided by a banking company or financial institution to an "account holder", in the ordinary course of business:-

i) services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc;

ii) transfer of money including telegraphic transfer, mail transfer, electronic transfer etc.

6.14.25. What are the services that are not provided by a banking company or financial institution to an account holder, in the ordinary course of business, and will consequently be covered under another Rule?

Following are examples of services that are generally NOT provided by a banking company or financial institution to an account holder (holder of a deposit account bearing interest), in the ordinary course of business:-

i) financial leasing services including equipment leasing and hire-purchase;

ii) merchant banking services;

iii) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;

iv) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services;

v) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

vi) banker to an issue service.

In the case of any service which does not qualify as a service provided to an account holder, the place of provision will be determined under the default rule i.e. the Main Rule 3. Thus, it will be the location of the service receiver where it is known (ascertainable in the ordinary course of business), and the location of the service provider otherwise.

6.14.26. What are "Online information and database access or retrieval services"?

"Online information and database access or retrieval services" are services in relation to online information and database access or retrieval or both, in electronic form through computer network, in any manner. Thus, these services are essentially delivered over the internet or an electronic network which relies on the internet or similar network for their provision. The other important feature of these services is that they are completely automated, and require minimal human intervention.

Examples of such services are:-

i) online information generated automatically by software from specific data input by the customer, such as web-based services providing trade statistics, legal and financial data, matrimonial services, social networking sites;

ii) digitized content of books and other electronic publications, subscription of online newspapers and journals, online news, flight information and weather reports;

iii) Web-based services providing access or download of digital content.

The following services will not be treated as "online information and database access or retrieval services":-

i) Sale or purchase of goods, articles etc over the internet;

ii) Telecommunication services provided over the internet, including fax, telephony, audio conferencing, and videoconferencing;

iii) A service which is rendered over the internet, such as an architectural drawing, or management consultancy through e-mail;

iv) Repair of software, or of hardware, through the internet, from a remote location;

v) Internet backbone services and internet access services.

6.14.27. What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

Nature and value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable.

In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services':-

i) Travel Agent (any mode of travel)
ii) Tour Operator
iii) Commission agent for a service [an agent for buying or selling of goods is excluded]
iv) Recovery Agent

Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf of the provider of the 'main service'.

Illustration 7:

A freight forwarder arranges for export and import shipments. There could be two possible situations here- one when he acts on his own account, and the other, when he acts as an intermediary.

When the freight forwarder acts on his own account (say, for an export shipment)

A freight forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account (i.e. he buys-in and sells fright transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation- loading, unloading, handling etc) are "bundled" with the principal service owing to a single contract or a single price (consideration).

On an import shipment with similar conditions, the place of supply will be in the taxable territory, and so the service tax will be attracted.

When the freight forwarder acts as an intermediary

Where the freight forwarder acts as an intermediary, the place of provision will be his location.

Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose.

Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account, will not be categorized as intermediaries.

6.14.28 What is the service of "hiring of means of transport"?

Normally the following will constitute means of transport:-

i) Land vehicles such as motorcars, buses, trucks;

ii) Vessels;

iii) Aircraft;

iv) Vehicles designed specifically for the transport of sick or injured persons;

v) Mechanically or electronically propelled invalid carriages;

vi) Trailers, semi-trailers and railway wagons.

The following are not 'means of transport':-

i) Racing cars;

ii) Containers used to store or carry goods while being transported;

iii) Dredgers, or the like.

6.14.29 What if I provide a service of hiring of a fleet of cars to a company on an annual contract? What will be place of provision of my service if my business establishment is located in New Delhi, and the company is located in Faridabad (Haryana)?

This Rule covers situations where the hiring is for a period of upto one month. Since hiring period is more than one month, this sub-rule cannot be applied to the situation. The place of provision of your service will be determined in terms of Rule 3 i.e. receiver location, which in this case is Faridabad (Haryana).

Rule 10- Place of Provision of a service of transportation of goods

6.14.30 What are the services covered under this Rule?

Any service of transportation of goods, by any mode of transport (air, vessel, rail or by a goods transportation agency), is covered here. However, transportation of goods by courier or mail is not covered here.

6.14.31 What is the place of provision of a service of transportation of goods?

Place of provision of a service of transportation of goods is the place of destination of goods, except in the case of services provided by a Goods Transportation Agency in respect of transportation of goods by road, in which case the place of provision is the location of the person liable to pay tax (as determined in terms of rule 2(1)(d) of Service Tax Rules, 1994 (since amended).

Illustration 8:

A consignment of cut flowers is consigned from Chennai to Amsterdam. The place of provision of goods transportation service will be Amsterdam (outside India, hence not liable to service tax). Conversely, if a consignment of crystal ware is consigned from Paris to New Delhi, the place of provision will be New Delhi.

6.14.32 What does the proviso to this Rule imply?

The proviso to this Rule states as under:-

"Provided that the place of provision of services of transportation of goods by goods transportation agency shall be the location of the person liable to pay tax."

Sub-rule 2(1)(d) of Service Tax Rules, 1994 provides that where a service of transportation of goods is provided by a 'goods transportation agency', and the consignor or consignee is covered under any of the specified categories prescribed therein , the person liable to tax is the person who pays, or is liable to pay freight (either himself or through his agent) for the transportation of goods by road in a goods carriage. If such person is located in non-taxable territory, then the person liable to pay tax shall be the service provider.

Illustration 9:

A goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Bhopal, Madhya Pradesh. Say, XYZ is a registered assessee and is also the person liable to pay freight and hence person liable to pay tax, in this case. Here, the place of provision of the service of transportation of goods will be the location of XYZ i.e. Haryana.

Illustration 10:

A goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Jammu (non-taxable territory). Say, as per mutually agreed terms between ABC and XYZ, the dealer in Jammu is the person liable to pay freight. Here, in terms of amended provisions of rule 2(1)(d), since the person liable to pay freight is located in non-taxable territory, the person liable to pay tax will be ABC. Accordingly, the place of provision of the service of transportation of goods will be the location of ABC i.e. Delhi.

Rule 11- Passenger Transportation Services

6.14.33 What is the place of provision of passenger transportation services?

The place of provision of a passenger transportation service is the place where the passenger embarks on the conveyance for a continuous journey.

6.14.34 What does a "continuous journey" mean?

A "continuous journey" means a journey for which:-

(i) a single ticket has been issued for the entire journey; or

(ii) more than one ticket or invoice has been issued for the journey, by one service provider, or by an agent on behalf of more than one service providers, at the same time, and there is no scheduled stopover in the journey

6.14.35 What is the meaning of a stopover? Do all stopovers break a continuous journey?

"Stopover" means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time. All stopovers do not cause a break in continuous journey. Only such stopovers will be relevant for which one or more separate tickets are issued. Thus a travel on Delhi-London- New York-London-Delhi on a single ticket with a halt at London on either side, or even both, will be covered by the definition of continuous journey. However if a separate ticket is issued, say New York-Boston-New York, the same will be outside the scope of a continuous journey.

Rule 12- Services provided on board conveyances

6.14.36 What are services provided on board conveyances?

Any service provided on board a conveyance (aircraft, vessel, rail, or roadways bus) will be covered here. Some examples are on-board service of movies/music/video/ software games on demand, beauty treatment etc, albeit only when provided against a specific charge, and not supplied as part of the fare.

6.14.37 What is the place of provision of services provided on board conveyances?

The place of provision of services provided on board a conveyance during the course of a passenger transport operation is the first scheduled point of departure of that conveyance for the journey.

Illustration 11:

A video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory, hence not liable to tax).

If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).

Rule 13- Power to notify services or circumstances

6.14.38 What is the implication of this Rule?

This Rule states as follows:-

"In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service."

The rule is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent with these rules leading to double taxation. Due to the cross border nature of many services it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory. This rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business.

Rule 14- Order of application of Rules

6.14.39 What is the implication of this Rule?

Rule 14 provides that where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration.

This Rule covers situations where the nature of a service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable.

Following illustrations will make the implications of this Rule clear:-

Illustration 12:

An architect based in Mumbai provides his service to an Indian Hotel Chain (which has business establishment in New Delhi) for its newly acquired property in Dubai. If Rule 5 (Property rule) were to be applied, the place of provision would be the location of the property i.e. Dubai (outside the taxable territory). With this result, the service would not be taxable in India.

Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India.

By application of Rule 14, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.

Illustration 13:

For the Ms Universe Contest planned to be held in South Africa, the Indian pageant (say, located in Mumbai) avails the services of Indian beauticians, fashion designers, videographers, and photographers. The service providers travel as part of the Indian pageant's entourage to South Africa. Some of these services are in the nature of personalized services, for which the place of provision would normally be the location where performed (Performance rule-Rule 4), while for others, under the main rule (Receiver location) the place of provision would be the location of receiver.

Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India.

By application of Rule 15, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.

6.14.40 Taxability of 'bundled services'

'Bundled service' means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of 'bundled service' would be air transport services provided

by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.

Two rules have been prescribed for determining the taxability of such services in clause (3) of section 66F of the Act. These rules, which are explained below, are subject to the provisions of the rule contained in sub section (2) of section 66F.

6.14.40.1 Services which are naturally bundled in the ordinary course of business

The rule is – 'If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character'

Illustrations 14:

- A hotel provides a 4-D/3-N package with the facility of breakfast. This is a natural bundling of services in the ordinary course of business. The service of hotel accommodation gives the bundle the essential character and would, therefore, be treated as service of providing hotel accommodation.
- A 5 star hotel is booked for a conference of 100 delegates on a lump sum package with the following facilities:
    - Accommodation for the delegates
    - Breakfast for the delegates,
    - Tea and coffee during conference
    - Access to fitness room for the delegates

- Availability of conference room
- Business centre

As is evident a bouquet of services is being provided, many of them chargeable to different effective rates of tax. None of the individual constituents are able to provide the essential character of the service. However, if the service is described as convention service it is able to capture the entire essence of the package. Thus the service may be judged as convention service and chargeable to full rate. However it will be fully justifiable for the hotel

to charge individually for the services as long as there is no attempt to offload the value of one service on to another service that is chargeable at a concessional rate.

6.14.40.2 Services which are not naturally bundled in the ordinary course of business

The rule is – 'If various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax.'

Illustrations 15:

- A house is given on rent one floor of which is to be used as residence and the other for housing a printing press. Such renting for two different purposes is not naturally bundled in the ordinary course of business. Therefore, if a single rent deed is executed it will be treated as a service comprising entirely of such service which attracts highest liability of service tax. In this case renting for use as residence is a negative list service while renting for non-residence use is chargeable to tax. Since the latter category attracts highest liability of service tax amongst the two services bundled together, the entire bundle would be treated as renting of commercial property.

6.14.40.3 Significance of the condition that the rule relating to 'bundled service' is subject to the provisions of sub-section (2) of section 66F

Sub-section (2) of section 66 lays down **:** 'where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description'. This rule predominates over the rule laid down in sub-section (3) relating to 'bundled services'. In other words, if a bundled service falls under a service specified by way of a description then such service would be covered by the description so specified. The illustration, relating to a bundled service wherein a pandal and shamiana is provided in combination with catering service, given in the second bullet in para 9.1.2 above explains the operation of this rule.

6.14.40.4 Manner of determining if the services are bundled in the ordinary course of business

Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

- The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.
- Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.
- The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of

the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are –

- There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.
- The elements are normally advertised as a package.
- The different elements are not available separately.
- The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above.

When two or more rules may appear equally applicable then rule that occurs later among the rules preferable.

6.15 VALUATION OF TAXABLE SERVICES (Section 67)

SECTION 67: Valuation of taxable services for charging service tax —**(1)** Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to die gross amount charged.

(3) The gross amount charged for die taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation — For the purposes of this section, —

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

"SECTION 67A: Date of determination of rate of tax, value of taxable service and rate of exchange —The rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided.

Rule 1: Service Tax (Determination of Value) Rules, 2006 Rule 2: Definitions

Rule 2(a): Act means the FINANCE ACT, 1994

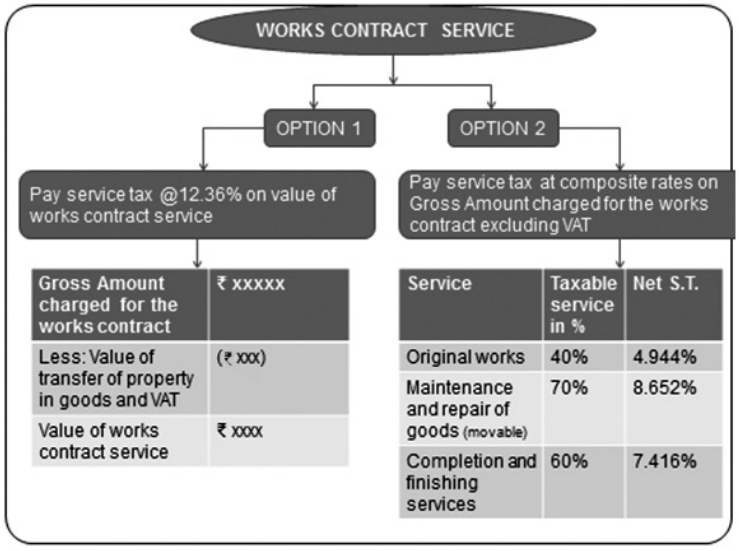
Rule 2(b): section means the section of the Act;

Rule 2(c): value shall be the meaning assigned to it in section 67;

Rule (d): words and expressions used in these rules and not defined but defined in the Act shall have the meaning respectively assigned to them in the Act.

Rule 2A: Consideration for Works Contracts (w.e.f 1-7-2012):

In case of works contract service provider has two options for payment of service tax. Once any one of the option has been claimed that is final for the given contract.



Net service tax in case of option 2: @40% on 12.36% in case of original works, 70% on 12.36% in case of maintenance and repair of goods in relation to movable and 60% on 12.36% in case of completion and finishing services.

Original works means

(i) all new constructions,

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable

(iii) erection, commissioning or installation or plant, machinery or equipment or structures, whether pre-fabricated or otherwise.

Rule 2B: Determination of value of service in relation to money changing (w.e.f. 1-4-2011):

In respect of purchase or sale of foreign currency, including money changing, the value of taxable service shall be determined by the service provider for payment of service tax is in terms of Rule 2B of the Service Tax (Determination of Value) Rules, 2006, are as follows.

(i) The difference between buying rate or selling rate, as the case may be, and the RBI reference rate for that currency at that time multiplied by units of currency exchanged;

Example 45: US$1000 are sold by a customer at the rate of ₹ 45 per US$.

RBI reference rate for US$ is ₹ 45.50 at that time.	₹
RBI reference rate for US$ at that time	= 45.50
Less: selling rate by a customer	= 45.00
Difference (irrespective of Plus or Minus)	= 0.50
The taxable value	= ₹ 500 (i.e. US$1000 x Re. 0.50)
Service Tax (Standard Rate)	= ₹ 60 (i.e. ₹ 500 x 12%)

Note: Service tax is subject to 2% and 1% Education and SAH Education Cess.

Example 46: INR70000 is changed into Great Britain Pound (GBP) and the exchange rate offered is ₹70, thereby giving GBP 1000.

RBI reference rate for that currency at that time for GBP is ₹ 69.

		₹
RBI reference rate for GBP at that time	=	69.00
Less: Buying rate by a customer	=	70.00
Difference (irrespective of Plus or Minus)	=	1.00
The taxable value	=	₹ 1000.00 (i.e. GBP1 000 x Re. 1.00)
Service Tax (Standard Rate)	=	₹ 120.00 (i.e. ₹ 1000 x 12%)

Note: Service tax is subject to 2% and 1% Education and SAH Education Cess.

(ii) In case where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received, by the person changing the money.

Example 47:

INR70000 is changed into Great Britain Pound (GBP) and the exchange rate offered is ₹ 70, thereby giving GBP 1000.

RBI reference rate for that currency at that time for GBP is not available.

The taxable value	=	**₹ 700 (i.e. GBP1000** x **₹ 70** x **1%)**
Service Tax (Standard Rate)	=	₹ 84 (i.e. ₹ 700 x 12%)

Note: Service tax is subject to 2% and 1% Education and SAH Education Cess.

(iv) In case both the currencies are not Indian rupees, @1% of the lesser of the amounts received if the two currencies are converted at RBI reference rate.

Example 48: US$ 1,000 is changed into UK £ 571 .4286 (i.e. 1 UK POUND = US$ 1.75).

RBI reference rate for that currency at that time for 1 US$ is ₹ 45 and for 1 UK POUND = ₹ 85

Particulars	**Value in ₹**	**Remarks**
US Dollars converted into RBI reference rate at that time of exchange	45,000	USD 1000 x ₹ 45
UK Pounds converted into RBI reference rate at that time of exchange	48,571	UK £ 571.4286 x ₹ 85

The lower of the above two currencies at RBI reference rate is ₹ 45,000. Therefore, the taxable value is ₹ 450 (i.e. ₹ 45,000 x 1%)

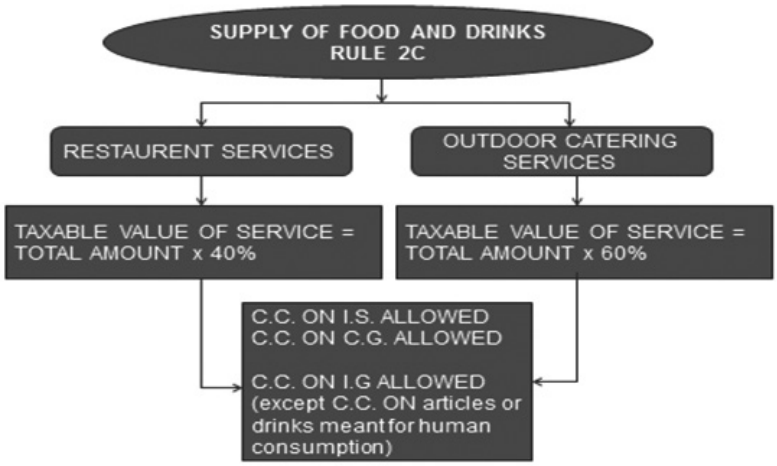
Service Tax (Standard Rate) = ₹ 54 (i.e. ₹ 450 x 12%)

Note: Service tax is subject to 2% and 1% Education and SAH Education Cess

Rule 2C: Determination of value of service in supply of food and drink in a restaurant or outdoor catering (w.e.f. 1-7-2012):

The value of the service portion shall be determined in the following manner-

Value of 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.



C.C. = CENVAT CREDIT

I.S. = INPUT SERVICE

C.G. = CAPITAL GOODS

I.G. = INPUT GOODS

Important - As per Explanation 1 to the said Rule 2C 'Total amount' (referred to in the second column of the table above) means the sum total of gross amount charged and the fair market value of all goods and services supplied by the service receiver in or in relation to the supply of food or any other article of human consumption or any drink (whether or not intoxicating), under the same contract or any other contract, less (i) the amount charged for such goods or services provided by the service receiver; and (ii) the value added tax or sales tax, if any, levied to the extent they form part of the gross amount or the total amount, as the case may be.

Example 49: Food King Pvt. Ltd. Supplies foods and beverages only.

(i) at a restaurant for ₹ 11,250 (inclusive of VAT ₹ 1,250) located at Mylapore, Chennai and

(ii) Supplied food to Infosys company for ₹ 22,500 (including of VAT ₹ 2,500). Find service tax liability?

Answer:

			₹
(i)	Value of service = 10,000 x 40%	=	4,000 (i.e. restaurant services)
(ii)	Value of service = 20,000 x 60%	=	12,000 (i.e. outdoor catering services)
Total value of services		=	16,000
Service Tax 12.36% on ₹ 16,000		=	1,978

Rule 3: Consideration received is not wholly or partly consisting of money

Rule 3(a): Valuation shall be on the basis of gross amount charged by service provider for similar services.

Rule 3(b): Valuation shall be on the basis of equivalent money value of such consideration, which shall not be less than cost of provision of such services. [Rule 3(b) is applicable if value cannot be determined as per Rule 3(a)].

The value of services as per the equivalent money in no case shall be less than the cost of provision of such taxable service. Such cost will have to be worked out on the basis of usual costing principles of normal costs and allocation of normal overheads including reasonable profit thereon. A certificate from a practicing Cost Accountant or a practicing Chartered Accountant should be obtained for this purpose.

Rule 4: Rejection of value

Where the Central Excise Officer is satisfied that the value so determined by the service provider is not in accordance with the provisions of the Act or these rules, he shall issue a notice to such service provider to show cause why the value of such taxable service for the purpose of charging service tax should not be fixed at the amount specified in the notice.

The Central Excise Officer shall, after providing reasonable opportunity of being heard, determine the value of such taxable service for the purpose of charging service tax in accordance with the provisions of the Act and these rules.

The Central Excise Officer has to follow the principle of natural justice.

Rule 5: Inclusion in or exclusion from value of certain expenditure or costs

Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.

Out of pocket expenses incurred are includible in the value of taxable service.

Reimbursement of expenses is not includible

If the expenditure is not part of service provided by the service provider to service receiver, but incurred by him as per business practice or convenience are not includible.

If the reimbursement expenditure is part of service provided by the service provider to service receiver is to be included in the value of taxable services. However, expenditure incurred by service provider as "*pure agent*" of service receiver is not includible [Rule 5(2) of Valuation Rules].

Example 50: Reimbursement expenses can be viewed as

Octroi or entry tax paid by carriage and freight forwarding agent on behalf of owner of goods, Customs duty by customs house agent on behalf of client, Advertisement charges paid by an advertising agency to newspaper on behalf of clients, Ticket charges paid by Travel Agent and recovered from his customer.

Pure Agent

As per Rule 5 Pure Agent means

i. A person who enters into a contractual agreement with recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable services.

Anything charged extra over and above pure agent, such an amount will be taxable.

ii. A person who neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service.

iii. Any person who does not use such goods or services so procured

iv. Any person who receives only the actual amount incurred to procure such goods or services.

v. The service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

vi. The recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

vii. The recipient of service is liable to make payment to the third party;

viii. The recipient of service authorizes the service provider to make payment on his behalf;

ix. The recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

x. The payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

xi. The service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

xii. The goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service, it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice are not.

Example 51: X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement on television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent on behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by Y. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

Example 52: In the course of providing a taxable service, a service provider incurs costs such as traveling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Example 53: A contract with B, an architect, for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemized expense or as part of an inclusive overall fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Example 54: Company X provides a taxable service of rent-a-cab by providing chauffeur-driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X. This sum is subject to service tax.

Rule 6: The commission costs, etc., will be included or excluded

The value of the taxable services shall include,—

i. The commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

ii. The adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

iii. The amount of premium charged by the insurer from the policy holder;

iv. The commission received by the air travel agent from the airline;

v. The commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

vi. The reimbursement received by the authorized service station, from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer;

vii. The commission or any amount received by the rail travel agent from the Railways or the customer;

viii. The remuneration or commission, by whatever name called, paid to such agent by the client engaging such agent for the services provided by a clearing and forwarding agent to a client rendering services of clearing and forwarding operations in any manner; and

ix. The commission, fee or any other sum, by whatever name called, paid to such agent by the insurer appointing such agent in relation to insurance auxiliary services provided by an insurance agent.

The value of any taxable service, as the case may be, does not include —

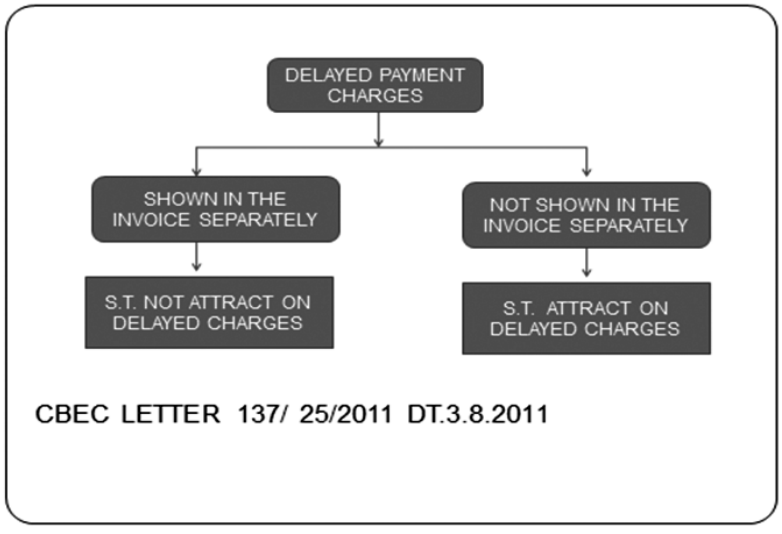
i. Initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;

ii. The airfare collected by air travel agent in respect of service provided by him;

iii. The rail fare collected by rail travel agent in respect of service provided by him; and Interest on loans.

Example 55: In respect of delay payment charges recovered by the service provider is includable in the value of taxable service?

Answer: vide CBEC LETTER 137/25/2011 dt.3.8.201 1, it is clarified in the following manner:



6.16 IMPORTANT ISSUES UNDER SERVICE TAX PROVISIONS

6.16.1 There is no Service Tax on free services. This is because there is no consideration involved in rendering the free service. However the service tax department is likely to verify whether the services were in fact rendered free.

6.16.2 If the service provider received an amount from service receiver indirectly in addition to receiving the value of services, such receipt is not subject to Service Tax.

Example 56: A mandap keeper lets out his premises to a contactor at market rates. The contractor then gave donation of ₹ 20 lakhs to the mandap keeper as contribution to corpus of the mandap. This amount was not in relation to service of mandap provided by mandap keeper and hence will not attract service tax. *CKP Mandal* v *CCE* (2006) (Bom. HC).

However, in the above instance if the market rate is say ₹ 5 lakhs and the service has been offered at ₹ 2 lakhs, the difference between ₹ 5 lakhs and ₹ 2 lakhs namely ₹ 3 lakhs will suffer service tax and the balance namely ₹ 20 lakhs less ₹ 3 lakhs will not suffer service tax. This is laid out in Service Tax (Determination of Value) Rules, 2006 which says that if any amount is received indirectly as part of consideration for the services rendered then such indirect consideration will form part of the value of taxable services.

6.16.3 Option to pay an amount in case of lottery service under section 65(105) (zzzzn):

The distributor or selling agent is liable to pay service tax for the taxable service of promotion, marketing, organizing or any other manner assisting in organizing lottery.

As per Rule 6(7C) of the Service Tax Rules, 1994 the distributor or selling agent shall have the option to pay an amount at the rate specified below instead of paying service tax w.e.f 1-4-2012 (vide NT 3/201 2-ST DT. 17.3.2012)).

S.No.	Rate	Condition
i	₹ 7,000 on every ₹ 10 lakh (or part of ₹ 10 lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80%.
ii	₹ 11,000 on every ₹ 10 lakh (or part of ₹ 10 lakh) of aggregate face value of lottery tickets printed by the organizing State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%.

Provided that in case of online lottery, the aggregate face value of lottery tickets for the purpose of this sub-rule shall be taken as the aggregate value of tickets sold, and service tax shall be calculated in the manner specified in the said Table.

Provided further that the distributor or selling agent shall exercise such option within a period of one month of the beginning of each financial year and such option shall not be withdrawn during the remaining part of the financial year.

Provided also that the distributor or selling agent shall exercise such option for financial year 2010-11, within a period of one month of the publication of this sub-rule in the Official Gazette or, in the case of new service provider, within one month of providing of service under the said sub-clause and such option shall not be withdrawn during the remaining part of that financial year.

Terms	Meanings	Examples
Face value	The amount mentioned on the lottery ticket.	Face value of ₹ 10 per ticket
Aggregate face value	For printed tickets: Face value of ticket x No. of lottery tickets printed. For online tickets: Face value of ticket x No. of lottery tickets sold	2,50,000 tickets printed x ₹ 10 =₹ 25 lacs 2,00,000 tickets sold x ₹ 10 = ₹ 20 lacs
Guaranteed prize payout	the aggregate prize money distributed to all winners	Let us say ₹ 15 lacs in case of printed tickets out of ₹ 25 lacs. (i.e. 60%)

Example 57: M/s Martin Pvt. Ltd. is a distributor or selling agent authorized by a State in India. Following is the details of lotteries of a distributor to be organized by the State.

Particulars	Lakhpati (Printed)	Crorepati (Online)
No. of tickets proposed	2,50,000	3,00,000
Face value of ticket	₹ 10 each	₹ 500 each
Guaranteed prize payout	@60%	@90%
No. of tickets sold	2,00,000	2,35,000

Calculate the service tax under composition scheme as per Rule 6(7C) of the Service Tax Rules, 1994.

Answer:

Lakhpati lottery tickets - Printed

No. of tickets proposed	2,50,000 tickets
Face value of ticket	₹ 10 each
Total face value	₹ 25,00,000
Guaranteed prize payout	@60%
Multiples of TEN lakhs or part of TEN lakhs	3 (i.e. ₹ 25,00,000/₹ 10,00,000)
Service tax payable for every ₹ 10 lakhs or part thereof	₹ 11,000
Total Service tax (subject to Cess)	33,000 (i.e. 3 x ₹ 11,000)

Crorepati lottery tickets –Online

No. of tickets sold	2,35,000 tickets
Face value of ticket	₹ 500 each
Total face value	₹ 11,75,00,000
Guaranteed prize payout	@90%
Multiples of TEN lakhs or part of TEN lakhs	118 (i.e. ₹ 11 ,75,00,000/₹ 10,00,000)
Service tax payable for every ₹ 10 lakhs or part thereof	₹ 7,000
Total Service tax (subject to Cess)	₹ 8,26,000 (i.e. 118 x ₹ 7,000)

Total service tax liability payable by M/s Martin Pvt. Ltd.

Particulars	Amount in₹
Lakhpati lottery tickets - Printed	33,000
Crorepati lottery tickets – Online	8,26,000
Sub-total	8,59,000
Add: Education cess @2%	17,180
Add: Secondary and Higher Education cess @1%	8,590
Total service tax liability	8,84,770

6.16.4 Persons marking the lottery tickets are exempt from service tax (vide Notification No. 50/201 0-ST, dated. 08-10-2010):

The Central Government, exempts persons marketing the lottery tickets (hereinafter referred to as 'such person'), other than the distributors or selling agents appointed or authorized by the lottery organising State (hereinafter referred to as 'such distributor or selling agent'), from the whole of service tax leviable thereon on the value of taxable service of marketing of lottery, if the optional composition scheme under sub-rule (7C) of rule 6 of Service Tax (2nd Amendment) Rules, 2010 dated 8th October 2010 is availed of by such distributor or selling agent, in respect of such lottery during the financial year.

Provided that if such person also markets lottery tickets for distributors or selling agents who have not so opted, then nothing contained in this notification shall apply to the value of service provided to the distributors or selling agents who have not so opted.

6.16.5 Penalty for Non-Payment or Delayed Payment of Service Tax (Section 76 of the Finance Act, 1994) W.E.F. 8-4-2011:

Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 76 penalty (w.e.f. 8-4-2011) is as follows:

₹ 100 for every day of delay
(OR) } Whichever is higher.
@1% of the tax per month

Overall penalty should not exceed 50% of the service tax payable.

Such penalty shall be payable starting from the first day after the due date till the date of actual payment of outstanding amount of service tax.

Example 58: An assessee, fails to pay service tax of ₹ 15 lakhs payable by 6th June 2011. He pays the amount on 16th June 2011. What is the penalty payable by M? (CA Final June 2009 Old Syl modified)

Answer: Penalty is calculated as follows:

₹ 15,00,000 x 10 days/30 days x 1% pm = ₹ 5,000

Or

100 per day x 10 days = ₹ 1,000

(Whichever is higher)

Therefore the penalty is ₹ 5,000

6.16.6 Service Tax Liability — In case of Tax Deducted at Source (TDS) under Income Tax Act, 1961 Service Tax is payable on the value of Service and Not on value net of TDS.

Service Tax is to be paid on the gross value of taxable service which is charged by a Service Tax assessee for providing a taxable service. Income tax deducted at source is includible in the charged amount. Therefore, service Tax is payable on the gross amount including the amount of Income Tax deducted at source also.

Example 59: Mr. X, an architect has received the fees of ₹ 4,48,500 after the deduction of Income Tax of ₹ 51,500. The Service Tax is payable on ₹ 4,48,500.

Answer: No, the service tax can be payable on value of services. Hence, the value of services is₹ 5,00,000 and the service tax @ 12.36% can be levied on ₹ 5,00,000.

Hence, the service tax liability is ₹ 55,002 (i.e. ₹ 5,00,000 x 12.36/112.36)

6.17 E-PAYMENT OF SERVICE TAX

The limit of ₹ 50 lakhs has been reduced to ₹ 10 lakhs in the preceding financial year, w.e.f. 1-4-2010 (Notification No. 1/201 0).

6.18 SELF ADJUSTMENT OF EXCESS TAX PAID

Tax paid in excess to the credit of Government for a month/quarter may be adjusted by the assessee against the tax payable for the succeeding month/quarter Rule 6(4A) of the Service Tax Rules, 1994.

6.18.1 Conditions for Self-Adjustment

As per the Rule 6(4B) of the Service Tax Rules, 1994, self adjustment of excess payment of service tax allowed under Rule 6(4A) is subject to the following conditions:

i. Excess payment since exact amount to be paid could not be calculated

ii. When tax is to be paid by 31st March and calculation of exact amount of service tax is difficult

iii. Any calculation mistakes

An assessee who have centralized registration (i.e. one RC) can adjust the excess service tax paid on their own without any monetary limit provided the excess amount paid is on account of delayed receipt of details of payments from branches.

Self adjustment will not be applicable when excess payment relates to interpretation of law, taxability, classification, valuation or eligibility to exemption notification.

In case of an assessee with multiple registration certificates (RCs), excess service tax paid on their own without any monetary limit w.e.f. 1.4.2012 [NT3/201 2-ST dt 17-3-2012]. The monetary limit is ₹ 2,00,000 upto 31-3-2012 for a month/quarter as per Rule 6(4B) (iii) of the Service Tax Rules, 1994.

Such adjustment can be made only in the succeeding month or quarter.

The details of self-adjustment should be intimated to the Superintendent of Central Excise within a period of 15 days from the date of adjustment as per Rule 6(4B) (iv) of the Service Tax Rules, 1994. W.e.f. 1-4-2012 there is no need to intimate to the Department about such self-adjustment.

6.18.2 Advance payment of Services Tax

As per Section 6(1A) of the Finance Act, 1994 (w.e.f. 1.3.2008);

i. The assessee may, on his own, pay Service tax in advance and adjust the amount towards future liability.

ii. He shall intimate details of advance payment to the Superintendent of Central Excise within 15 days of such payment.

iii. He shall indicate the details of adjustment of advance payment in the returns.

6.19 SPECIAL AUDIT

Section 72A

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

(i) Has failed to declare or determine the value of a taxable service correctly; or

(ii) Has availed and utilized credit of duty or tax paid-

(a) Which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or

(b) By means of fraud, collusion, or any willful misstatement or suppression of facts; or

(iii) Has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under 20 the jurisdiction of the said Commissioner,

He may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

(2) The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the 25 said Commissioner mentioning therein such other particulars as may be specified by him.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of such person have been audited under any other law for the time being in force.

(4) The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit under Sub-Section (1) and proposed to be utilized in 30 any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation – For the purposes of this section –

(i) "chartered accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949;

(ii) "cost accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of 35 section 2 of the Cost and Works Accountants Act, 1959.;

(k) in section 73,-

(i) for the words "one year", wherever they occur, the words "eighteen months" shall be substituted;

(ii) after sub-section (1), the following sub-section shall be inserted, namely –

"(1A) Notwithstanding anything contained in sub-section (1), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.";

(iii) In sub-section (4A), for the words, brackets and figures "sub-sections (3) and (4)", the word, brackets and figure "sub-section (4)" shall be substituted;

6.20 RETURN

6.20.1 Filing of Returns

Every assessee registered under Service tax provisions should file returns mandatorily electronically (w.e.f. 1-10-2011) as explained below:

Period	Due date (e-filing)	Return (must be filed in triplicate)	Person responsible to file	Remarks
1st April to 30th September	25th of October	ST-3 Every assessee shall submit the half-yearly return electronically w.e.f. 1-10 2011.	All assessees (provider or recipient of service as the case may be)	Due date is a public holiday, then next working day is the due date. One ST-3 can file for multiple services. 'Nil' return acceptable but no return will attract penalty.
1st October to 31st March	25th April	ST-3 Every assessee shall submit the half-yearly return electronically w.e.f. 1-10-2011.	All assessees (provider or recipient of service as the case may be)	Due date is a public holiday, then next working day is the due date. One ST-3 can file for multiple services. 'Nil' return acceptable but no return will attract penalty.
1st April to 30th September	25th of October	ST-3A Every assessee shall submit the half-yearly return electronically w.e.f. 1-10-2011.	All assessees to whom provisional assessment has been granted.	A statement giving details of the difference between the service tax deposited and the service tax liable to be paid for each month or quarter, as the case may be, in a memorandum accompanying the half-yearly return.
1st October to 31st March	25th April	ST-3A Every assessee shall submit the half-yearly return electronically w.e.f. 1-10-2011.	All assessees to whom provisional assessment has been granted.	A statement giving details of the difference between the service tax deposited and the service tax liable to be paid for each month or quarter as the case may be in a memorandum accompanying the half-yearly return.

6.20.2 Service Tax Return Preparer (STRP)

With effect from Finance Act, 2008, dated 10-5-2008 a scheme of Service Tax Return Preparer being introduced in the service tax provisions.

A STRP shall assist the person or class of persons to prepare and furnish the return in such manner as may be specified in the Scheme.

Service Tax Return Preparer (STRP) being an individual, who has authorized to act as a service tax return preparer under the Scheme.

6.20.3 Preservation Period of Records and Documents

All records and documents concerning any taxable service, CENVAT transactions etc. must be preserved for a minimum period of 5 years immediately after the financial year to which such records pertain (Rule 5(3) of Service Tax Rules 1994.)

6.20.4 Revised Return

With effect from 1st March, 2008 (Rule 7B of the Service Tax Rules), an assessee is allowed to rectify mistakes and file Revised Return within 90 days from the date of filing of the original return. Revised return after 90 days not allowed. (w.e.f. 1.3.2007 to 29.2.2008 the time limit was 60 days).

This implies that Returns pertaining to the period prior to 1st March, 2007 can be revised without the time limit.

Example 60: X Ltd. filed the ST-3 return on 30th November 2010 for the period from 1st April 2010 to 30th September 2010. Subsequently on 1st February 2011, some mistakes were found in the ST-3 return which was originally submitted on 30th November 2010. Service tax authorities rejected the revised return filed by the X Ltd. on 5th February, 2011, since the revised return was filed by the assessee after 90 days from the due date of filing the return (i.e. 25th October, 2010). The action of the department is correct?

Answer: No, the department action is not sustainable in the eyes of law. As per Rule 7B of the Service Tax Rules, 1 994, the time limit of 90 days for filing of revised return counts only from the date of filing of the original return and not from the due date for filing of original return as contained in the Explanatory Notes. Therefore, X Ltd. can file revised return by 5th February, 2011.

6.21 PENALTIES

Late fee (Penalty) in case of late filing of Form ST-3

Fee for Late filing of ST-3 (As per Rule 7C of Service Tax Rules, 1994)

If a person fails to furnish the ST-3 return within the due date [25th October and 25th April every year] he shall be liable to pay late fee (penalty) is as follows:

Delay upto 15 days ₹ 500

Delay upto 30 days ₹ 1,000

Delay beyond 30 days ₹ 1,000 + ₹ 100 per day subject to a maximum of ₹ 20,000 (w.e.f. 8-4-20 1 1 ₹ 2,000 enhanced to ₹ 20,000)

Late fee should be paid at the time of filling the return without waiting for any communication or notice from the Department. However, filing of return cannot be refused for non-submission of evidence of payment of late fee along with the Return.

Other Penalties

Sl. No.	Types of penalty	Penalty (prior to 8-4-2011)	Penalty (w.e.f. 8-4-2011)
i.	Non-filing of Return Section 77 of the Finance Act, 1994)	Upto ₹ 5,000	Upto ₹ 10,000
ii.	Not obtaining registration (section 77 of the Finance Act, 1944)	₹ 200 per day for every day of default or ₹ 5,000 whichever is higher.	₹ 200 per day for every day of default or ₹ 10,000 whichever is higher, starting with the first day after the due date, till the date of actual compliance;
iii.	Non-maintenance of proper books of accounts (Section 77 of the Finance Act, 1994)	Upto ₹ 5,000	Upto ₹ 10,000
iv.	Non-appearance before Officers on issue of summons (Section 77 of the Finance Act, 1994)	₹ 200 per day for every day of default o r ₹ 5,000 whichever is higher	₹ 200 per day for every day of default or ₹ 10,000 whichever is higher, starting with the first day after the due date, till the date of actual compliance;

Sl. No.	Types of penalty	Penalty (prior to 8-4-2011)	Penalty (w.e.f. 8-4-2011)
v.	Failure to pay tax electronically when so required to pay (Section 77 of the Finance Act, 1994)	Upto ₹ 5,000	Upto ₹ 10,000
vi.	Issuing incorrect invoice or not accounting invoices in books (Section 77 of the Finance Act, 1994)	Upto ₹ 5,000	Upto ₹ 10,000
vii.	Failure to pay service tax (Section 76 of the Finance Act, 1994)	₹ 200 for every day of delay or @2% of the tax per month whichever is higher. However, such higher should not exceeds amount of Service tax	₹ 100 for every day of delay or @1% of the tax per month whichever is higher. Such penalty shall be payable starting from the first day after the due date till the date of actual payment of outstanding amount of service tax. However, the total amount of penalty payable shall not exceed 50% of the service tax payable. Where the true or complete details of the transactions are recorded in the specified records, the penalty under this section can be waived if the service tax and interest paid before issue of show cause notice under section 73(3).
	Section 78A – Evasion of service tax, – Isuance of invoice without provision of service, – availment of Cenvat Credit without recipt of service of goods, or – Service tax collected remaining overdue for more than 6 months.		Section 78A is being introduced, to make provision for imposition of penalty on director, manager, secretary or other officer of the company, who is in any manner knowingly concerned with specified contraventions. Penalty upto ₹ 1 Lakh
viii.	Fraud or suppression of acts (Section 78 of the Finance Act, 1994): Wrongful utilization of Cenvat credit by reason of fraud, collusion or any willful mis-statement etc. with the intent to evade the payment of service tax, the provider of service shall be liable to pay penalty in terms of the provisions of Section 78 of the Finance Act, 1994.	A show cause notice has been issued under Section 73(1A) of the Finance Act, 1994 by demanding Minimum 100% of service tax. Maximum 200% of service tax. The penalty will be reduced to 25%, if tax, interest and penalty paid within 30 days from the date of receipt of order of Central Excise Officer.	100% of the service tax, where the true and complete details of the transactions are not recorded in the specified records. This penalty cannot be waived. 50% of the service tax, where the true and complete details of the transactions are recorded in the specified records. This penalty can be waived. 25% of the service tax, where the true and complete details of the transactions are recorded in the specified records and the assessee pays service tax and interest thereupon within 30 days (if taxable turnover ≤ ₹ 60 lakh then within 90 days) from the date of the communicated by the Central Excise Officer. This penalty can be waived.

Sl. No.	Types of penalty	Penalty (prior to 8-4-2011)	Penalty (w.e.f. 8-4-2011)
ix.	During the Department audit or verification of records of the assessee, they found short payment of service tax or sometimes, the amount erroneously refunded to the assessee. If all such transactions are completely recoded in the specified records (Section 73(4A) of the Finance Act, 1994 w.e.f. 8-4-2011). This provision is applicable to those assessees who have no intention to evade tax.		@1% of such tax for each month, for the period during which the default continues. However, such penalty shall be a maximum of 25% of the tax amount. The assessee who would like to take the benefit of this provision to avail the reduced penalty, will have to make the payment of tax with interest and penalty before issuance of Show Cause Notice under Section 73 of the Finance Act, 1994. This penalty can be waived.

6.22 ADJUDICATION & APPEALS

6.22.1 Adjudication

(i) Central Excise Officers have been empowered to adjudicate in following –

(*a*) Demand of service tax and its recovery - section 73.

(*b*) Rectification of mistake by amending own order - section 74.

(*c*) Imposition of penalty - section 83A

(*d*) Refund of service tax - section 11B of Central Excise Act made applicable to Service Tax.

(ii) **Time limit for issue of show cause notice -** If it is found that assessee has paid less tax, department will issue a show cause notice cum demand.

If any service tax is not levied or not paid or short levied or short paid or erroneously refunded, Central Excise Officer shall issue a show cause notice for demand can be made within 18 months from 'relevant date' [section 73(1)].

If such short payment etc. was by reason of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any provision of Finance Act, 1994 or rules, show cause notice can be issued within five years [*proviso* to section 73(1)]. If notice is issued under 5 years, the demand for normal period would not Service — S.C. Decision in the case of Alcobex Metals. After considering the representation, Central Excise Officer will determine the service tax payable. Such tax cannot be more than the amount specified in show cause notice. Thereupon, the person shall pay the amount so determined [section 73(2)].

(iii) **Voluntary Payment before receipt of show cause notice -** Assessee may pay such tax on the basis of his own ascertainment or on the basis of tax ascertained by Central Excise Officer, before issue of show cause notice. After payment of tax, assessee should inform the Central Excise Officer in writing about such payment, and then the central excise officer shall not issue any show cause notice under section 73(1) in respect of service tax so paid [section 73(3)].

(iv) **Rectification -** The Central Excise Officer who has passed order (of assessment or demand or penalty) can rectify any mistake apparent from the record, within two years of the date in which the order was passed. The mistake must be 'apparent from the records'.

(v) Revision - The Commissioner of Central Excise can revise the orders passed by adjudicating authority subordinate to him. The revision order can be passed any time within two years of the original order, but not afterwards. No revision can be made if appeal against such order is pending with Commissioner (Appeals) [section 84]. Appeal against the order of Commissioner (after revision) lies with CESTAT under section 86.

In case of assessee appeal also, appellate tribunal can admit an appeal or permit the filing of memorandum of cross objections after the expiry of the relevant period.

6.22.2 APPEALS

(i) Appeal to Commissioner (Appeals) - Appeal to Commissioner (Appeals) can be made against order of any Central Excise Officer subordinate to Commissioner in respect of demand, interest or penalty or denial of refund of service tax. Appeal should be in prescribed form and duly verified. Appeal must be filed within three months from date of receipt of order. Delay upto three months can be condoned by Commissioner (Appeals). The procedures and powers will be similar to those under Central Excise. [section 85 of Finance Act, 1994].

(ii) Appeal to Tribunal - Appeal to CESTAT (Tribunal) can be made against order of Commissioner passed by him under section 73, 83A or 84 or order of Commissioner (Appeals) passed by him under section 85 [order in appeal from order of AC/DC] by assessee or the department. Appeal has to be filed within three months from date of receipt of order by assessee, Board or Commissioner as the case may be. [section 86 of Finance Act, 1994].

Tribunal can condone the delay in filing appeal on showing sufficient cause. Appeal has to be accompanied with prescribed fees, if appeal is by the assessee. Tribunal is final fact finding authority.

(iii) Appeals to HC/SC – If issue involves classification or valuation, appeal lies with Supreme Court. If issue does not involve classification or valuation dispute, appeal lies with High Court only on substantial question of law.

PRACTICAL PROBLEMS

Point of Taxation:

Example 61: Sun Academy Pvt. Ltd., is providing commercial training services since, 2009. During the year 2011-12 service tax liability arises to pay was ₹ 12,00,000. However, service tax paid was paid ₹ 8 lacs after adjustment of CENVAT CREDIT of ₹ 4 lacs. In the month of April 2012, 60 students were joined for pursing Point of Taxation Rules (from 1st April'12 to 1 0th April'12). Fee per student is ₹ 3,000 (inclusive of Service tax) paid by all students the month of June 2012. Service Tax @12.36% paid on 5th July 2012. Calculate the following:

(a) Point of Taxation
(b) Due Date
(c) Service Tax liability
(d) Interest if any
(e) Penalty under Sec. 76 of the Finance Act, 1994, if any.

Answer:

(a)	Point of taxation	=	April 2012
(b)	Due date	=	6th May 2012
(c)	Service tax	=	₹ 19,800 (i.e. 3,000 x 60 x 12.36/112.36)
(d)	Interest	=	₹ 586 (i.e. 19,800 x 18/100 x 60/365)
(e)	Penalty	=	₹ 6,000
i.e. ₹ 100 x 60 days		=	₹ 6000 or ₹ 391 (19,800 x 12/1 00x 60/365) whichever is higher

Example 62: State briefly whether the following service under the Finance Act, 1994 relating to service tax are taxable service.

(a) Service provided in the State of Rajasthan by a person having a place of business in the State of Jammu and Kashmir.

(b) Service provided from India for use outside India

(c) Service provided from outside India and received in India by Individual otherwise than purpose of use in business or commerce.

(d) Service provided to an Export Oriented Unit

Answer:

(a) These are taxable services. Services rendered within India (except in the state of Jammu and Kashmir) are come under the service tax net, provided these services are taxable services.

(b) These services can be considered as export of services, which are exempted from the service tax liability.

(c) Services in the nature of import are taxable if these are imported for the purpose of business or commerce. Services imported for the purpose of personal use by individuals are exempted from service tax.

(d) Service provided to export oriented undertaking is liable to service tax. Service rendered to EOU or supplies of services by EOU in domestic market is not presently exempt from service tax.

Example 63: Answer the following with reference to the Finance Act, 1994 as amended relating to applicability of service tax:

Service provided by educational institutions like IIMs by charging a fee from prospective employers like corporate houses regarding recruiting candidates through campus interviews.

Answer:

Manpower recruitment or supply agency is defined as 'any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client.

Educational institutes like IITs, IIMs etc. fall within the above definition. Thus, service tax is liable to be paid on services provided by such institutes in relation to campus recruitment.

Example 64: Answer the following:

(a) A particular service has been brought into service tax net with effect from 1-5-2011. Mr. Vignesh has provided this service on 10-5-2011 and invoice has been issued on the same date. The payment for the same was received on 30-4-2011. Is service tax payable on the same?

(b) Mr. Saravanan has collected ₹ 15,000 as service tax from a client mistakenly, even though no service tax is chargeable for such service. Should the amount so collected be remitted to the credit of the Central Government?

(c) Briefly explain the nature of the service tax

Answer:

(a) As per Rule 5(b) of the Point of Taxation Rules, 2011, no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within the period referred to in rule 4A of the Service Tax Rules, 1994.

As per rule 4A of the Service Tax Rules, 1994, an invoice is required to be issued within 14 days from the date of completion of service or from the date of receipt of any payment of taxable service, whichever is earlier.

In the given case, Mr. Vignesh is not liable to pay service tax.

(b) Section 73A of the Finance Act, 1994 casts an obligation on every person who has collected service tax from any recipient of service in any manner as service tax, to remit the same to the credit of the Central Government. On account of this provision, where any person has collected any amount, which is not required to be collected from any other person, in any manner as representing service tax, he should also immediately pay the amount so collected to the credit of the Central Government.

Hence, Mr. Saravanan has to remit the service tax collected by him on the non taxable services to the credit of Central Government of India.

(c) Section 70 of the Finance Act, 1994 enjoins that every person liable to pay service tax shall himself assess the tax due on the services provided by him and shall furnish a return to the Superintendent of Central Excise.

Example 65: Ms. P rendered taxable services to a client. A bill of ₹ 40,000 were raised on 29-4-2012. ₹ 15,000 were received from the client on 1-5-2012 and the balance on 23-5-2012. No service tax was separately charged in the bill.

(a) Is Ms. P liable to pay service tax, even though the same has not been charged by her?

(b) If so, what is the value of taxable services and the service tax?

(c) Due date of payment of service tax?

Note: previous year turnover is ₹ 25 lakhs

Answer:

(a) Ms. P is liable to pay service tax even though she has not collected the service tax from his client, by considering the service tax is inclusive in the value of the bill. The point of taxation is 29-4-2012. It means she is liable to pay service tax for the month of April, 2012.

(b) Service tax liability is as follows:

Value of taxable services = 40,000x 100/112.36	=	₹ 35,600
Service tax liability = 35,600 x 12.36/100	=	₹ 4,400

(c) Due date of payment of service tax is 5th July 2012.

Example 66: Mr. Vasudevan is a practicing Cost Accountant, has rendered freely, a service to a client which is taxable, but has not charged or received any fee from a client. Is service tax payable on such free services?

Answer:

Service tax is payable when services are provided for consideration as per Section 67 of the Finance Act, 1994. Moreover the charging section 66 provides that service tax is chargeable on the value of taxable service. Hence, if the value is Free no service tax is payable even though the service may be taxable. However, this principle applies only when there is really a 'free service' and not when its cost is recovered through different means.

Example 67: Mr. Harish, a consulting engineer raised a bill of ₹ 2,20,600 (including service tax @1 2.36%%) on his client for consulting services rendered by him in the month of June, 2012. A partial payment of ₹ 1,65,450 was received by Mr. Harish in the month of September 2012 as full and final settlement. Compute the service tax amount payable by Mr. Y and the due date by which service tax can be deposited. Previous year taxable services are ₹ 74 lakhs.

Answer:

Service tax is payable only on the basis of point of taxation rules. Hence, service tax is required to be paid on the entire bill value. The service tax is required to be paid on the value of service which is actually billed in the month of June 2012.

Value of taxable services (₹ 2,20,600 x100/112.36)	=	₹ 1,96,333
Service tax payable on ₹ 1,96,333 @ 12%	=	₹ 23,560
Education cess @ 2% on ₹ 23,560	=	₹ 471
Secondary and Higher Education cess @ 1% on ₹ 23,560	=	₹ 236
Total	=	₹ 2,20,600

Therefore, service tax payable to the government ₹ 24,267.

Due dates of payment of service tax is quarterly for an individual. Therefore, due date is on or before 5th July 2012.

Tax Dedcuted at Source:

Example 68: A Ltd. provided Information Technology & Software services to B Ltd. in the month of July 2012. A bill inclusive of Service Tax issued in the month of July 2012. B Ltd paid ₹ 24,81,750 (after deducting TDS under sec 1 94J of the Income Tax Act, 1961 @10% towards TDS) in the month of August, 2012. You are required to calculate:

(*a*) Service tax liability

(*b*) Due date of payment of service tax.

Answer **(Amount in ₹)**

(a)	Net payment received	=	24,81,750 = 90%
	TDS @ 10%	=	2,75,750 = 10%
	Total bill value		27,57,500

Service tax liability = ₹ 27,57,500 x 12.36/112.36 = 3,03,335

(b) Due date of payment of service tax in case of manual payment is on or before 5th of August 2012.

Due date of payment of service tax in case of e-payment is on or before 6th August 2012.

(Note: service tax is liable to pay on provisional as per the rule 3 of the Point of Taxation Rules, 2011, w.e.f. 1-4-2011)

Interest

Example 69: Mr. X practicing Chartered Accountant received ₹ 20,00,000 in the June 2012. He paid service tax on 25th July 2012 by way of GAR – 7 challan. Gross receipts in the year 2011-12 were ₹ 25 lakhs. You are required to calculate Interest on delay payment of service tax.

Answer :

Service tax @12.36% on ₹ 20,00,000 = ₹ 2,47,200.

Due date of payment of service tax- 5th July, 2012.

No. of days delay = 20 days

Interest = ₹ 2,032 (i.e.₹ 2,47,200 x 15/100 x 20/365)

Example 70: Dhruva Engineering Ltd. deposited the service tax due for the month of May, 2012 by cheque in the designated bank on 5th June, 2012. The cheque was realized by the designated bank on 9th June, 2012. The service tax authority has issued a notice to the company under section 75 of Chapter V of the Finance Act, 1994 demanding interest for the delayed period. Is the demand justified? Give reasons for your answer.

Answer:

As per Rule 6(2A) of the Service Tax Rules, if the service tax is paid by cheque, the date of presentation of the cheque to the designated bank shall be deemed to be the date on which service tax has been paid subject to realization of the cheque.

In view of the above, Dhruva Engineering Ltd paid the service tax in time for the month of May 2012. Therefore, the demand for payment of interest is not justifiable.

Example 71: What is the rate of interest for late filing of return (i.e. V Form ST-3)?

Answer :

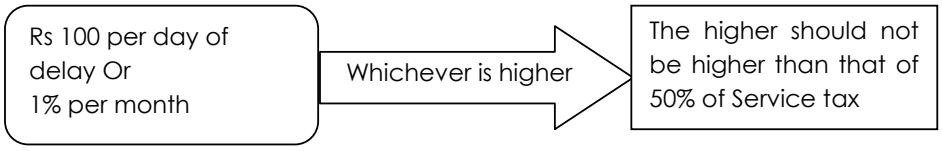
No interest will be levied in case of late filing of return Form ST-3.

Penalty for Delayed Payment of Service Tax:

Example 72: X Ltd. is liable to pay service tax of ₹ 1,00,000 on or before 5th July 2011 but he paid it on 15th July 2011. What is the penalty for non-payment or delayed payment of service tax? Can this penalty be waived or reduced?

Answer:

Calculation of Penalty under Section 76 of the Finance Act, 1994 (w.e.f. 8-4-2011):



Such penalty shall be payable starting from the first day after the due date till the date of actual payment of outstanding amount of service tax.

However, the total amount of penalty payable shall not exceed 50% of the service tax payable.

Penalty = ₹ 100 x 10 days = ₹ 1,000
Or Whichever is higher
₹ 1,00,000 x 1/100 x 10/31 = ₹ 323
Therefore, penalty is ₹ 1,000

Where the true or complete details of the transactions are recorded in the specified records, the penalty under this section can be waived if the service tax and interest paid before issue of show cause notice under section 73(3).

Penalty for Late Filing of Return:

Example 73: SM Ltd. filed its service tax returns for the half years ending on September 2010 and March 2011 on 25-11-2010 and 31-7-2011. The two half yearly returns show a service tax liability of ₹ 2,00,000 and ₹ 1,00,000 respectively. Is any late fee/fine payable by SM Ltd.? If yes, what is the quantum of such fee in both the cases?

Will your answer be different if SM Ltd. files a nil return for the half year ending on September 2010?

Answer:

Form ST-3 half yearly – due dates

25th October for the first half year ending 30th September

25th April for the second half year ending 31st March

Actual No. of days delay for the first half year return = 31 days

(Oct 6 days + Nov 25 days)

Therefore, penalty is ₹ 1,100

Actual No. of days delay for the 2nd half year return = 97 days

(April 5 days + May 31 days + June 30 days + July 31 days)

Upto 30 days of delay ₹ 1,000 plus ₹ 100 per day of delay subject to maximum of ₹ 20,000(w.e.f. 8-4-2011) Therefore, penalty is ₹ 7,700.

Penalty can be reduced or waived if the ST-3 return belongs to nil return.

Study Note - 7

ADJUDICATION, PENALTIES AND APPEALS IN INDIRECT TAXES

This Study Note includes

7.1 Common Topics in Indirect Taxes
7.2 Adjudication in Indirect Taxes
7.3 Enforcement Powers of Revenue Officers
7.4 Penalties in Indirect Tax Laws
7.5 Appeal provisions under Central Excise, Service Tax and Customs
7.6 Settlement Commission
7.7 Authority for Advance Ruling

7.1 COMMON TOPICS IN INDIRECT TAXES

Three major indirect taxes, viz. Central Excise, Service Tax and Customs are being administered by single authority i.e. Central Board of Excise and Customs (CBE&C) under Ministry of Finance, Government of India. Final departmental appellate authority i.e. Tribunal is common. It is, therefore, natural that basic thinking and approach is same in all the legislations connected with these three taxes.

Many provisions of Central Excise are made applicable to service tax. Many provisions of customs law have been made applicable to Central Excise.

7.1.1 Provisions in respect of Demands, Refunds, Penalties, Appeals are Common or Similar

Provisions relating to demands, refunds, penalties and appeals are either common in all the three legislations or at least they are similar.

7.1.2 Assessee and Assessment

Assessment means determining the tax liability.

Duty is paid by the manufacturer on his own while clearing goods from the factory/warehouse, on 'self assessment'. The assessee himself has to determine classification and valuation of goods and pay duty accordingly.

Rule 2(b) of Central Excise Rules states that 'assessment' includes self-assessment of duty made by the assessee and provisional assessment made under Rule 7.

'Assessee' - Rule 2(c) of Central Excise Rules states that 'assessee' means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored, and includes an authorized agent of such person.

Self Assessment - The assessment under Central Excise is basically an Invoice based self-assessment, except in case of cigarettes. Rule 6 of Central Excise Rules provides that the assessee shall himself assess the duty payable on excisable goods, except that that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal of goods.

The assessee has to submit monthly return in ER-1/ER-2/ER-3 form. The return has to be along with 'Self Assessment Memorandum', where Assessee declares that (a) the particulars in ER-1/ER-2/ER-3 return are correctly stated (b) Duty has been assessed as per provisions of Section 4 or 4A of CEA (c) TR-6 challans by which duty has been paid are genuine.

In case of service tax also, Section 70(1) of Finance Act, 1994 provides that every person liable to pay service tax shall himself assess the tax due and file return. The ST-3 return filed by assessee contains a 'Self-Assessment Memorandum'.

7.1.3 Scrutiny of Correctness of Duty

After submission of return by assessee, first stage dealer and second stage dealer, the 'proper officer' will scrutinise the return on the basis of information contained in the return and further enquiry as considered necessary. The manner of scrutiny will be prescribed by CBE&C [Rule 12(3) – inserted w.e.f. 1-4-2005].

Every assessee shall make available to 'proper officer' all documents and records for verification as and when required by such officer [Rule 12(4)].

7.1.4 Assessment Order in Customs but not in Excise and Service Tax

In case of customs, Bill of Entry (in case of imports) and Shipping Bill (in case of exports) is an assessment order. If the valuation shown by assessee is not accepted by department, order with reasons will have to be issued within 14 days. Appeal can be filed against the order. Mere filing of refund claim is not sufficient.

In case of excise and service tax, the assessee is required to file returns. Excise officers will not 'assess' the duty i.e. assessment order is not issued. If the officers are of opinion that there is short payment, show cause notice cum demand will have to be issued.

7.1.5 Provisional Assessment

Rule 7 of Central Excise Rules make provisions in respect of provisional assessment. Provisional assessment can be requested by the assessee. Department cannot itself order provisional assessment.

Final assessment will be made later by Assistant/Deputy Commissioner after getting the required details. In case of such provisional assessment, demand can be raised within one year after the provisional assessment is finalised.

Overview of Provisions of Provisional Assessment - An assessee can request for provisional assessment in following circumstances – (a) Assessee is unable to determine the value of excisable goods in terms of Section 4 of CEA on account of non-availability of any document or information *or* (b) Assessee is unable to determine rate of duty applicable.

In aforesaid cases, assessee may request Assistant/Deputy Commissioner in writing giving reasons for provisional assessment of duty. [Assessee should give reason why he wishes to have provisional assessment]. After such request, the Assistant/Deputy Commissioner may by order allow payment of duty on provisional basis. The Assistant/Deputy Commissioner shall also specify the rate or value at which the duty will be paid on provisional basis. [Rule 7(1)].

Payment of duty on provisional basis will be allowed subject to execution of bond for payment of differential duty [Rule 7(2)]. After that Assistant/Deputy Commissioner should pass order for final assessment within 6 months from date of order of provisional assessment. This period can be extended by further 6 months by Commissioner and further without any time limit by Chief Commissioner [Rule 7(3)]. If differential amount is payable, interest is payable [Rule 7(4)]. If excess amount was paid, it is refundable with interest [Rule 7(5)]. The refund is subject to provision of Unjust Enrichment [Rule 7(6)].

Finalisation of Provisional Assessment

AC/DC is required to pass order of final assessment after getting relevant information, within six months of date of communication of his order allowing provisional assessment. The period of 6 months can be extended by Commissioner of CE, on making a specific request, for reasons to be recorded in writing. Extension beyond one year for further period can be granted only by Chief Commissioner. [Rule 7(3) of Central Excise Rules].

No time limit for finalisation in case of customs – In *Shakti Beverages* v. *CC* 2003(153) ELT 445 (CEGAT 3 member bench), it was held that there is no time limit for finalising provisional assessment. The only question that can be considered by Tribunal is whether due to delay in finalising provisional assessment whether appellant has suffered any prejudice and whether there is violation of principles of natural justice. [The principle should apply to Central Excise also].

Interest payable/receivable - If differential duty is found to be payable, interest as specified in Section 11AA or 11AB will be payable by assessee from first day of the month succeeding the month *for which* such amount is determined till date of payment thereof. [Rule 7(4)].

Since the word used is '*for*', interest is payable from first day of next month after clearance of goods. For example, if goods were cleared on 15th October 2003 under provisional assessment and assessment was finalized on 25th March 2004, interest will be payable from 1st November, 2003 till date of payment.

If differential amount is found to be refundable to assessee, it shall be refunded with interest at rate as specified in Section 11BB. The period for payment of Interest will be same as per section 11BB. Thus, interest is payable by department is on the same basis as payable by assessee, i.e. not from date of finalisation of provisional assessment, but from month next to the month on which duty was provisionally paid. [Note that u/s 11BB, interest on delayed refund is payable only three months after filing of refund application. This provision does not apply to refund obtainable after finalization of Provisional Assessment].

Interest in case of customs - Section 18 of Customs Act (inserted w.e.f. 13-7-2006) makes provision for payment of interest after finalization of provisional assessment.

Refund after finalization of assessment

If duty is paid on provisional basis, refund claim can be filed within one year after duty is adjusted after final assessment. [*Explanation* B(eb) to Section 11B].

Refund subject to provision of Unjust Enrichment - Rule 7(6) of Central Excise Rules clarifies that refund is subject to provisions of 'Unjust Enrichment', i.e. refund will be granted to manufacturer if he has not passed on incidence of duty to another person – confirmed in *Hindustan Lever* v. *CCE* (2004) 171 ELT 12 (CESTAT).

In case of customs duty, there was no parallel provision in respect of provisional assessment. Section 18(5) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, has made provision for unjust enrichment in case of customs duty refund when there was provisional assessment.

7.2 ADJUDICATION IN INDIRECT TAXES

Adjudicate means to hear or try and decide judicially and adjudication means giving a decision. As per Oxford Dictionary, 'adjudicate' means deciding judicially (regarding a claim etc.), pronounce.

Excise and Customs Authorities are empowered to determine classification, valuation, refund claims and the tax/duty payable. They are also empowered to grant various permissions under rules and impose fines, penalties, etc., and confiscate offending goods. Since the authorities are departmental officers, the process is called "departmental adjudication".

They are required to follow principles of natural justice. Their adjudicating powers are prescribed under Act and departmental circulars Their orders are appealable.

These are 'quasi judicial authorities' and they are not bound by any trade notice or instructions of superiors.

Uncontrolled authority may cause great damage to an assessee and hence opportunity of appeal against the order has been provided. The topmost authority of departmental appeal is "Tribunal" in Excise and Customs. The decision of the Tribunal is final as far as the departmental remedy of appeal is concerned. Provisions are available for appeal/reference to High Court/Supreme Court in limited cases. Needless to mention, writ jurisdiction of High Court and Supreme Court is independent of any provision/s of the Excise Act and Writ Petition can be filed in High Court/SLP in Supreme Court irrespective of any provision of Excise Act.

7.2.1 Principles of Natural Justice

Basic requirements of principle of natural justice are – (a) Full information about charges, (b) Allowing party to state his defence (Personal Hearing), (c) Unbiased authority & (d) Order with reasons.

7.2.2 Adjudicating Authority

(i) Any authority competent to pass any order or decision under Central Excise Act.

(ii) Commissioner (appeals) and CBEC are not adjudicating authority.

(iii) If remission of duty for loss of goods involved is up to ₹ 10,000, the Superintendent of Central Excise is adjudicating authority.

(iv) If amount of duty or Cenvat credit involved is up to ₹ 5,00,000, such demand can be made by Deputy/Assistant Commissioner of Central Excise. Remission of duty for loss of goods up to ₹ 1,00,000 can also be granted by such authority.

(v) If amount of duty or Cenvat credit involved is above ₹ 5,00,000 and upto ₹ 50,00,000 such demand can be made by Joint Commissioner of Central Excise. Remission of duty for loss of goods up to ₹ 5,00,000 can also be granted by such authority.

(vi) If amount of duty or Cenvat credit involved is above ₹ 5,00,000 and upto ₹ 50,00,000 such demand can be made by Additional Commissioner (Circular No. 957/18/2011-CX-3 25th October, 2011) or Commissioner of Central Excise. Remission of duty for loss of goods up to ₹ 5,00,000 can also be granted by such authority.

(vii) Demand of duty or demand of CENVAT credit of any amount (i.e. without any upper limit) can be made by Commissioner or Commissioner of Central Excise.

(viii) Gazetted officer rank starts from Superintendent of Central Excise.

7.2.3 Remission of Duty (Rule 21 of the Central Excise Rules, 2002)

Remission of Duty means duty levied but exempted from payment of duty with the permission of Adjudicating Authority. Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty (i.e. no demand of duty) payable on such goods, subject to such conditions as may be imposed by him by order in writing (Rule 21 of the Central Excise Rules, 2002).

Note: Remission of duty is not allowed in case of theft, since the goods are available for consumption somewhere else.

Procedure for claiming Remission of Duty :

(i) A manufacturer has to make an application in duplicate to the Range Officer indicating complete details of the goods and reasons for destruction, along with the proof that the goods have become unfit for consumption or for marketing such as report of chemical test or any other test, conducted by a Government recognized laboratory.

(ii) The application will be quickly processed by the Range Office. In case the matter falls within the competency of superior officer, he will forward the application along with his recommendation to the Deputy/Assistant Commissioner within 15 days of receipt.

(iii) The Deputy/Assistant Commissioner will scrutinise the application and based upon the information given by the assessee, if found in order, allow destruction of goods and remission of duty, if the case relates to his competency. Otherwise, he will forward the application with his remarks to the superior authority competent to give permission for destruction and remission (Additional/Joint Commissioner or Commissioner, as the case may be) within 3 days.

(iv) Where only physical verification is required, the same may be conducted by the remission granting authority (proper officer), as specified above and upon his satisfaction, destruction of goods and remission of duty may be allowed.

(v) As far as possible, destruction should be made inside the factory.

(vi) The goods are rendered unfit for consumption or marketing should be accepted and necessary permission should be granted within a period of 21 days or earlier, if possible. Where samples are drawn, such permission should be granted within 45 days.

Example 1: B Ltd. was engaged in the manufacture of lead and zinc concentrates. At the time of carrying out the physical stock taking, some difference was found between the physically verified stock and the stock as per the books. According to B Ltd., this difference was due to de-bagging, shifting of concentrates, seepage of rain water and storage and loading on trucks. B Ltd. applied for the remission of duty under rule 21 of the Central Excise Rules, 2002. Revenue claimed that the shortage could have been avoided or minimized by the assessee, as they were neither due to natural causes, nor due to unavoidable accident. Thus, the prayer for remission was declined.

Answer:

In the case of UOI v Hindustan Zinc Limited 2009 (233) ELT 61 (Raj), *the High court said that* Revenue's claim is not valid in law. B Ltd can get benefit under Rule 21 of the Central Excise Rules 2002.

7.2.4 Rebate of Duty

Rebate of duty can be under stood as duty draw back. Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

7.2.5 Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded [Section 11A of Central Excise Act, 1944/Section 28 of Customs Act / Section 73 of Finance Act, 1994]

Show Cause Notice under section 11A(1)(a) of Central Excise Act provides that a Central Excise authority can, within ONE year from *relevant date*, serve show cause notice on assessee chargeable to duty if—

(a) Central Excise duty has not been paid or short paid

(b) Central Excise duty erroneously refunded.

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

Section 28 of the Customs Act,1962 also deals with recovery of duties not levied or short levied or erroneously refunded. In the case of *C.Cus.* v *Sayed Ali* 2011 (SC) the Apex Court held that—

- Director General of Revenue Intelligence or
- Director General of Central Excise Intelligence
- Are not eligible for issuing show cause notices. However, w.e.f 16.9.2011 the law amended retrospectively by providing validity to those show cause notices issued by the Director General of Revenue Intelligence or, Director General of Central Excise Intelligence.

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupee one hundred.

Duty and interest paid before issue of show cause notice Section 11A(1)(b)

As per section 11A(1)(b), the person chargeable with duty may, before service of notice under Section 11A(1)(a), pay on the basis of his own ascertainment of such duty or the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

Description	Relevant section	Time period to issue notice	Excise duty	Interest @18%p.a	Penalty equal to the duty specified in the notice
Duty paid along with interest before issue of show cause notice (other than fraud)	Section 11A(1)(b)	One year from the relevant date, if required	Liable to pay	Liable to pay	No penalty is required to pay

Intimation to the Central Excise Officer under section 11A(2): The person who has paid the duty under section 11A(1)(b), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under section 11A(1)(a) or any penalty leviable under the provisions of this Act or the rules made thereunder. It means penalty cannot be levied.

Show cause notice under section 11A(3): where the Central Excise Officer is of the opinion that the amount paid under section 11A(1)(b), falls short of the amount actually payable, then he shall proceed to issue the notice as provided under section 11A(1)(a) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of ONE year shall be computed from the date of receipt of information under section 11A(2).

Show Cause Notice under section 11A(4) in case of fraud: the Central Excise Officer can also be issued a show cause notice within FIVE years from relevant date if Central Excise duty has not been paid by way of fraud, or collusion, or willful misstatement and suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty. Show cause can be issued by demanding the amount of duty along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice.

Description	Relevant section	Time period to issue notice	Excise duty	Interest @18%p.a (1-4-2011)	Penalty (w.e.f. 8-4-2011)
Show Cause issued under on the grounds of fraud	Section 11A(4)	5 years from the relevant date	Liable to pay	Liable to pay	Liable to pay equal to the duty specified in the notice

Fraud noticed during the audit, investigation but the details are available in the specified records Section 11A(5):

As per Section 11A(5), where fraud or collusion or willful misstatement and suppression of facts, or contravention of any of the provisions of this Act, found during the course of any audit, investigation or verification but the details relating to the transactions are available in the specified record, then in such cases, the Central Excise Officer shall within a period of FIVE years from the relevant date, serve a notice on the person chargeable with duty requiring him to show cause why he should not pay the amount of specified in the notice along with interest under section 11AA and **penalty equivalent to 50% of such duty**.

Description	Relevant section	Time period to issue notice	Excise duty	Interest @18%p.a (w.e.f.1-4-2011)	Penalty (w.e.f. 8-4-2011)
Show Cause issued on the grounds of fraud. Fraud noticed during the audit, investigation but the details are available in the specified records	Section 11A(5)	5 years from the relevant date	Liable to pay	Liable to pay	Liable to pay equivalent to 50% of such duty

Fraud noticed during the audit, investigation but the details are available in the specified records, where as dues has been paid before issue of show cause notice Section 11(6)

Under section 11A(6), any person chargeable with duty under section 11(5) may, before service of show cause notice on him, pay the duty in full or in part, as may be accepted by him along with the interest payable thereon under section 11AA and penalty equal to 1% per month of such duty to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of 25% of the duty, and inform the Central Excise Officer of such payment in writing.

Description	Relevant section	Time period to issue notice	Excise duty	Interest @18%p.a (w.e.f. 1-4-2011)	Penalty (w.e.f. 8-4-2011)
Fraud noticed during the audit, investigation but the details are available in the specified records, where as dues has been paid before issue of show cause notice	Section 11A(6)	5 years from the relevant date (if applicable)	Liable to pay	Liable to pay	Liable to pay @1% per month of such duty or 25% of the duty whichever is less.

As per section 11A (7) the Central Excise Officer, on receipt of information under section 11(6) shall not serve any show cause notice and all proceedings in respect of the said duty shall be deemed to be concluded where it is found by the Central Excise Officer that the amount of duty, interest and penalty as provided under section 11(6) has been fully paid. If the Central Excise Officer found that duty short paid then show cause notice can be issued within ONE year shall be computed from the date of receipt of such information.

Section 11A is being amended to insert sub-section (7A) providing that service of a statement containing details of duty not paid, short levied or erroneously refunded shall be deemed to be service of notice under sub-section (1) or (3) or (4) or (5) of this section.

According to section 11A (8) while computing the period of ONE year or FIVE years the period during which there was any stay by an order of the court or tribunal in respect of payment of such duty shall be excluded.

As per section 11A(9) if the department has not been established against the person to whom notice was issued under section 11A(4) i.e. fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, then any Appellate Authority or Tribunal or Court concludes that the notice issued by the Central Excise Officer shall determine the duty of excise payable by such person for the period of ONE year, deeming as if the notice were issued under Section 11A(1)(a).

As per section 11A(10) the Central Excise Officer shall determine the amount of duty of excise due from such person not being in excess of the amount specified in the show cause notice. The Central Excise Officer can do so after allowing the concerned person an opportunity of being heard.

Under section 11A(11) the Central Excise Officer shall determine the amount of duty of excise under section 11A(10) within SIX months from the date of notice where it is possible to do so, in respect of cases falling under section 11A(1). Cases falling under section 11A(4) and (5), within ONE year from the date of notice.

As per section 11A(12) where the Appellate Authority or Tribunal or Court modifies the amount of duty of excise determined by the Central Excise Officer under section 11(10), then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified.

As per section 11A(13) where the amount as modified by the Appellate Authority or Tribunal or Court is more than the amount determined under section 11A(10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

As per section 11A(14) where an order determining the duty of excise is passed by the Central Excise Officer under section 11A, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately. It means section 11A and 11AA goes hand-in-hand.

As per section 11A(15) where interest alone is payable has not been paid or part paid or erroneously refunded, then section 11A(1) to (14) shall apply, mutatis mutandis.

Important points:

(i) If the Court has issued a Stay Order for recovery of amount, the period during which the stay order is in operation will be excluded for calculation of the time limit.

(ii) If demand has been raised without show cause, notice is invalid and unsustainable. At the same time penalty cannot be imposed if show cause notice does not contain proposal for penalty.

(iii) While interpreting section 32L(3), the Gujarat High Court held that for working out the time limit prescribed under section 11A for recovery of duties, the period commencing from the date of application to the Settlement Commission to the date of receipt of the order under section 32L by the adjudicating authority, shall be excluded Vishwa Traders Pvt. Ltd. v UOI 2009 (241) ELT 164 (Guj). Section 32L, deals with sending back a case to proper officer if applicant has not co-operated with the Settlement Commission.

(iv) *Relevant Date:* it means it may be any one of the following:

- (a) date of actual filling of monthly return, or
- (b) Date on which return should have been filed, when required to be filed but not filed, or
- (c) If no return is required to be filed under the Central Excise, then the date of payment of duty, or
- (d) In case of provisional assessment, relevant date is the date of adjustment of duty after final adjustment.
- (e) In case of erroneous refund, date of such refund.

7.2.6 Protective Demand

It means issue show-cause notice-cum-demand in time, so that it does not get time barred, specially in case of receipt of audit objections, protective demands should be issued in time.

7.2.7 Omission to Give Correct Information Cannot be Construed As 'Suppression of Facts' for the Purpose of the Proviso to Section 11A(1) of The Central Excise Act, 1944

In case of *Joint Venture* v *CCE* 2007 (SC), the Supreme Court of India observed that since the expression "suppression" used in proviso to section 11A(1) of the Central Excise Act, 1944 is accompanied by very strong words as fraud or collusion, it should be construed strictly. Suppression means failure to disclose full information with intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. The Apex Court held that mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. The Apex Court explained that an incorrect statement cannot be equated with a willful misstatement.

7.3 ENFORCEMENT POWERS OF REVENUE OFFICERS

7.3.1 Powers of Central Excise Officers

i. **Power to access registered premises:** As per Rule 22(1) of Central Excise Rules, 2002, an officer empowered by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

ii. **Power to stop and search:** As per Rule 23 of Central Excise Rules, 2002, any Central Excise Office, may search any conveyance carrying excisable goods in respect of which he has reason to believe that the goods are being carried with the intention of evading duty.

iii. **Power to detain or seize goods:** As per Rule 24 of Central Excise Rules, 2002, if a Central Excise Officer, has reason to believe that any goods, which are liable to excise duty but no duty has been paid thereon or the said goods were removed with the intention of evading the duty payable thereon, the Central Excise Officer may detain or seize such goods.

iv. **Power to delegate authority:** As per Section 12E(1) of Central Excise Act, 1944, a Central Excise Officer may exercise the powers and discharge the duties conferred or imposed under this Act on any other Central Excise Officer who is sub-ordinate to him.

Notwithstanding anything contained in sub-section (1), the Commissioner of Central Excise (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on a Central Excise Officer other than those specified in section 14.

v. **Power to arrest:** As per the provisions of Section 13 of the Central Excise Act, 1944 the central excise officer not below the rank of inspector can arrest any person whom he has a reason to believe to be liable to punishment under the Central Excise Law. However, such an arrest can be only with the prior approval of Commissioner of Central Excise. The arrested person must be produced before the Magistrate within twenty four hours of the arrest.

According to Section 14 of the Central Excise Act, 1944, any Central Excise Officer not below the rank of Superintendent of Central Excise shall have power to summon any person whose attendance he considers necessary for gathering relevant evidence and documents. All persons so summoned shall be bound to attend, either in person or by an authorized agent. Every such inquiry as aforesaid shall be deemed to be a 'Judicial Proceeding' within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860.

Section 18 of the Central Excise Act, 1944 all arrests shall be carried out in accordance with the provisions of the Code of Criminal Procedure relating to arrest.

Note: provisions of arrest are not applicable to service tax matters.

vi. **Power to summon persons to give evidence and produce documents in inquiries under this Act:** As per Section 14 of the Central Excise Act, 1944,

(a) Any Central Excise Officer duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(b) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions for attendance under this section.

(c) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860.

7.3.2 Show-Cause Notice Can be Issued by the Following Authority Under Section 11A

Authority	Demand of Duty/Cenvat Credit (applicable for Central Excise and Service Tax matters)
Superintendents	Upto ₹ 1,00,000 (Excluding cases involving determination of rate of duty or valuation and cases involving extended period of limitation). *[C.B.E. & C. Circular No. 922/12/2010-CX., dated 18.5.2010]*
Assistant/Deputy Comm. of C. Ex	₹ 5,00,000 (Except the cases where Superintendents are empowered to adjudicate). *[C.B.E. & C. Circular No. 922/12/2010-CX., dated 18.5.2010]*
Joint Comm. of C. Ex.	₹ 5,00,000 to ₹ 50,00,000
Additional Comm. of C. Ex.	₹ 5,00,000 to ₹ 50,00,000 (Circular No. 957/18/2011-CX-3 25th October, 2011)
Commissioner of Central Excise	Without any limit.

It means to say that the Superintendent of Central Excise now can issue the show cause notice.

Now, Superintendents are eligible to issue Show Cause Notices (SCN) involving duty and or CENVAT credit upto ₹ 1,00,000. It means to say that Superintendents are competent to issue SCN were cases involving wrong availment of CENVAT credit upto a monetary limit of ₹ 1,00,000 or duty calculated wrongly. They also eligible to decide Show Cause Notice proposing only imposition of penalty.

However, they would not be eligible to decide (i.e. settle) cases which involve excisability of a product, classification, eligibility of exemption, valuation and cases involving suppression of facts, frauds etc. [C.B.E. & C. Circular No. 922/12/2010-CX, dated 18.5.2010]

A show cause notice issued before the finalization of provisional assessment is not valid in law. In the case of *CCE & C* v *I.T.C. Ltd.* (2006) the Supreme Court of India observed that the power to issue a show cause notice under section 11A of the Central Excise Act, 1944 can be invoked only when duty is not levied or not paid or short-levied or short-paid. Such a proceeding can be initiated within one year from the relevant date. As per section 11A(3)(ii)(b), in case of provisional assessment the relevant date is the date of adjustment of duty after final assessment.

7.3.3 Joint Commissioner or Additional Commissioner of Central Excise is Empowered to Issue Show Cause Notices Without Upper Monetary Limit in Cases Relating to

i. export under bond or

ii. export under rebate or

iii. loss of goods during transit to warehouse

7.3.4 Records Should be Returned Within 30 Days from the Date of Issue of Show Cause Notice (Rule 24A of Central Excise Rules, 2002)

A new rule has been inserted in the Central Excise Rules 2002 to provide that records seized by the department during an investigation but not relied upon in the Show Cause Notice should be returned to the party within 30 days of the issue of show cause notice or the completion of the period for issue of the show cause notice [Notification No. 17/2009-CE(NT), dated 7.7.2009].

7.3.5 Interest on Delayed Payment of Duty (Section 11AA of C.Ex. Act W.E.F. 1-4-2011 Similar Provision Under the Section 28AA(1) of the Customs Act.)

Interest on delay payment should not be less than 10% and nor more than 36%. The interest is payable from the next date after the due date in case of delay in payment. The interest rate is 18%p.a. w.e.f. 1-4-2011. (Prior to 1-4-2011 it was @13% p.a.).

No interest is shall be payable where, the duty payable arises subsequent to the issue of an order, instruction or direction by the Board under section 37B and such amount of duty is voluntarily paid in full, within 45 days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.

Recovery of duty from successor: if the assessee transfers his business or trade to third party, any duty is due from predecessor (namely assessee) can be recovered from successor in trade or business. It is clear that only goods, plant etc transferred by predecessor can be attached and not goods or machinery acquired by the successor.

In case of liquidation of the company, the assets are transferred or disposed of by Court order and hence, recovery of duty from successor does not arise.

If non-payment or short payment of duty is due to oversight or by mistake but not intentional as per section 11A(2B), in such case it provides that the assessee in default may, before the notice issued under section 11A(1) is served on such assessee, make payment of the unpaid duty and inform to the Central Excise Officer in writing about the payment of differential amount. Hence, the person who has paid the duty under Section 11A(2B) shall, in addition to the duty be liable to pay the interest under section 11AA. However, no penalty is payable. [CCE v SKF India Ltd. 2009 (239) ELT 385 (SC)]

Example 2: Mr. X, paid the duty for the month of June 2011 on 15th July 2011. Hence, the interest @18% p.a. is calculated on the amount of duty for 10 days of delay (i.e. due date is 5th July 2011).

Example 3: Mr. Y, paid the duty for the month of June 2011 on 5th July for ₹ 10,300. It was found by the department officer, the actual amount of duty is ₹ 15,450 for the June 2011. Hence, the interest @18% p.a. is calculated on the amount of duty which is short paid from the 1st day of the month following the month in which the duty ought to have been paid, till the date of payment. It means delay number of days count start from 6th July 2011 upto the date of actual payment.

Interest @18% p.a. is payable from 6th July 2011 upto the date of payment.

7.4 PENALTIES IN INDIRECT TAX LAWS

7.4.1 Penalty [Section 11AC of Central Excise Act, 1944/Section 114A of Customs Act, 1962/Section 78 of Finance Act, 1994]

Penalty attracted if any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful miss-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty.

7.4.2 Penalty Provisions W.E.F. 8-4-2011

Penalty equal to the duty evaded [section 11AC(1)(a)]

Where any duty of excise has not been levied or paid or short levied or short paid or erroneously refunded, by reason of fraud or collusion or any willful miss-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made there under with internet to evade payment of duty, the person who is liable to pay duty as determined under section 11A(10) shall also be liable to pay a penalty equal to the duty so determined. Provisions are same even in the case of Customs Act, 1962 under section 114A.

Penalty equal to fifty per cent, of the duty so evaded [section 11AC (1)(b)]

Where of any transaction available in the specified records, reveal that any duty of excise has not been levied or paid or short paid or erroneously refunded as referred to in section 11A(5) (i.e. details relating to the transactions are available in the specified records), the person who is liable to pay duty as determined under section 11A(10) shall also be liable to pay a penalty equal to 50% of the duty.

Penalty equal to twenty-five per cent, of the duty [section 11AC(1)(c)]

Any duty as determined by Central Excise Officer has been paid along with interest thereon under section 11AA (where duty earlier was not paid due to suppression or willful statement or fraud or collusion but transactions recorded in specified records) within 30 days of the date of communication of order of the Central Excise Officer, then the amount of penalty liable to be paid by such person shall be 25% of the duty.

If duty is paid but interest is not paid within 30 days, benefit of reduced penalty of 25% is not available.

The assessee can go for appeal after making payment of duty, interest and 25% of duty as penalty, if he likes.

Description	Relevant section	Time period to issue notice	Excise duty	Interest @18%p.a (w.e.f.1-4-2011)	Penalty (w.e.f. 8-4-2011)
Where duty earlier was not paid due to suppression or willful statement or fraud or collusion but transactions recorded in specified records.	Section 11AC(1)(c)	5 years from the relevant date	Liable to pay	Liable to pay	25% of the duty *(Duty and interest paid within 30 days of the date of communication of order).*

Modified penalty [section 11AC(1)(d)]

Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under section 11A(10), then the amount of penalty and interest payable shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined under section 11A(10) shall also be liable to pay such amount of penalty or interest so modified.

Modified penalty more than the amount already determined [section 11AC(2)]

If the duty determined as payable is increased by appellate authority, benefit of reduced penalty will be available if interest and 25% of consequential increase in penalty is paid within 30 days. The count of 30 days starts from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.

7.4.3 'Unjust Enrichment'

It means the assessee gaining double benefits under the law out of one transaction.

Example 4: X Ltd. manufactured and sold goods to its buyer by collecting excise duty. Subsequently X Ltd. claimed refund of excise duty for the same transaction. Hence, such refund of duty to the manufacturer will amount to excess and un-deserved profit. This is called as 'Unjust Enrichment'

Example 5: Y Ltd. collected the excise duty and not remitted to the department of Excise. This is known as 'Unjust Enrichment'

Example 6: Z Ltd. claimed the Cenvat credit of excise duty and duty drawback. This is called as 'Unjust Enrichment'.

Where refund is due (i.e. Unjust Enrichment) it should be transferred to a Consumer Welfare Fund instead of paying it to the assessee. Thereby, provisions in respect of 'Unjust Enrichment' were incorporated under Central Excise Act, 1944 which will be applicable even for Service Tax and Customs duty.

Refund of Duty and interest (Section 11B of Central Excise Act, 1944)

a. The assessee can claim the refund of duty if due to him along with interest (w.e.f. 10.05.2008).

b. The refund should be filed in form 'R' in duplicate in the office of Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.

c. Application for refund should be made within ONE year from the relevant date. Time limit not applicable in the following cases:—

   (i) duty paid by the assessee under protest

   (ii) in case of appeal, order is decided in favour of assessee then the time limit of one year not applicable.

d. The relevant date of one year count starts from the date of order.

Example 7: The assessee had paid excess amount of interest under section 11AA of Central Excise Act, 1944. Consequently, a refund claim for the said interest was filed by the assessee under section 11B. The Department objected to the refund claim on the ground that section 11B merely provides for refund of duty paid erroneously and not interest.

Answer:

As per the decision of the High Court, the payment of interest is automatic with payment of duty in case of delayed payment of duty and in case of delayed payment of refund of duty. Therefore payment of interest cannot be excluded from provisions of section 11B merely because it uses the expression of 'refund of duty' [*CCEx. v Northern Minerals Ltd*. 2007 (216) ELT 198 (P&H)]

Example 8: The assessee had never applied for revision of classification and once the classification is finalized and duty is paid accordingly, unless and until such classification is challenged and/or disturbed, it is not possible for the assessee to make refund claim based on some order passed by the Appellate authority in other case. Such order cannot universally be applied without going into facts of the case. Therefore, in the given case refund of duty is not allowed to the assessee- Wood Polymer Limited 2010 (H.C.).

7.4.4 Refund Under Section 11B of Central Excise Act, 1944/Section 27 of Customs Act, 1962/Section 83 of Finance Act, 1944 is applicable in the following Cases

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account maintained with the Commissioner of Central Excise

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Example 9: Greenview Technologies Ltd. has paid excess amount of interest under section 11AA of Central Excise Act, 1944. Consequently, a refund claim for the said interest was filed by Greenview Technologies Ltd. under section 11B. The Department raised the objection to the refund claim on the ground that section 11B merely provides for refund of duty paid erroneously and not the interest. Do you think that the objection raised by the Department is valid in law?

Answer:

The provision applicable for refund of duty extended to refund of interest with effect from 10th May 2008. Hence, application for refund of duty has to be made by the assessee within one year from the relevant date to the Assistant or Deputy Commissioner of Central Excise.

Therefore Greenview Technologies Ltd is eligible to claim refund of interest along with duty. Department view is not valid.

7.4.5 Documents Required for Filing the Refund Applications

i. Application form 'R'

ii. ARE-1 (original copy)

iii. Bill of lading or airway bill (duly attested)

iv. Shipping bill copy duly attested

v. Copy of invoice which shows clearly the value of goods and duty thereon.

7.4.6 Interest on Delayed Refunds (Section 11BB of Central Excise Act, 1944 Section 27A of Customs Act, 1962/Section 83 of Finance Act, 1994)

If the refund of duty along with interest has been granted to the assessee the same has to be paid within 3 months from the date of application made by him. If the amount is not paid within the time period of 3 months then interest @ 6% p.a. interest has to be paid.

While working out the time limit prescribed under section 11BB interest on delayed refunds, the period commencing from the date of application to the Settlement Commission under section 32E, to the date of receipt of the order under section 32L by the adjudicating authority, shall be excluded. Section 32L deals with sending back a case to proper officer if applicant has not co-operated with the Settlement Commission

7.4.7 Deposit of Duty Collected from the Buyer in Excess of Duty or Service Tax Assessed, into the Credit of Central Government. (Section 11D Of C. Ex Act, 1944 / Section 28B of Customs Act, 1962/Section 73A of Finance Act, 1994)

Interest on the amounts Collected in Excess of the Duty (Section 11DD of C. Ex. Act, 1944 / Section 73B of Finance Act, 1994)

Assessee is liable to make payment of interest on excess duty collected from any person or where a person has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty. Therefore, interest is payable @15% p.a. from the first day of the month succeeding the month in which the amount ought to have been paid till the date of payment of such amount Section 11DD of C.Ex. Act, 1944).

7.4.8 Provisional Attachment of Property (Section 11DDA of C.Ex. Act, 1944 Section 28BA of Customs Act, 1962 / Section 73C of Finance Act, 1994)

Omitted w.e.f. 1.3.2013.

7.4.9 Liability Under Act to be First Charge

w.e.f. 8-4-2011, the Finance Act, 2011 has inserted a new section 11E of the Central Excise Act, 1944 so as to create first charge on the property of the defaulter for recovery of excise duty dues from such defaulter subject to provisions of section 529A of the Companies Act, 1956 and the Recovery of Debts Due to Bank and the Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002. Similar provisions in Customs Act, 1962 under section 131BA.

Deposit of duty demanded or penalty levied (Section 35F of C.Ex. Act, 1944 / Section 129E of Customs Act, 1962/Section 83 of Finance Act, 1994)

The person aggrieved with the decision of the adjudicating authority wants to go for appeal against the order shall, pending the appeal, deposit the duty demanded or penalty levied. Sometimes, the appellate authority in its discretion dispense with such deposit (i.e. no deposit of duty is required in such case). Such waiver of deposit is with the interest of revenue. These provisions are same in case of Section 129E of the Customs Act, 1962.

Interest on delayed refund of amount deposited (Section 35FF of C.Ex. Act, 1944 / Section 129EE of Customs Act, 1962/Section 83 of Finance Act, 1994)

If the appeal is decided in the favour of assessee, the pre-deposit is refundable within three months from the date of communication of the order to adjudicating authority. Delay in refund will attract interest @ 6% as per section 11BB of C.Ex. Act, 1944.

Publishing the name of any person and particulars of any proceedings (Section 37E)

Section 37E introduced by the Taxation Laws (Amendment) Act, 2006 provides for publishing the name of any person and particulars of any proceedings in relation to such person, in public interest. The provisions are as follows:

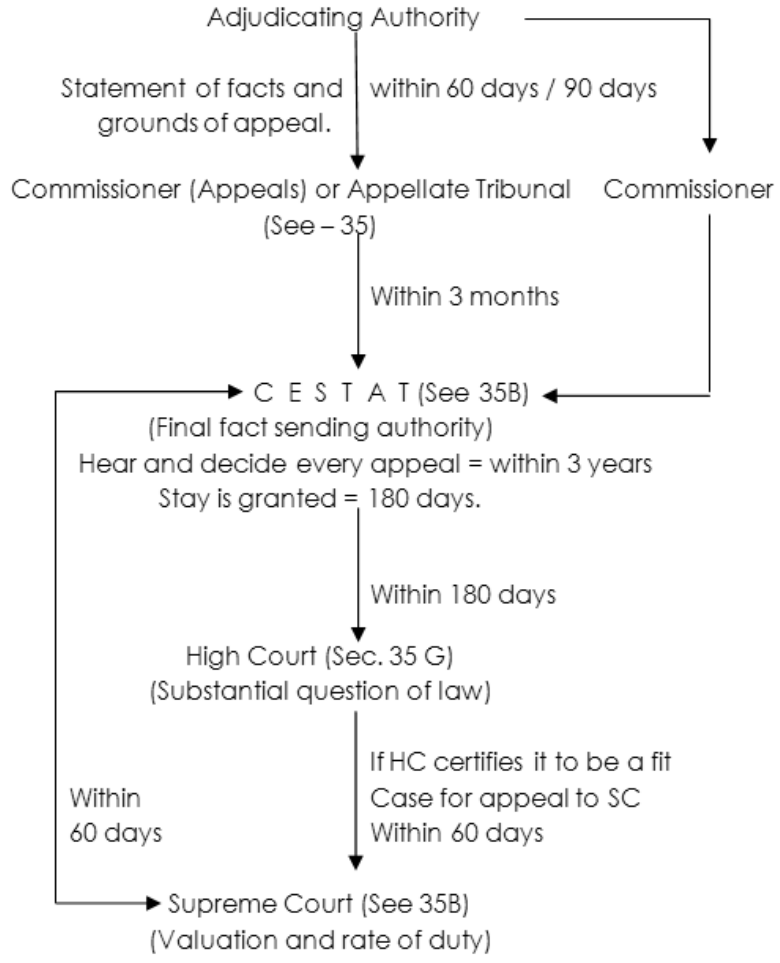
(i) The Central Government may publish name of any person and any other particulars relating to any proceedings or prosecutions in respect of such person if it is of the opinion that it is necessary or expedient in the public interest to do so. The Government can do the publication in such manner as it thinks fit.

(ii) The publication shall be made in relation to any penalty only after the time for presenting an appeal to the Commissioner (Appeals) or the Appellate Tribunal expires without an appeal being presented or the appeal, if presented, gets disposed off.

(iii) In the case of a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published if, in the opinion of the Central Government, circumstances of the case justify it.

7.5 APPEAL PROVISIONS UNDER CENTRAL EXCISE, SERVICE TAX AND CUSTOMS

Assessment Procedure



7.5.1 Section 35: Appeals to Commissioner (Appeals) —

(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parries or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

SECTION 35A: Procedure in appeal -

(1) The Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(3) 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

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless' the appellant is given notice within the time-limit specified in section 11A to show cause against the proposed order.

(4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(4A) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed.

(5) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Chief Commissioner of Central Excise and the Commissioner of Central Excise.

SECTION 35B: Appeals to the Appellate Tribunal -

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order —

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under section 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise under section 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, under section 35A, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, —

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse, or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998;

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where—

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order,

does not exceed fifty thousand rupees.

(1A) Every appeal against any order of the nature referred to in the first proviso to sub-section (1), which is pending immediately before the commencement of section 47 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of, or connected with, such appeal and which is so pending shall stand transferred on such commencement to the Central Government, and the Central Government shall deal with such appeal or matter under section 35EE as if such appeal or matter were an application or a matter arising out of an app" made to it under that section.

(IB) (i) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, by B* in the Official Gazette, constitute such Committee as may be necessary for the purposes of this Act.

(ii)Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Central Excise or two Commissioners Central Excise, as the case may be.

(2) The Committee of Commissioners of Central Excise may, if it is of opinion that an order passed by the Appellate Commissioner Excise under section 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) under section 35A, is not proper, direct any Central Excise Officer authorised by him in this behalf to appeal on its behalf to the Appellate Tribunal against such order.

Provided that where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Central Excise who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against such order.

Explanation — For the purposes of this sub-section, "jurisdictional Chief Commissioner;" means the Chief Commissioner of Central Excise having jurisdiction over the adjudicating authority in the matter.

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Central Excise, or, as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed

against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(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.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of, —

(a) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the relates is more than fifty lakh rupees, ten thousand rupees:

Provided that no fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to sub-section (4).

(7) Every application made before the Appellate Tribunal, —

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by a fee of five hundred rupees :

Provided that no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Central Excise under this sub-section.

7.5.2 Departmental Appeals not Allowed (W.E.F. 01-09-2011)

The Central Board of Excise and Customs (CBE&C) has issued instructions (vide F.No. 390/ Misc./ 163/2010- JC dated 17-8-2011) by fixing the following different minimum monetary limits for filing appeals to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and High Court:

i. Departmental appeals in the Tribunal (CESTAT) shall not be filed in cases where the duty involved is ₹5 lakh and below.

ii. Departmental appeals in the High Court should not be filed in cases where the duty involved is ₹10 lakhs and below.

iii. Departmental appeals in the Supreme Court should not be filed in cases where the duty involved is ₹25 lakhs and below

However, Departmental appeals in case of adverse judgments relating to the following disputes shall be allowed irrespective of the amount involved.

(a) Where the constitutional validity of the provisions of an Act or Rule is under challenge.

(b) Where notification/instruction/order or Circular has been held illegal or ultra virus.

Example 10: X Ltd. received a protective demand notice from the department on 1.7.2013 under Section 11A of the Central Excise Act, 1944 where the duty demanded is ₹ 5,00,000, in addition to interest of ₹ 10,000 and Penalty of ₹ 1,00,000. The assessee went for appeal and filed the case in the Commissioner (Appeals) on 1.8.2013. Subsequently on 31.10.2013, the Commissioner (Appeals) decided

the case in favour of the assessee. The Committee of Commissioners can delegate the authority to the department officers to go for further appeal on its behalf to the Appellate Tribunal (CESTAT) against such order.

Answer:

As per the Central Board of Excise and Customs (CBE&C) instructions (vide F.No. 390/Misc./163/ 2010-JC dated 17-8-2011), in a case involving duty of ₹ 5lakh and below, no appeal shall henceforth (i.e. w.e.f. 1-9-2011) be filed in the Tribunal (CESTAT).

Hence, in the given case, no appeal shall henceforth be filed in the Tribunal as the duty involved is within the monetary limit of ₹ 5 lakh.

SECTION 35C: Orders of Appellate Tribunal -

(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(1A) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) 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 under sub-section (1) 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:

Provided that an amendment which has the effect of enhancing an assessment or reducing & refund or otherwise increasing the liability of the other party, shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three year from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on expiry of that period, stand vacated.

Provided that in case where delay in disposing of the appeal is not attributable to the appellant, the tribunal may extend the period of stay by a period not exceeding 185 days subject to the condition that if the appeal is not disposed of within the total period of 365 days from the date of order, the stay shall stand vacated.

(3) The Appellate Tribunal shall send a copy of every order passed under this section to the Commissioner of Central Excise and the other party to the appeal.

(4) Save as provided in the National Tax Tribunal Act, 2005, orders passed by the Appellate Tribunal on appeal shall be final.

Example 11: The CESTAT passed its order on 01.01.2009. The assessee filed the application for rectification of a mistake apparent from the record in the said order on 23.05.2009. However, the Tribunal could

not dispose of the application till 30.06.2009. Thereafter, the Tribunal rejected the application on the ground that the six months period had lapsed. Do you think that the stand taken by the Tribunal is valid in law?

Answer:

The assessee has filed the application for rectification of mistake apparent from the record within six month from the date of passing the original order. Hence, it is apparent that Tribunal is not justified in rejecting the application on the ground that the six months period has lapsed as the application had been filed before the expiry of SIX months. *Sree Ayyangar Spg & Wvg Mills Ltd.* v *CIT* 2008 (229) ELT 164 (SC).

Example 12: The High Court held that in a case of confiscation of goods because of their under valuation, Tribunal could not cancel the confiscation order for want of evidence from the foreign supplier. *CCus.* v *Jaya Singh Vijaya Jhaveri* 2010 (251) ELT 38 (Ker).

An order passed by CESTAT based on consent and the matter was remanded at the instance of Revenue, then Revenue could not pursue an appeal against such order in a higher forum.

Example 13: The Tribunal had remanded the matter in order to re-compute the duty payable by the assessee on the basis of representation of Revenue. Thereafter, the Revenue filed an appeal against the said order. The assessee contended that the appeal filed by the Revenue was not maintainable since the order had been passed by the Tribunal on the submission of the representative of the Revenue. Further, since it is a consent order, no appeal would lie. Hence, the High Court held that an appeal against the consent order cannot be filed by the Revenue (*CCus* v *Trilux Electronics* 2010 (253) ELT 367 (Kar).

SECTION 35D: Procedure of Appellate Tribunal -

(1) The provisions of subsections (1), (2), (5) and (6) of section 129C of the Customs Act, 1962(52 of 1962), shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962.

(2) Omitted

(3) The President or any other member of the Appellate Tribunal authorised in this behalf by the President may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member where—

(a) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(b) the amount of fine or penalty involved,

does not exceed ten lakh rupees.

SECTION 35E: Powers of Board or Commissioner of Central Excise to pass certain orders —

(1) The Committee of Chief Commissioners of Central Excise may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Central Excise in its order.

Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which,

after considering the facts of the decision or order, if is of the opinion that the decision or order passed by the Commissioner of Central Excise is not legal or proper, may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.

(2) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(4) Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or the authorised officer 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 sub-section (4) of section 35B shall, so far as may be, apply to such application.

SECTION 35EE: Revision by Central Government—

(1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 35B, annul or modify such order.

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

Explanation.— For the purposes of this sub-section, "order passed under section 35A" includes an order passed under that section before the commencement of section 47 of the Finance Act, 1984 against which an appeal has not been preferred before such commencement and could have been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

(IA) The Commissioner of Central Excise may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 35A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

(2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3) An application under sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of,—

(a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise Officer in the case to which the application relates is one lakh rupees or less;

(b) one thousand rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise Officer in the case to which the application relates is more than one lakh rupees:

Provided that no such fee shall be payable in the case of an application referred to in sub-section (IA).

(4) The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

(5) No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section,—

(a) in any case in which an order passed under section 35A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value; and

(b) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

(6) Where the Central Government is of opinion that any duty of excise has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in section 11 A.

SECTION 35F: Deposit, pending appeal, of duty demanded or penalty levied.—Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

Explanation.— For the purposes of this section "duty demanded" shall include, —

(i) amount determined under section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 57CC of Central Excise Rules, 1944;

(iv) amount payable under rule 6 of Cenvat Credit Rules, 2001 or Cenvat Credit Rules, 2002 or Cenvat Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder.

SECTION 35FF: Interest on delayed refund of amount deposited under the proviso to section 35F. — Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section

11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

SECTION 35G: Appeal to High Court -

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party; in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which-

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in subsection (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two judges of the High Court, and shall be decided in accordance with the opinion of such judges or of the majority, if any, of such judges.

(8) Where there is no such majority, the judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other judges of the High Court and such point shall be decided according to the opinion of the majority of the judges who have heard the case including those who have first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

SECTION 35-I: Power of High Court or Supreme Court to require statement to be amended — If the High Court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Appellate Tribunal for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

SECTION 35J: Case before High Court to be heard by not less than two judges —

(1) When any case has been referred to the High Court under section 35G or section 35H, it shall be heard by a Bench of not less than two judges of the High Court and shall be decided in accordance with the opinion of such judges or of the majority, if any, of such judges.

(2) Where there is no such majority, the judges shall state the point of law upon which they differ and the case shall then be heard upon that point only by one or more of the other judges of the High Court, and such point shall be decided according to the opinion of majority of the judges who have heard the case including those who first heard it.

SECTION 35K: Decision of High Court or Supreme Court on the case stated —

(1) The High Court or the Supreme Court hearing any such case shall decide the question of law raised therein and shall deliver its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with such judgment.

(1A) Where the High Court delivers a judgment in an appeal filed before it under section 35G, effect shall be given to the order passed on the appeal by the concerned Central Excise Officer on the basis of a certified copy of the judgment;

(2) The costs of any reference to the High Court or an appeal to the High Court or the Supreme Court, as the case may be, which shall hot include the fee for making the reference, shall be in the discretion of the Court.

SECTION 35L: Appeal to the Supreme Court - An appeal shall lie to the Supreme Court from—

(a) any judgment of the High Court delivered-

(i) in an appeal made under section 35G; or

(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003; or

(iii) on a reference made under section 35H,

in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment the High Court certifies to be a fit one for appeal to the Supreme Court.

(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

SECTION 35M: Hearing before Supreme Court -

(1) The provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 35L as they apply in the case of appeals from decrees of a High Court:

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (1) of section 35K or section 35N.

(2) The costs of the appeal shall be in the discretion of the Supreme Court.

(3) Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 35K in the case of a judgment of the High Court.

SECTION 35N: Sums due to be paid notwithstanding reference, etc — Notwithstanding that a reference had been made to the High Court or the Supreme Court or an appeal has been preferred to the Supreme Court, under this Act before the commencement of the National Tax tribunal Act, 2005, sums due to the Government as a result of an order passed under sub-section (1) of section 35C shall be payable in accordance with the order so passed.

SECTION 35-0: Exclusion of time taken for copy — In computing the period of limitation prescribed for an appeal or application under this Chapter, the day on which the order complained of was served, and if the party preferring the appeal or making the application was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded.

SECTION 35Q: Appearance by authorised representative —

(1) Any person who is entitled or required to appear before a Central Excise Officer or the Appellate Tribunal in connection with any proceedings under this Act, otherwise than when required under this Act to appear personally for examination on oath or affirmation, may, subject to the other provisions of this section, appear by an authorised representative.

(2) For the purposes of this section, "authorised representative" means a person authorised by the person referred to in sub-section (1) to appear on his behalf, being—

(a) his relative or regular employee; or

(b) any legal practitioner who is entitled to practice in any civil court in India; or

(c) any person who has acquired such qualifications as the Central Government may prescribe for this purpose.

(3) Notwithstanding anything contained in this section, no person who was a member of the Indian Customs and Central Excise Service -Group A and has retired or resigned from such Service after having served for not less than three years in any capacity in that Service, shall be entitled to appear as an authorised representative in any proceedings before a Central Excise Officer for a period of two years from the date of his retirement or resignation, as the case may be.

(4) No person,—

(c) who has been dismissed or removed from Government service; or

(d) who is convicted of an offence connected with any proceeding under this Act, the Customs Act, 1962 or the Gold (Control) Act, 1968; or

(e) who has become an insolvent, shall be qualified to represent any person under sub-section (1),

for all times in the case of a person referred to in clause (a), and for such time as the Commissioner of Central Excise or the competent authority under the Customs Act, 1962 or the Gold (Control) Act, 1968, as the case may be, may, by order, determine in the case of a person referred to in clause (b), and for the period during which the insolvency continues in the case of a person referred to in clause (c).

(5) If any person, —

(a) who is a legal practitioner, is found guilty of misconduct in his professional capacity by any authority entitled to institute proceedings against him, an order passed by that authority shall have effect in relation to his right to appear before a Central Excise Officer or the Appellate Tribunal as it has in relation to his right to practice as a legal practitioner;

(b) who is not a legal practitioner, is found guilty of misconduct in connection with any proceedings under this Act by the prescribed authority, the prescribed authority may direct that he shall thenceforth be disqualified to represent any person under sub-section (1).

(6) Any order or direction under clause (b) of sub-section (4) or clause (b) of sub-section (5) shall be subject to the following conditions, namely: —

(a) no such order or direction shall be made in respect of any person unless he has been given a reasonable opportunity of being heard;

(b) any person against whom any such order or direction is made may, within one month of the making of the order or direction, appeal to the Board to have the order or direction cancelled; and

(c) no such order or direction shall take effect until the expiration of one month from the making thereof, or, where an appeal has been preferred, until the disposal of the appeal.

SECTION 35R: Appeal not to be filed in certain cases —

(1) The Central Board of Excise and Customs may, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of this Chapter.

(2) Where, in pursuance of the orders or instructions or directions, issued under sub-section (1), the Central Excise Officer has not filed an appeal, application, revision or reference against any decision or order passed under the provisions of this Act, it shall not preclude such Central Excise Officer from filing appeal, application, revision or reference in any other case involving the same or similar issues or questions of law.

(3) Notwithstanding the fact that no appeal, application, revision or reference has been filed by the Central Excise Officer pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal, application, revision or reference shall contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

(4) The Appellate Tribunal or court hearing such appeal, application, revision or reference shall have regard to the circumstances under which appeal, application, revision or reference was not filed by the Central Excise Officer in pursuance of the orders or instructions or directions issued under sub-section (1).

(5) Every order or instruction or direction issued by the Central Board of Excise and Customs on or after the 20th day of October, 2010, but before the date on which the Finance Bill, 2011 receives the assent of the President, fixing monetary limits for filing of appeal, application, revision or reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly.

SECTION 36: Definitions - In this Chapter - **(b)** "High Court" means, -

(i) In relation to any State, the High Court for that State;

(ii) In relation to a Union Territory to which the jurisdiction of the High Court of a State has been extended by law, that High Court;

(iii) In relation to the Union Territories of Dadra and Nagar Haven' and Daman and Diu the High Court at Bombay;

(iv) In relation to any other Union Territory, the highest court of civil appeal for that territory other than the Supreme Court of India.

(c) "President" means the President of the Appellate Tribunal.

SECTION 36A: Presumption as to documents in certain cases — Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, —

(a) unless the contrary is proved by such person, presume —

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

SECTION 37C: Service of decisions, orders, summons, etc. —

(1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, —

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgement due, to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1).

SECTION 38A: Effect of amendments, etc., of rules, notifications or orders — Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced

and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

SECTION 84: Appeals to Commissioner of Central Excise (Appeals) —

(1) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (3) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.

Explanation. — For the removal of doubts, it is hereby declared that any order passed by an adjudicating officer subordinate to the Commissioner of Central Excise immediately before the commencement of clause (C) of section 113 of the Finance (No. 2) Act, 2009, shall continue to be dealt with by the Commissioner of Central Excise as if this section had not been substituted.

SECTION 85: Appeals to the Commissioner of Central Excise (Appeals) —

(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter made before the date on which the Finance Bill, 2012 receives the assent of the President:

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944.

SECTION 86: Appeals to Appellate Tribunal -

(1) Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A, or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order.

(1A) (i) The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Chapter.

(ii) Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

(2) The Committee of Chief Commissioners of Central Excise may, if it objects to any order passed by the 'Commissioner of Central Excise under section 73 or section 83A, direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion against the order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise is not legal or proper, direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

(2A) The Committee of Commissioners may, if it objects to any order passed by the Commissioner of Central Excise (Appeals) under section 85, direct any Central Excise Officer to appeal on its behalf to the Appellate Tribunal against the order.

Provided that where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.

Explanation.— For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter.

(3) Every appeal under sub-section (2) or sub-section (2A) shall be filed within four months from the date on which the order sought to be appealed against is received by the Committee of Chief Commissioners or, as the case may be, the Committee of Commissioners.'

(4) The Commissioner of Central Excise or any Central Excise Officer subordinate to him or the assessee, as the case may be, on receipt of a notice that an appeal against the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) or sub-section (2A) by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub section (3).

(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.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of service tax and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of, —

(a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees :

Provided that no fee shall be payable in the case of an appeal referred to in sub-section (2) or sub-section (2A) or a memorandum of cross-objections referred to in sub-section (4).

(6A) Every application made before the Appellate Tribunal, —

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by a fee of five hundred rupees :

Provided that no such fee shall be payable in the case of an application filed by the Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be under this sub-section.

(7) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the Central Excise Act 1944.

7.6 SETTLEMENT COMMISSION

The settlement Commission is constituted under section 32 of the Central Excise Act,1944 in order to speedy disposal and easy settlement of tax disputes of Customs and Central Excise involving high revenue stake and thereby save time and energy of both the applicant and the department.

The settlement Commission has the power to grant immunity from prosecution and also to reduce or waive the penalty or fine, if the applicant has made a true and full disclosure of his duty liability. It is similar to 'out of Court' settlement of dues to avoid lengthy and costly litigation.

Constitution : The Settlement Commission consists of a Chairman and as many Vice-Chairmen and Members as the Central Government may think fit and functions within the Department of Central' Government dealing with Customs and Central Excise matters. The Chairman, Vice-Chairmen and other members of the Settlement Commission shall be appointed from amongst persons of integrity and outstanding ability having special knowledge of and experience in administration of Customs and Central Excise Laws. The Commission has its Principal Bench at New Delhi. At any stage of the hearing of any such case or matter, the Chairman may, if he thinks that the case or matter is of such a nature that it ought to be heard by a Bench consisting of 3 Members, constitute such Bench and if Vice-Chairman is not one of the Members, the senior among the Members shall act as the presiding officer of such Bench.

SECTION 31: Definitions — Unless the context otherwise requires,—

(a) "assessee" means any person who is liable for payment of excise duty assessed under this Act or any other Act and includes any producer or manufacturer of excisable goods or a registered person under the rules made under this Act, of a private warehouse in which excisable goods are stored;

(b) "Bench" means a Bench of the Settlement Commission;

(c) "case" means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made.

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;

(d) "Chairman" means the Chairman of the Settlement Commission;

(e) "Commissioner (Investigation)" means an officer of the Customs or a Central Excise Officer appointed as such Commissioner to conduct enquiry or investigation for the purposes of this Chapter;

(f) "Member" means a Member of the Settlement Commission and includes the Chairman and the Vice-Chairman;

(g) "Settlement Commission" means the Customs and Central Excise Settlement Commission constituted under section 32; and

(h) "Vice-Chairman" means a Vice-Chairman of the Settlement Commission.

7.6.1 Advantages of Settlement Commission

(i) Quick settlement of disputes to avoid prolonged litigation

(ii) Settlement commission provides chance to turn a new leaf.

(iii) Settlement commission can grant waiver/reduction of penalty, fine or interest.

(iv) Settlement commission can grant immunity from prosecution to an assessee, its directors and partners. (Immunity cannot be granted in respect of prosecution under Indian Penal Code or any other Central law w.e.f. 1-6-2007).

(v) Issues can be resolved within an outer limit of 9 months to 1 year.

7.6.2 Section 31(C) [Corresponding Customs Section 127A(B)] Defines "Case" to mean

- any proceeding under this Act or any other Act
- for the levy, assessment and collection of excise duty/ customs duty,
- ***pending before an adjudicating authority*** on the date on which an application for settlement is made.

Remanded proceedings- Not pending proceedings: However, when any proceeding is referred back in any appeal/revision by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication/ decision, then such proceeding shall not be deemed to be a 'Proceeding Pending' for the purposes of the above. Therefore, no settlement application can be filed in respect of cases remanded for fresh adjudication.

Pending appeals not 'case': Since Commissioner (Appeals) is not 'Adjudicating Authority', hence, proceedings pending before him will not be regarded as 'case' for the purposes of Settlement.

SECTION 32: Customs and Central Excise Settlement Commission.-

(1) The Central Government shall, by notification in the Official Gazette, constitute a Commission to be called the Customs and Central Excise Settlement Commission for the settlement of cases under this Chapter and Chapter XIVA of the Customs Act, 1962 (52 of 1962).

(2) The Settlement Commission shall consist of a Chairman and as many Vice-Chairmen and other Members as the Central Government thinks fit and shall function within the Department of the Central Government dealing with customs and central excise matters.

(3) The Chairman, Vice-Chairman and other Members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, administration of customs and central excise laws:

Provided that, where a member of the Board is appointed as the Chairman, Vice-Chairman or as a Member of the Settlement Commission, he shall cease to be a member of the said Board.

SECTION 32A: Jurisdiction and powers of Settlement Commission —

(1) Subject to the other provisions of this Chapter, the jurisdiction, powers and authority of the Settlement Commission may be exercised by Benches thereof.

(2) Subject to the other provisions of this section, a Bench shall be presided over by the Chairman or a Vice-Chairman and shall consist of two other Members.

(3) The Bench for which the Chairman is the presiding officer shall be the principal Bench and other Benches shall be known as additional Benches.

(4) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Chairman may authorise the Vice-Chairman or other Member appointed to one Bench to discharge also the functions of the Vice-Chairman or, as the case may be, other Member of another Bench.

(5) The principal Bench shall sit at Delhi and the Central Government shall, by notification in the Official Gazette, establish additional Benches at such places as it considers necessary.

(6) Notwithstanding anything contained in the foregoing provisions of this section, and subject to any rules that may be made in this behalf, when one of the persons constituting a Bench (whether such person be the presiding officer or other Member of the Bench) is unable to discharge his functions owing to absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the presiding officer or in the office of one or the other members of the Bench, the remaining Members may function as the Bench and if the presiding officer of the Bench is not one of the remaining Members, the senior among the remaining Members shall act as the presiding officer of the Bench:

Provided that if at any stage of the hearing of any such case or matter, it appears to the presiding officer that the case or matter is of such a nature that it ought to be heard of by a Bench consisting of three Members, the case or matter may be referred by the presiding officer of such bench to the Chairman for transfer to such Bench as the Chairman may deem fit.

Provided further that at any stage of the hearing of any such case or matter, referred to in the first proviso, the Chairman may, if he thinks that the case or matter is of such a nature that it ought to be heard by a Bench consisting of three Members, constitute such Bench and if Vice-Chairman is not one of the Members, the senior among the Members shall act as the presiding officer of such Bench.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the Chairman may, for the disposal of any particular case, constitute a special Bench consisting of more than three Members.

(8) Subject to the other provisions of this Chapter, the special Bench shall sit at a place to be fixed by the Chairman.

SECTION 32B: Vice-Chairman to act as Chairman or to discharge his functions in certain circumstances—

(1) In the event of the occurrence of any vacancy in the office of the Chairman by reason of his death, resignation or otherwise, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the Central Government may, by notification in the Official Gazette, authorise in this behalf, shall act as the Chairman until the date on which a new Chairman, appointed in accordance with the provisions of this Chapter to fill such vacancy, enters upon his office.

(2) When the Chairman is unable to discharge his functions owing to absence, illness or any other cause, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the Central Government may, by notification in the Official Gazette, authorise in this behalf, shall discharge the functions of the Chairman until the date on which the Chairman resumes his duties.

SECTION 32C: Power of Chairman to transfer cases from one Bench to another.—On the application of the assessee or the Chief Commissioner or Commissioner of Central Excise and after giving notice to them, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairman may transfer any case pending before one Bench, for disposal, to another Bench.

7.6.3 Section 32E (Corresponding Customs Section 127B) are as Follows

(I) Conditions to be fulfilled before a settlement application is filed to Settlement Commission:

The following conditions must be fulfilled before a settlement application can be filed-

(a) In case of Central Excise, the applicant must be an assessee. "Assessee" means any person who is liable for payment of excise duty assessed under this Act or any other Act and includes any producer or manufacturer of excisable goods or a registered person under the rules made under this Act, of a private warehouse in which excisable goods are stored.

In case of Customs, the applicant may be an importer or exporter or any other person;

(b) the case must have not been adjudicated i.e. settlement application can be made only before adjudication;

(c) the application should contain-

(i) a full and true disclosure of his duty liability which has not been disclosed before the Central Excise/ proper Officer having jurisdiction,

(ii) the manner in which such liability has been derived,

(iii) the additional amount of excise/customs duty accepted to be payable by him, and

(iv) such other particulars as may be prescribed,

(v) including the particulars of such excisable/ dutiable goods in respect of which he admits short levy on account of -

- misclassification,
- under-valuation,
- inapplicability of exemption notification or
- CENVAT credit or
- otherwise (Amendment by the Finance Act, 2010 w.e.f 8-5-2010)

[Before amendment it was provided that the following shall not be eligible for settlement:

(i) the goods in respect of which no proper record has been maintained by the assessee in his daily stock register (in case of central excise); or

(ii) the goods not included in the entry made under this Act (in case of customs)].

(d) the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner; (in case of customs, the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be);

(e) a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant; (in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer applicable to Custom);

(f) the additional amount of duty accepted by the applicant in his application exceeds3 lakh;

(g) the applicant has paid the additional amount of excise duty accepted by him along with interest under section 11AB (or Customs section 28AB);

(h) if any excisable/ dutiable goods, books of accounts or other documents or any sale proceeds of goods have been seized, application for settlement has been made only after 180 days from the date of seizure.

(II) Cases for which no settlement application can be made : The Settlement Commission cannot entertain the following cases -

(a) cases pending with the Appellate Tribunal or any Court;

(b) cases involving the interpretation of the classification goods under the Customs/Excise Tariff;

Cases involving a purely classification issue cannot be taken up by the Settlement Commission. However, the Settlement Commission can settle a complicated case having several issues including one of classification - Oriflame India Pvt. Ltd. [2000] 122 ELT 601 (Sett. Comm.).

(c) no application for settlement can be made in relation to offence of goods notified under Section 123 of the Customs Act. 1962 or the goods covered under Narcotic Drugs and Psychotropic Substances Act, 1985 *(applicable only for customs)*.

(III) Fees for filing an application : An application to Settlement Commission shall be made in prescribed form with a fee of ₹ 1,000 and cannot withdrawn by the applicant.

7.6.4 SECTION 32F (corresponding Customs section 127C) provides for the following procedure to be followed by the Settlement Commission for disposal of a case -

(i) Acceptance or Rejection of Application: On receipt of an application for settlement, the Settlement Commission shall, within 7 days from the date of receipt of the application, issue a notice to the applicant to explain in writing as to why the application made by him should be allowed to be proceeded with. After taking into consideration the explanation provided by the applicant, the Settlement Commission, shall, within a period of 14 days from the date of the notice, pass an order either allowing the application to be proceeded with, or rejecting the application. In case of rejection, the proceedings before the Settlement Commission shall abate on the date of rejection.

However, where no notice has been issued or no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

A copy of every such order shall be sent to applicant and to the Commissioner having jurisdiction.

(ii) Calling of Report from Commissioner when Application Allowed: Where an application is allowed or deemed to have been allowed to be proceeded with, the Settlement Commission shall, within seven days from the date of order allowing the application, call for a report along with relevant records from the Commissioner having jurisdiction and the Commissioner shall furnish the report within 30 days of receipt of communication from the Settlement Commission.

However, if the Commissioner does not furnish the report within 30 days as aforesaid, the Settlement Commission shall proceed further in the matter without the report of the Commissioner.

(iii) Further investigation by Commissioner (Investigation) : Where a report of the Commissioner has been furnished within 30 days as aforesaid, the Settlement Commission may, after examination of such report, if it is of the opinion that any further enquiry or investigation in the matter is necessary, direct the Commissioner (Investigation) within 15 days of the receipt of the report, to make or cause to be made such further enquiry or investigation and furnish a report within a period of 90 days of the receipt of the communication from the Settlement Commission, on the matters covered by the application and any other matter relating to the case.

However, if the Commissioner (Investigation) does not furnish the report within the aforesaid period, the Settlement Commission shall proceed to pass an order without such report.

(iv) Passing of Final Order: After examination of the records and the report of the Commissioner of Central Excise/Customs including the report of the Commissioner (Investigation) if any, and after giving an opportunity of being heard both to the applicant and to the Commissioner and examining such other evidence as may be placed before it, the Settlement Commission shall pass final order as it thinks fit in accordance with the provisions of the Act.

The order shall be passed only on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner or Commissioner (Investigation).

(v) Time limit for Passing of Final Order: The final order on settlement shall be passed -

- within 9 months from the last day of the month in which the application was made,

- failing which

(a) the settlement proceedings shall abate, and

(b) the adjudicating authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application for settlement had been made.

Extension of time by 3 months : The aforesaid period of 9 months may, for reasons to be recorded in writing, be extended by the Settlement Commission for a further period not exceeding 3 months.

(vi) Terms of Final Order: Such an order shall provide for the terms of settlement including any demand by way of duty, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective. In case of rejection, such order shall contain reasons thereof. Further, the amount of settlement ordered by the Settlement Commission shall not be less than the duty liability admitted by the applicant in the settlement application.

(vii) Recovery : Where any duty, interest, fine and penalty payable in pursuance of a final order is not paid by the assessee within 30 days of receipt of a copy of the order by him, the amount which remains unpaid, shall be recovered along with interest due thereon, as the sums due to the Central Government by the Central Excise Officer having jurisdiction over the assessee in accordance with the provisions of section11.

(viii) Consequences of Settlement obtained by Fraud: The orders passed by the Settlement Commission are conclusive and can only be reopened by the Settlement Commission. Any such order obtained by way of fraud or misrepresentation of facts shall be void. In case the Settlement has become void because it has been obtained by fraud and misrepresentation of facts, then the matters in respect of settlement shall be deemed to have been revived from the stage when the application was made to the Settlement Commission and the Central Excise/proper officer

shall decide such case within a period of 2 years from the date of receipt of communication that the settlement has become void.

7.6.5 SECTION 32D

The decision of Settlement Commission will be according to the opinion of the majority. However, in case the members are equally divided on any point(s), then-

(a) the point(s) of difference shall be referred to Chairman or one or more additional members, and

(b) such point or points will be decided according to the opinion of the majority of the total members (i.e. additional members and the members who first heard it).

7.6.6 Power Of The Settlement Commission

(i) Power to order Provisional Attachment to Protect Revenue [Section 32G (Customs section 127D)]: The Settlement Commission has the power to order provisional attachment of any property belonging to the applicant in the prescribed manner. Such order can be made by the Settlement Commission during the pendency of any proceedings before it where it is of the opinion that such attachment is necessary for the purpose of protecting the interests of the revenue.

Cessation of attachment : Any such provisional attachment shall cease to have effect from the date the sums due to the Central Government in respect of such attachment are discharged by the applicant and the evidence in respect of such discharge is submitted to the Settlement Commission.

(ii) Power to Grant Immunity from Prosecution or Imposition of Penalty or Fine (Section 32K (Customs section 127H)] : If the Settlement Commission is satisfied that applicant has cooperated with it in the proceedings before it and has made a full and true disclosure of his duty liability, then the Commission may grant to an applicant immunity from-

(a) prosecution for any offence under this Act, and

(b) also wholly or partly from imposition of any penalty and fine under this Act.

Exception : The Settlement Commission cannot grant any immunity if the proceedings for the prosecution of the applicant were instituted before the date of receipt of the settlement application.

Immunity Withdrawn: The immunity so granted will be withdrawn in any of the following cases -

(a) If the applicant fails to pay any sum specified in the settlement order within the time specified in such order or fails to comply with any other condition subject to which the immunity was granted; or

(b) If the Settlement Commission is satisfied that the applicant had in the course of the proceedings concealed any particulars material to the settlement or had given false evidence.

(iii) Power to send case back to Central Excise/Customs Officer [Section 32L (Customs section 1271)]: If the applicant does not cooperate with the Settlement Commission in the proceeding before it, the Settlement Commission may send the case back to the Central Excise/Customs officer for further action as per law. If the application is sent back, then, all submissions made and all the information giver by the applicant before the Settlement Commission can be used by the Excise/ Customs officer while deciding the case.

In that case, the period commencing from the date of the application to the Settlement Commission and ending with the date of receipt by the Central Excise/Customs officer of the order sending case back to him, shall be excluded for the purposes of time limit u/s 11A and interest u/s 11BB

(iv) Other Powers: The Settlement Commission shall have the following other powers -

(a) all the powers which are vested in a Central Excise/Customs Officer under this. Act or the rules made there under;

(b) power to regulate its own procedure;

(c) exclusive jurisdiction over the case where application is allowed to be proceeded with and until the settlement order has been passed.

SECTION 32H: Power of Settlement Commission to reopen completed proceedings — If the Settlement Commission is of the opinion (the reasons for such opinion to be recorded by it in writing) that, for the proper disposal of the case pending before it, it is necessary or expedient to reopen any proceeding connected with the case but which has been completed under this Act before application for settlement under section 32E was made, it may, with the concurrence of the applicant, reopen such proceeding and pass such order thereon as it thinks fit, as if the case in relation to which the application for settlement had been made by the applicant under that section covered such proceeding also:

Provided that no proceeding shall be reopened by the Settlement Commission under this section after the expiry of five years from the date of application.

Provided further that no proceeding shall be reopened by the Settlement Commission under this section in a case where an application under section 32E is made on or after the 1st day of June, 2007.

SECTION 32-I: Powers and procedure of Settlement Commission —

(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in a Central Excise Officer under this Act or the rules made thereunder.

(2) Where an application made under section 32E has been allowed to be proceeded with under section 32F, the Settlement Commission shall, until an order is passed under sub-section (5) of section 32F, have, subject to the provisions of sub-section (4) of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case.

(3) In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

(4) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

SECTION 32J: Inspection, etc., of reports — No person shall be entitled to inspect, or obtain copies of, any report made by any Central Excise Officer to the Settlement Commission; but the Settlement Commission may, in its discretion furnish copies thereof to any such person on an application made to it in this behalf and on payment of the prescribed fee:

Provided that, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment of the prescribed fee by such person, furnish him with a certified copy of any such report or part thereof relevant for the purpose.

SECTION 32M: **Order of settlement to be conclusive —** Every order of settlement passed under sub-section (5) of section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

SECTION 32N: **Recovery of sums due under order of settlement —** Any sum specified in an order of settlement passed under sub-section (5) of section 32F may, subject to such conditions if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered as sums due to the Central Government in accordance with the provisions under section 11 by the Central Excise Officer having jurisdiction over the person who made the application for settlement under section 32E.

7.6.7 Bar on subsequent application for settlement in certain cases [Section 32-0 (Customs Section 127L), Amendment by the Finance Act, 2010 w.e.f. 8-5-2010]

(i) an order of settlement passed u/ s 32F(5) (Customs section 127C(5) provides for the imposition of a penalty on the person who made the application for settlement, on the ground of concealment of particulars of his duty liability; or

(ii) after the passing of an order of settlement in relation to a case, as aforesaid, 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 (Customs Section 1271), then, applicant shall not be entitled to apply for settlement in relation to any other matter.

[Effect of amendment: General Bar on filing second application for settlement has been removed. Thus, an application for settlement can be filed as many times, as the aforesaid conditions stand non-violated.]

7.6.8 Adjudicating Authority Can Track Information Submitted in the Office of Settlement Commission

Cases which are sent back to the adjudication authority, all submissions or disclosures and information furnished by applicant before Settlement Commission can be made use of by the adjudicating authority while finalizing demand of duties, interest and imposing penalties.

Bar on subsequent application for settlement in certain cases (*Section 32*(*O*):

The assessee shall not be entitled to apply for settlement (i.e. second time) under section 32E in relation to any other matter if

(i) an order of settlement passed for 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 passing of an order of settlement in relation to a case, such person is convicted of any duty 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.

7.6.9 Entire Amount of Duty Should be Disclosed Under Section 127B of The Customs Act

Application u/s 127B is maintainable only if the duty liability is disclosed. The disclosure contemplated is in the nature of voluntary disclosure of concealed additional customs duty. Hence, 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 [*Sanghvi Reconditioners Pvt. Ltd.* v *UOI* 2010 (251) ELT 3 (SC)]

7.6.10 Recovery of Duty Drawback Erroneously Paid by The Revenue

As per section 127A of the Customs Act, 1962, the Settlement Commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the revenue as the 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.

The contention that recovery of duty drawback does not involve levy, assessment and collection of customs duty as envisaged under section 127A(b) was not accepted .

Therefore, the Settlement Commission had jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue [*UOI* v *Customs & Excise Settlement Commission* 2010].

SECTION 32P: Proceedings before Settlement Commission to be judicial proceedings — Any proceedings under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of I860).

SECTION 96A: Definitions — In this Chapter, unless the context otherwise requires,—

(a) "advance ruling" means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided, by the applicant;

(b) "applicant" means —

(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint venture in India; or

(iii) resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,

and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 96C;

Explanation. — For the purposes of this clause, "joint venture in India" means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a nonresident having substantial interest in such arrangement;

(c) "application" means an application made to the Authority under sub-section (1) of section 96C;

(d) "Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under subsection *(2A),* of section 28F of the Customs Act, 1962.

(e) "non-resident", "Indian company" and "foreign company" have the meanings respectively assigned to them in clauses (30), (26) and (23A) of section 2 of the Income-tax Act, 1961 (43 of 1961);

(f) words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder shall apply, so far as may be, in relation to service tax as they apply in relation to duty of excise.

SECTION 96B: **Vacancies, etc., not to invalidate proceedings** — No proceeding before, or pronouncement of advance ruling by, the Authority under this Chapter shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.

SECTION 96C: Application for advance ruling —

(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.

(2) The question on which the advance ruling is sought shall be in respect of, -

(a) classification of any service as a taxable service under Chapter V;

(b) the valuation of taxable services for charging service tax;

(c) the principles to be adopted for the purposes of determination of value of the taxable service under the provisions of Chapter V;

(d) applicability of notifications issued under Chapter V;

(e) **admissibility of credit of duty or tax in terms of the rules made in this regard.**

(f) determination of the liability to pay service tax on a taxable service under the provisions of Chapter V.

(3) The application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

(4) An applicant may withdraw an application within thirty days from the date of the application.

SECTION 96D: Procedure on receipt of application —

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner of Central Excise and, if necessary, call upon him to furnish the relevant records :

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Commissioner of Central Excise.

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application:

Provided that the Authority shall not allow the application where the question raised in the application is, -

(a) already pending in the applicant's case before any Central Excise Officer, the Appellate Tribunal or any Court;

(b) the same as in a matter already decided by the Appellate Tribunal or any Court:

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner of Central Excise.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

Explanation - For the purposes of this sub-section, "authorised representative" has the meaning assigned to it in sub-section (2) of section 35Q of the Central Excise Act, 1944 (1 of 1944).

(6) The Authority shall pronounce its advance ruling in writing within ninety days of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Commissioner of Central Excise, as soon as may be, after such pronouncement.

SECTION 96E: Applicability of advance ruling —

(1) The advance ruling pronounced by the Authority under section 96D shall be binding only-

(a) on the applicant who had sought it;

(b) in respect of any matter referred to in sub-section (2) of section 96C;

(c) on the Commissioner of Central Excise, and the Central Excise authorities subordinate to him, in respect of the applicant.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

SECTION 96F: Advance ruling to be void in certain circumstances –

(1) Where the Authority finds, on a representation made to it by the Commissioner of Central Excise or otherwise, that an advance ruling pronounced by it under sub-section (4) of section 96D has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void ab initio and thereupon all the provisions of this Chapter shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

(2) A copy of the order made under sub-section (1) shall be sent to the applicant and the Commissioner of Central Excise.

SECTION 96G: Powers of Authority –

(1) The Authority shall, for the purpose of exercising its powers regarding discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions and compelling production of books of account and other records, have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908).

(2) The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974), and every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code (45 of 1860).

SECTION 96H: Procedure of Authority - The Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure in all matters arising out of the exercise of its powers under this Act.

SECTION 96-I : **Power of Central Government to make rules —**

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the form and manner for making application under sub-section (1) of section 96C;

(b) the manner of certifying a copy of advance ruling pronounced by the Authority under sub-section (7) of section 96D;

(c) any other matter which, by this Chapter, is to be or may be prescribed.

(3) Every rule made under this Chapter shall be laid, as soon as may be, after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7.7 AUTHORITY FOR ADVANCE RULING

Advance Ruling means, determination of a question of law or fact specified in the application submitted by applicant regarding the liability to pay duty in relation to activity of manufacture or import or export proposed to be undertaken by the applicant.

Scope of advance ruling is being extended to cover resident public limited companies; a notification is being issued for this purpose, under section 96A(b)(iii) of the Finance Act, 1994 as amended by Finance Act 2013.

Advance Ruling helps the assessee to be clear about legal aspects in advance (i.e. before starting the business or venture). The Authority for Advance Ruling will give a decision on question raised before it. Such ruling will be binding on the applicant as well as on the department. Every procedure before the Authority for Advance Ruling deemed to be a judicial proceeding.

SECTION 23A: **Definitions —** Unless the context otherwise requires,—

(a) "activity" means production or manufacture of goods;

(b) "advance ruling" means the determination, by the authority of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity proposed to be undertaken, by the applicant;

(c) "applicant" means —

(i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company,

who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint venture in India; or

(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf,

and which or who, as the case may be, makes application for advance ruling under sub-section (1) of section 23C;

Explanation.- For the purposes of this clause, "joint venture in India" means a contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders are a non-resident having substantial interest in such arrangement

(d) "application" means an application made to the Authority under sub-section (1) of section 23C;

(e) "Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962.

(f) "Non-resident", "Indian company" and "foreign company" shall have the meanings respectively assigned to them in clause (30), (26) and (Z3A) of section 2 of the Income Tax Act, 1961.

7.7.1 As Per Section 23A(C) of the Central Excise Act, an Application for Advance Ruling can be Made by any of the following if they Propose to Undertake any business activity in India

(i) A Non-resident setting up a joint venture in India in collaboration with a non-resident or a resident.

(ii) A resident setting up a joint venture in India in collaboration with a non-resident.

(iii) A wholly owned subsidiary Indian company, of which the holding company is a foreign company, such holding company proposes to undertake any business activity in India.

(iv) A joint venture in India in which at least one of the participants, partners, or equity share holders is a non-resident having substantial interest in the joint venture.

(v) As may be specified by the Central Government of India by issuing a notification.

(vi) Public Sector Undertakings (PSUs) can now seek advance ruling on Customs, Central Excise and Service Tax matters. All Indian companies (those considered as resident under Income Tax law) have now been allowed to seek advance ruling on project imports. NT No. 21/2009CE, 124/2009 20.08.2009. Applicable for Customs also.

(vii) A Public Limited Company is Eligible for Making an Application to the Authority for Advance Rulling (N.T.67/2011 Dt 22.9.2011)

In section 23A of the Central Excise Act, for clause (e), the following clause shall be substituted, namely:—

"Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under sub-section (2A), of section 28F of the Customs Act, 1962.' (Finance Act, 2009).

Clause (a) of Section 23A is being amended to extend the definition of the term "activity" to include any new business of production or manufacture proposed to be undertaken by the existing producer or manufacturer.

7.7.2 Section 23C(2) provides for the admissibility of application for advance ruling, inter alia, for credit of excise duty paid or deemed to have been paid. The scope of admissibility has been expanded to include credit of service tax paid or deemed to have been paid on Input Services.

7.7.3 Application for Advance Ruling can be made in respect of following questions under Central Excise, Customs and Service Tax

i. Classification of goods or services

ii. Applicable of any exemption notification

iii. Admissibility of CENVAT credit

iv. Determination of Assessable value

v. Determination of origin of goods in case of Customs

vi. Determination of liability to pay duties of excise on any goods

On receipt of application Authority may admit or reject the application. In general in the following cases the application can be rejected in the following cases:

(a) If the question raised is already pending before an officer of Excise or Tribunal or any Court.

(b) If the matter has already been decided by CESTAT or any Court.

Application can be withdrawn within 30 days from the date of filing the application.

Authority for Advance Ruling once accepted the application can decide the case within 90 days from receipt of application.

Authority for Advance Ruling is common in Income Tax, Customs and Central Excise;

As per section 28F(2A) of Customs Act (w.e.f. 19.8.2009), Central Government can authorize Authority of Advance Ruling appointed under section 245-O of the Income Tax Act, 1961 to act as authority for advance for advance rulings under Central excise and customs. Therefore, Authority for Advance Ruling under income tax will also be Authority for excise, customs and service tax matters (Notification No. 143/2009 Cus.(NT) dated 15.9.2009).

SECTION 23B: Vacancies, etc., not to invalidate proceedings — No proceeding before, or pronouncement of advance ruling by, the Authority under this Chapter shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.

SECTION 23C: Application for advance ruling -

(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought

(2) The question on which the advance ruling is sought shall be in respect of, —

(a) classification of any goods under the Central Excise Tariff Act, 1985 (5 of 1986);

(b) applicability of a notification issued under sub-section (1) of section 5A having a bearing on the rate of duty;

(c) the principles to be adopted for the purposes of determination of value of the goods under the provisions of this Act.

(d) applicability of notifications issued, in respect of duties of excise under this Act, the Central Excise Tariff Act, 1985 and any duty chargeable under any other law for the time being in force in the same manner as duty of excise leviable under this Act;

(e) admissibility of credit of excise duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of the excisable goods.

(f) determination of the liability to pay duties of excise on any goods under this Act.

(3) The Application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

(4) An applicant may withdraw an application within thirty days from the date of the application.

SECTION 23D: Procedure on receipt of application.—

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner of Central Excise and, if necessary, call upon him to furnish the relevant records:

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Commissioner of Central Excise.

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application:

Provided that the Authority shall not allow the application where the question raised in the application is,—

(a) already pending in the applicant's case before any Central Excise Officer, the Appellate Tribunal or any Court;

(b) the same as in a matter already decided by the Appellate Tribunal or any Court

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner of Central Excise.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

Explanation - For the purposes of this sub-section, "authorised representative" shall have the meaning assigned to it in sub-section (2) of section 35Q.

(6) The Authority shall pronounce its advance ruling in writing within ninety days of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Commissioner of Central Excise, as soon as may be, after such pronouncement.

SECTION 23E: Applicability of advance ruling —

(1) The advance ruling pronounced by the Authority under section 23D shall be binding only—

(a) on the applicant who had sought it;

(b) in respect of any matter referred to in sub-section (2) of section 23C;

(c) on the Commissioner of Central Excise, and the Central Excise authorities subordinate to him, in respect of the applicant.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.

SECTION 23F: Advance ruling to be void in certain circumstances.—

(1) Where the Authority finds, on a representation made to it by the Commissioner of Central Excise or otherwise, that an advance ruling pronounced by it under sub-section (6) of section 28-1 has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void *ah initio* and thereupon all the provisions of this Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

(2) A copy of the order made under sub-section (1) shall be sent to the applicant and the Commissioner of Central Excise.

SECTION 23G: Powers of Authority -

(1) The Authority shall, for the purpose of exercising its powers regarding discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions and compelling production of books of account and other records, have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908).

(2) The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974), and every proceeding before the Authority shall be deemed to be judicial proceeding within the meaning of section 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

SECTION 23H: Procedure of Authority — The Authority shall, subject to the provisions of this Chapter, have power to regulate its own procedure in all matters arising out of the exercise of its powers under this Act.

WTO:

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

The WTO is an organization for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other. The goal of the WTO is to improve the welfare of the peoples of the member countries.

GATT 94:

The term "GATT" stands for the "General Agreement on Tariffs and Trade". It is an agreement between States aiming at eliminating discrimination and reducing tariffs and other trade barriers with respect to trade in goods. The GATT 1994 is one of the multilateral agreements annexed to the WTO Agreement. It is an international treaty binding upon all WTO Members.

Impact of tax on GATT 94:

The Most Favoured Nation (MFN) principle, as has been noted, requires Members not to discriminate among countries. The national treatment principle, which complements the MFN principle, requires that an imported product which has crossed the border after payment of customs duties and other charges should not receive treatment that is less favourable than that extended to the like product produced domestically. In other words, the principle requires member countries to treat imported products on the same footing as similar domestically produced goods.

Thus it is not open to a country to levy on an imported product, after it has entered the country on payment of customs duties at the border, internal taxes (such as a sales tax) at rates that are higher than those applied to comparable domestic products. Likewise, regulations affecting the sale and purchase of products in the domestic market cannot be applied more rigorously to imported products.

Study Note - 8

STATE LEVEL VAT

This Study Note includes

8.1 Background of State VAT
8.2 Basic Principle of VAT
8.3 Registration Under VAT
8.4 Overview of State VAT
8.5 Purchase Tax in VAT or 'Reverse Change'
8.6 Tax Rates Under VAT
8.7 Valuation of Taxable Turnover
8.8 Procedural Provisions relating to VAT
8.9 Assessment of Tax
8.10 Impact of VAT on CST
8.11 Role of Cost Accountant Under VAT
8.12 Agricultural Products or Commodities
8.13 High Seas
8.14 Phased out Inter-State Sale-Tax (i.e Central Sales Tax)

8.1 BACKGROUND OF STATE VAT

Tax on sale within the State is a State subject. Over the period, many distortions had come in taxation. Following were some of the problems -

i. Unhealthy competition among States by giving sales tax incentives to new industries. When one State gave incentives, others also had to give. This ruined State finances.

ii. 'Tax rate war' started to attract more revenue to State. Often, goods from the State were sent to another State on stock transfer basis and brought back in the same State to show as Inter-State Sale.

iii. States introduced 'first point sale' to avoid cascading effect of State sales tax. This made tax evasion easy.

iv. Cascading effect of tax due to Central Sales Tax.

Discussions with State Governments - Central Government initiated discussions with State Governments in 1995. After lot of persuasion by Central Government, all States ultimately agreed to introduce State Level Vat at the conference of Chief Ministers all States at Delhi in November, 1999.

'Empowered Committee' of State Governments - A high power committee consisting of senior representatives of all 29 States was constituted under Chairmanship of Dr. Asim Dasgupta, Finance Minister, West Bengal. After deliberations and many meetings, it was announced that all States have agreed to introduce VAT w.e.f. 1-4-2005. A 'White paper' was released by Dr. Asim Dasgupta, Chairman of Empowered Committee, on 17-1-2005. The White Paper is a policy document indicating basic policies of State Sales Tax VAT.

CST is proposed to be abolished – Vat is consumption based tax while CST is production based tax. Thus, CST is against principles of Vat.

Revenue loss if CST rate is reduced - If CST rate is reduced, State finances will suffer, since revenue of Central Sales Tax goes to respective State Government. It is proposed to authorise State Governments to levy tax on some services like medical, legal and education.

8.1.1 State-Wise position of VAT

Haryana was the only State to introduce VAT w.e.f. 1-4-2003. 20 States introduced VAT w.e.f. 1-5-2005. These include Assam, Andhra Pradesh, Bihar, Delhi, Goa, Karnataka, Kerala, Maharashtra, Punjab and West Bengal.

States ruled by BJP like Gujarat, Chhatisgarh, Jharkhand, Madhya Pradesh and Rajasthan introduced Vat w.e.f. 1-4-2006. Tamilnadu has introduced Vat on 1-1-2007.

Uttaranchal has not introduced Vat till November, 2007. UP has introduced Vat w.e.f. 1-1-2008. J&K is not in the picture due to constitutional issues.

Vat system not same in all States - The VAT system as introduced is result of deliberations of committee of representatives from 29 States. Each State has its own views and peculiarities. Hence, having uniform nationwide Vat is very difficult and some compromises/adjustments are inevitable.

Vat law not uniform in all States - Each State has made changes as per their needs. Though basic concepts are same in Vat Acts of all States, provisions in respect of credit allowable, credit of tax on capital goods, credit when goods are sold inter-state are not uniform. Even definitions of terms like 'business', 'sale', 'sale price', 'goods', 'dealer', 'turnover', 'input tax' etc. are not uniform. Schedules indicating tax rates on various articles are also not uniform, though broadly, the schedules are expected to be same.

8.1.2 State VAT is Diluted Version of VAT

The VAT as introduced, is a diluted version of VAT and some compromises have been made. There is no credit of Central Sales Tax paid on inter-state purchases. This problem will not arise if CST rate is reduced to 0% on 1-4-2010, as planned and inter-state sale is made 'zero rated'.

If goods are sent outside State on stock transfer basis, credit (set off) of tax paid on inputs is available only to the extent of tax paid in excess of 4%. Thus, credit (set off) to the extent of 4% tax on inputs is lost. It is not clear what will be position when CST rate is brought down to Nil. Thus, the VAT as introduced is State VAT and not a National VAT.

8.1.3 World Scenario in Respect of Development of 'VAT'

Concept of VAT was developed to avoid cascading effect of taxes. VAT was found to be a very good and transparent tax collection system, which reduces tax evasion, ensures better tax compliance and increases tax revenue.

First introduced in France - Concept of VAT was first conceived by Mr. Maurice Laure, Joint Director of French Tax Authority. Vat (termed as TVA in France) was introduced for the first time in France on 10-4-1954.

VAT in Europe - Vat system got real impetus when European Union (EU) made adopting VAT regime as condition precedent to joining European Common Market. Members of EU (that time it was European Common Market) were required to introduce common system of Vat *vide* Sixth Council Directive No. 77/388/EEC dated 17-5-1977. This is most important document so far as Vat is Europe is concerned.

Vat is imposed in Europe on both goods and services. Vat rate varies in various member countries of European Union. Minimum is 15% and maximum is 25%. General Vat rate in UK is 17.5%, but there is lower rate of 5% in case of some goods and some goods are exempt.

General Vat rate in some other countries is as follows : Sweden – 25%, Germany – 19%, France – 19.6%.

If goods or services are exported to another EU member country or other country, Vat is not imposed. Vat paid on inputs is granted as refund.

European Union was formed on 1-11-1993. Many countries joined EU later. As in July 2007, 27 countries are part of EU.

Development in other Countries - Many countries in Asia, Central America and other parts of Europe have introduced Vat. So far, about 135 countries have introduced Vat.

VAT in China - China introduced in VAT on 24 items in 1984. Later, regulations for VAT Tax were made effective on 1-1-1994 and VAT was extended to all goods and services. The general VAT rate is 17%. Vat rate is reduced to 13% in some cases. There is no VAT on exports.

Consumption Tax in Japan – Japan has system of consumption tax, which is levied @ 5%.

No VAT in USA - USA has not introduced VAT. In USA, tax is levied by State Governments on retail sale. The rate varies between 0% to 8.8%. There is no tax on services in USA.

Development in India - In India, VAT was introduced at manufacturing stage under Central Excise in 1986, termed as MODVAT (modified value Added Tax). MODVAT was re-named as CENVAT w.e.f. 1-4-2000. System of VAT was introduced in Service Tax w.e.f. 16-8-2002. Credit of excise duty and service tax was made inter-changeable w.e.f. 10-9-2004. Thus, partial integration of goods and service tax has been achieved. Presently, full integration is not possible since power to levy Sales Tax is with State Government.

8.2 BASIC PRINCIPLE OF VAT

VAT (Value Added Tax) is a tax on final consumption of goods and services.

VAT works on the principle that when raw material passes through various manufacturing stages and manufactured product passes through various distribution stages, tax should be levied on the 'Value Added' at each stage and not on the gross sales price. This ensures that same commodity does not get taxed again and again and there is no cascading effect. In simple terms, 'Value Added' means difference between selling price and purchase price. VAT avoids cascading effect of a tax.

Basically, VAT is Multi-Point Tax, with provision for granting set off (credit) of the tax paid at the earlier stage. Thus, tax burden is passed on when goods are sold. This process continues till goods are finally consumed. Hence, VAT is termed as 'consumption based' tax. It is tax on consumption of goods and services. VAT works on the principle of 'Tax Credit System'.

Distinction between Sales Tax and VAT - Basic distinction between Vat and sales tax is that sales tax is payable on total value of goods while Vat is payable only on 'value addition' at each stage.

8.2.1 Cascading Effect of Tax

Generally, any tax is related to selling price of product. In modern production technology, raw material passes through various stages and processes till it reaches the ultimate stage e.g., Steel Ingots are made in a steel mill. These are rolled into plates by a re-rolling unit, while third manufacturer makes furniture from these plates. Thus, output of the first manufacturer becomes input for second manufacturer, who carries out further processing and supply it to third manufacturer. This process continues till a final product emerges.

This product then goes to distributor/wholesaler, who sells it to retailer and then it reaches the ultimate consumer. If a tax is based on selling price of a product, the tax burden goes on increasing as raw material and final product passes from one stage to other, as given below, where A sales to B and B sales to C.

Details	**A**	**B**	**C**
	(₹)	(₹)	(₹)
Purchase	–	110	165
Value Added	100	40	35
Sub-Total	100	150	200
Add Tax 10%	10	15	20
Total	110	165	220

You will find that B is paying tax not only on his contribution of ₹ 40 but also on ₹ 100 and ₹ 10. Thus, same material gets taxed again and again and there is also tax on tax. As stages of production and/or sales continue, each subsequent purchaser has to pay tax again and again on the material which has already suffered tax. Tax is also paid on tax. This is called '*cascading effect*'.

8.2.2 Disadvantages of Cascading Effect of Taxes

A tax purely based on selling price of a product has cascading effect, which has the following disadvantages:

i. Real tax content in the price of a product cannot be known, as a product passes through various stages and tax is levied at each stage.

ii. Tax burden on any commodity will vary widely depending on the number of stages through which it passes in the chain from first producer to the ultimate consumer.

iii. Ancillarisation is discouraged and manufacturer tries to manufacture all parts and do all processes in his plant itself. This increases manufacturing costs.

iv. End use based exemptions and concessions (e.g. exports or goods consumed by poor) cannot be given since it is not known what were taxes paid in earlier states.

v. Exports cannot be made fully tax free.

8.2.3 VAT avoids Cascading Effect of Tax

System of VAT works on tax credit method. In Tax Credit Method of VAT, the tax is levied on full sale price, but credit is given of tax paid on purchases. Thus, effectively, tax is levied only on 'Value Added'. Most of the countries have adopted 'tax credit' method for implementation of VAT.

The aforesaid Example will work out as follows under VAT system.

'B' will purchase goods from 'A' @ ₹ 110, which is inclusive of duty of ₹ 10. Since 'B' is going to get credit of duty of ₹ 10, he will not consider this amount for his costing. He will charge conversion charges of ₹ 40.00 and sell his goods at ₹ 140. Following example will illustrate the tax credit method of VAT.

	Transaction without VAT		**Transaction with VAT**	
Details	A	B	A	B
	(₹)	(₹)	(₹)	(₹)
Purchases	–	110	–	100
Value Added	100	40	100	40
Sub-Total	100	150	100	140
Add Tax 10%	10	15	10	14
Total	110	165	110	154

Note - 'B' is purchasing goods from 'A'. In second case, his purchase price is ₹ 100 as he is entitled to VAT credit of ₹ 10 i.e. tax paid on purchases. His invoice shows tax paid as ₹ 14. However, since he has got credit of ₹ 10, effectively is paying only ₹ 4 as tax, which is 10% of ₹ 40, i.e. 10% of 'value added' by him.

Meaning of 'Value Added' - In the above example, the 'value' of inputs is ₹ 110, while 'value' of output is ₹ 150. Thus, the manufacturer has made 'value addition' of ₹ 40 to the product. Simply put, 'Value Added' is the difference between selling price and the purchase price.

8.2.4 Revenue Neutral Rate

Government was earlier getting tax revenue of ₹ 25. In above example, Government gets revenue of ₹14 only. To avoid loss of revenue, rate of tax will have to be suitably increased such that Government gets same revenue as per previous system. This is termed as 'RNR' (Revenue Neutral Rate'). In aforesaid example, RNR will be high i.e. 17.86% (25/140×100).

Practically, since most State Governments had single point sales tax at first level, RNR is not high. In fact, RNR is lower than the earlier sales tax rate since under VAT, tax is realised on final selling price and not the price at the first level.

For example, if earlier sales tax rate was 15% on wholesale price of ₹ 100; under VAT system, tax will be collected at consumption stage i.e. on retail price of (say) ₹ 140.

It has been decided to levy sales tax at RNR of 12.5% for most of commodities.

What is meant by Consumption types of 'VAT'? - 'Consumption based tax' means tax is actually levied only when goods are finally consumed/ utilised. Till then, the tax burden is passed on to next buyer.

8.2.5 Advantages of VAT Over Conventional System of Taxation

Advantages of VAT are as follows:

i. Tax burden is only at the last i.e. consumption stage. This is useful for taxation structure based on 'destination principle'.

ii. It becomes easier to give tax concessions to goods used by common man or goods used for manufacture of capital goods or exported goods.

iii. Exports can be freed from domestic trade taxes.

iv. It provides an instrument of taxing consumption of goods and services.

v. Interference in market forces is minimum.

vi. Simplicity and transparency.

vii. Aids tax enforcement by providing audit trail through different stages of production and trade.

viii. Thus, it acts as a self-policing mechanism resulting in lower tax evasion.

ix. Tax rates can be lower as tax is levied on retail price and not on wholesale price.

8.2.6 Disadvantages and Pitfalls in VAT

One major disadvantage of Vat is tremendous paper work and record keeping. Vat system can work only if record keeping is proper and reliable. The elaborate record keeping is not possible to small businesses. Hence, exemption is granted to tiny businesses whose turnover is below prescribed limits. In case of small businesses, a composition scheme is provided where tax is paid on gross value of sales at a fixed rate.

Some major problems in Vat are –

i. Bogus Invoices on which tax credit is availed, i.e. invoice without actual purchase of goods.

ii. Acquisition fraud (missing trader fraud).

iii. Carousel Fraud (missing trader fraud).

Acquisition fraud - The acquisition fraud is based on the fact that goods imported are tax free. A dealer imports goods and makes sale within the country. The dealer either has his own Vat registration number or he hijacks other's Vat number. He collects the tax from buyer and then disappears without paying the collected tax to Government. The buyer is usually innocent and is not aware that the seller is not going to pay tax to Government. This is 'missing trader fraud' of one type.

In Indian context, this fraud is possible when CST rate is Nil or is reduced to 1%. A dealer can purchase goods inter-state and make sale within the State. He will collect tax and then disappear. He may use someone else's vat number in his invoices or may himself get registered with address of some temporary rented premises.

8.3 REGISTRATION UNDER VAT

8.3.1 There are two types of Registration

(A) Compulsory Registration, and

(B) Voluntary Registration.

Registration is essential for a dealer for availing the benefit of VAT credit. If a dealer is either not registered or is registered as TOT (Turnover Tax) dealer then such dealers are not eligible for VAT credit on their purchases. Further, they cannot pass the VAT credit to others.

(A) Compulsory Registration

Compulsory registration is attracted either

i. Based on Turnover, or

ii. Based on Transactions

(i) Based on the Turnover

Registration under VAT of dealers is compulsory whose gross annual turnover is above ₹ 5 lakh.Provision has been initiated for voluntary registration also. All existing dealers will be automatically registered under the VAT Act. A new dealer will be allowed 30 days time from the date of liability to get registered. An application for registration should be made to the VAT Commissioner.

No need of compulsory registration for small dealers whose gross annual turnover is less than ₹ 5 lakh. Also, the Empowered Committee of State Finance Minister subsequently allowed the States to increase the threshold limit for the small dealers to ₹ 10lakh with the condition that the concerned State would bear the revenue loss, on account of increase in limit beyond ₹ 5lakh.

Example 1: Mr. X commenced business with effect from 1st July, 2008 for buying and selling automobile parts within the state of Tamil Nadu. His turnover exceeds ₹ 10 lakhs in the month of 1st of December, 2008 then he has to get register within 30 days from the date of crossing the threshold limit of ₹ 10 lakhs.

(ii) Based on transactions

Registration is Compulsory based on transactions (irrespective of turnover) if the dealer falls under the following category:

(a) Dealer is an importer.

(b) Dealer resides outside the State but is carrying on business within the State other than the State in which he has residence.

(c) Dealer is registered or liable to be registered under the Central Sales Tax Act, 1956, or any dealer making purchases or sales in the course of inter-state trade or commerce or dispatches any goods to a place outside the State otherwise than by way of sale.

(d) Dealer is liable to pay tax at Special rates as specified in the Schedule.

(e) Every commission agent, broker, del-credere agent, auctioneer or any other mercentile agent whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of his non- residential principal.

(f) Every person aviling an industrial incentive in the form of a tax holiday or tax deferment.

(g) Every dealer executing any works contarct exceeding ₹ 5 lakhs for the State Government or a local authority and any dealer executing works contract and opting to pay tax by way of composition.

Example 2: Special rate of tax will be levied on a few commodities listed in Schedule VI to the APVAT Act, 2005, like Liquor, petrol other than aviation motor sprit, Aviation motor sprit, Aviation turbine fuel, Diesel.

i. Every commission agent, broker, del-credere agent, auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of his non-resident principal.

ii. Every person availing an industrial incentive in the form of a tax holiday or tax deferment.

iii. Very dealer executing any works contract exceeding ₹ 5 lakhs for the State Government or a local authority and any dealer executing works contract and opting to pay tax by way of composition.

(B) Voluntary Registration

A Dealer can get himself voluntarily registered if he is not required to get himself compulsorily registered.

Taxable turnover of a dealer does not exceed the limit of ₹ 10 lakhs in the case of sales of goods and such dealer do not expect to exceed this limit still apply for voluntary registration for VAT.

He can do so if the activities of the dealer constitute a business for VAT purposes.

A dealer seeks voluntary registration because it gives him the following advantages:

i. When dealer makes taxable sales to other VAT dealers he can pass the input tax credit

ii. When dealer deals principally with other VAT dealer for purchasing of goods

iii. When dealer input tax credit likely to exceed the tax on the sales he made

iv. When dealer exports the goods input tax credit can be claimed as refund

None of the above advantages will be available to him if he does not get himself registered.

Without a registration he cannot issue tax invoice to his customer who is eligible otherwise for input tax credit. Such a customer will therefore have to charge a higher price for his sales if he cannot claim a credit for the VAT. In this case he might choose to trade with another VAT dealer and unregistered dealer would lose business.

Voluntary Registration may be refused by the department in any one of the following situations:

i. Dealer has no taxable sales at all

ii. Dealer has no proper place of business

iii. Dealer is not in a position to keep proper books of accounts

iv. Dealer has no bank account with any bank

v. Dealer has arrears outstanding under General Sales Act, CST Act, etc.

vi. Dealer has no proper identity

8.3.2 Effective date of Registration

If the dealer falls under the compulsory registration category then the dealer has to register under the respective State VAT Act. The registration is effective from the date on which application for registration is made, even if the registration is granted later.

Apply for registration

The dealer, who is required to be COMPULSORILY registered under VAT Act, will have to apply in the respective State VAT Form [For example Andhra Pradesh State Value Added Tax — From VAT 100] in the name of the tax office in whose jurisdiction the dealer's business premises is located.

Once registration is effected the dealer has to account for output tax attributable to his taxable sales. He will also have to submit VAT returns monthly to the Commercial Taxes Department and keep proper books of accounts.

8.3.3 Cancellation of VAT Registration

Registration can be cancelled in the following cases

i. Dealer ceases to exist for which he got registered under respective state VAT Act.

ii. Dealer got insolvent

iii. Change of business constitution.

iv. Amalgamation or liquidation of company

v. Sale of entire business.

8.3.4 Display of Certificate of Registration

i. The certificate of VAT registration or TOT registration shall be displayed in a conspicuous place at the place of business mentioned in such certificate and a copy of such certificate shall be displayed in a conspicuous place at every other place of business within the State.

ii. No certificate of registration issued shall be transferred.

iii. Where the certificate of registration issued is lost, destroyed, defaced or mutilated a duplicate of the certificate shall be obtained from the authority prescribed.

8.3.5 Tax Identification Number

Salient features of Tax Identification Number are as follows:

i. TIN consist of 11 digits

ii. First two characters represent the state code which is allotted by the Central Government which is common for all the dealer of a state and balance nine characters will be, however, different in different States.

iii. TIN is useful to the department of commercial tax in case of computer applications, for detecting stop filers and delinquent accounts

TIN also help full to the department for cross checking of sales and purchases across the state VAT dealers.

8.3.6 VAT Invoice

A VAT invoice is also called as Tax Invoice. A VAT invoice shows certain VAT details of a sale or other supply of goods and services. It can be either in paper or electronic form. Under the scheme of VAT, the most important document is tax invoice. A registered dealer is entitled to claim set-off only on the basis of a valid tax invoice. Set off is not available on purchases affected through a bill or cash memorandum. A Tax Invoice is must to claim input tax credit (set off).

A valid Tax Invoice shall contain the following particulars: –

i. The word tax invoice in bold letter at the top or at a prominent place.

ii. A consecutive serial number

iii. The date on which the invoice is issued

iv. The name, address and the TIN of the seller

v. The name, address and TIN of the buyer

vi. The description of the goods;

vii. The quantity or volume of the goods and price;

viii. The value of the goods;

ix. The rate and amount of tax charged; and

x. The total value of the goods

VAT Invoice Format

TAX INVOICE

M/S. …. (Name & Address of the selling dealer) …… Tax Identification Number (TIN) ……			Book No. (Pre-printed) Serial No. (Pre-printed) Date ___/__/____	
To…. (Name and address of the purchasing dealer)			Purchaser's Tax Identification Number (TIN) (in any)	
Sl. No.	Description of Goods	Quantity	Unit price or Rate	Total Amount (₹)
1	Air condition Machines	2	₹ 20,000	₹ 40,000
Total Sale value before adding VAT			₹ 40,000	
Plus VAT @ 12.5%			₹ 5,000	
Total Sale Price with VAT			₹ 45,000	
Signature (of Selling Dealer)				

8.3.7 Incentive Schemes under VAT

Incentives under VAT by and large are given to VAT Dealers by way of exemption from VAT, deferment of VAT liability and remission of duty. Each one described below.

Exemption from VAT

Dealers are exempted from payment of tax if their taxable turnover in any financial year does not exceeds ₹ 10 lakhs (some States restricted this limit to ₹ 5 lakhs).

The State Governments are empowered to issue exemption notifications from the payment of VAT to the eligible industry. However, such exemption notifications, ceases either with the expiry of exemption period or the exemption amount whichever occurs first.

8.3.8 Deferment of VAT liability

Under this eligible dealer collect VAT and pays VAT on their sales and purchases respectively. However, such eligible dealer is not required to pay the collected tax to the Government immediately. It means the liability to pay service to the Government is deferred for particular period. After expiry of such period, the liability is required to be paid in prescribed installments.

8.3.9 Remission of VAT

Remission of VAT means VAT liability arises to pay but exempted from payment (i.e. remits). Under this mode an eligible dealer is allowed to collect tax at an appropriate rate but is not required to pay the same. Such dealer is required to file periodical returns by showing tax liability. The Commercial Tax Department remits the tax liability. It means the VAT liability is deemed to have been paid. The input tax paid (i.e. VAT on purchases) by the dealer is being given as refund immediately after filing the return.

8.3.10 'Carousel Fraud' in VAT

'Carousel' means 'merry-go-around' or' roundabout' (Concise Oxford Dictionary). This is 'missing trader fraud' of another type. It is much more involved and difficult to trace. The fraud works as follows –

One dealer 'A' imports goods without tax. He sells goods to 'B' and charges Vat. 'B' avails credit of tax shown by 'A' in his Invoice. 'B' sells the goods to 'C' and charges VAT. Actually, 'B' has to pay only differential amount as tax. 'C' avails credit of tax shown by 'B' in his Invoice. 'C' sells goods to 'D' by charging VAT. Since 'C' has availed credit of VAT paid by 'B', he has to pay only differential amount,

which is small. 'D' exports the goods and claims refund of input tax i.e. entire tax shown by 'C' in his Invoice.

This is a legitimate transaction. The missing link is that 'A' actually does not deposit tax to Government. 'A' either has his own VAT registration number or he hijacks other's VAT number. He collects tax and then disappears. Thus, 'D' gets refund of tax which is actually not paid by 'A'. By the time Government traces the transaction to 'A', he i.e. 'A' has disappeared.

The same goods are used again and again for 'imports' and 'exports'. That is why the fraud is termed as 'carousel' fraud. The high value goods like microchips and mobile phones are generally used for such deals.

UK is said to be main victim of such fraud. It is reported that UK has lost 12.6 billion Euro in such frauds. It is said that fraudsters prefer UK since it has weak and time consuming legal system.

In UK, reverse charge has been introduced in 2006 on tax payable on wholesale sales of mobile phones and microchips to combat the fraud. In 'reverse charge', buyer himself is liable to pay VAT on goods purchased.

Can the fraud work in Indian context? – In Indian context, the fraud can work in inter-state purchases and sales in the same way in which it works in European countries in imports/exports. The person finally selling the goods outside the State can either claim refund of tax paid on his purchases or can adjust the credit for paying taxes on sales made within the States.

In fact, it is possible that actually, goods may not move. Only documents may move from one State to another.

What happens if 'D' is innocent and had entered into genuine transaction? - If 'D' is innocent, he cannot be penalised for default of 'A'. One such case has been decided by Court of Justice of European Communities, which is the highest Court of European Union. In *Optigen Ltd* v. *Commissioners of Customs and Excise* 2006 EUECJ C-354/03 (decided on 12-1-2006), it has been held that Government cannot refuse refund in such cases.

In India also, Tribunal has held that a buyer cannot be penalised for default of the seller.

In *Prachi Poly Products* v. *CCE* 2005 (186) ELT 100 (CESTAT SMB), it was held that a genuine buyer is eligible for Cenvat credit, even if the seller-manufacturer did not pay duty.

In *R S Industries* v. *CCE* 2003(153) ELT 114 (CEGAT), the manufacturer supplied goods to buyer on duty paying document. The manufacturer had availed Cenvat credit on inputs fraudulently. It was held that the buyer is not responsible for fraud of supplier and he is entitled to Cenvat credit on basis of a valid duty paying document.

Precautions being taken by State Governments under VAT - State Governments have put up or are in process of putting up check posts at State borders to ensure that all goods entering and leaving State are properly recorded. Though the purpose is sound, it is experience everywhere that such physical barriers increase harassment of honest tax payers while dishonest taxpayers can devise their own ways to hoodwink the system.

8.4 OVERVIEW OF STATE VAT

A 'White paper' was released by Dr. Asim Dasgupta, Chairman of Empowered Committee, on 17-1-2005. The White Paper is a policy document indicating basic policies of State Sales Tax VAT.

The white paper gives background of problems in present system of sales tax, principles of VAT and its advantages. It also gives basic design of State level VAT proposed to be implemented. States have generally followed the principles as given in the White Paper. Of course, there are variations.

Highlights of Policy Regarding State VAT as Contained in White Paper are given below.

A. **Tax Credit -** Manufacturer will be entitled to credit of tax paid on inputs used by him in manufacture. A trader (dealer) will be entitled to get credit of tax on goods which he has purchased for re-sale [*para 2.3 of White Paper on State-Level VAT*].

B. **Input Tax Credit - Credit will be available of tax paid on inputs purchased within the State. Credit will not be available** of certain goods purchased like petroleum products, liquor, petrol, diesel, motor spirit (position of furnace oil is not clear in white paper, but many States do not give credit).

C. **No credit is available in case of Inter-State purchases.**

D. **Credit of tax paid on capital goods -** Credit will be available of tax paid on capital goods purchased within the State. Credit will be available only in respect of capital goods used in manufacture or processing. The credit will be spread over three financial years and not in first year itself. There will be a negative list of capital goods [*para 2.4 of White Paper on State-Level VAT*]

   States has deviated from these provisions. In West Bengal and Kerala, it is available in 36 monthly instalments. In Karnataka, it is available in 12 monthly instalments, but value of capital goods should be minimum ₹ 10 lakhs. Capital goods of value less than ₹ 10 lakhs will be 'inputs' and immediate credit will be available. In Maharashtra, entire credit is available immediately.

E. **Instant credit –** Credit will be available as soon as inputs are purchased. It is not necessary to wait till these are utilised or sold [*para 2.3 of White Paper on State-Level VAT*].

F. **No credit of CST paid -** Credit of Central Sales Tax (CST) paid on inputs and capital goods purchased from other States will not be available [*para 2.6 of White Paper on State-Level VAT*]. This appears to be discriminatory and violative of Articles 303 and 304(a) of Constitution.

G. **Transitional Credit of stock as at the beginning of VAT Act -** Input tax as already paid on goods lying in stock as on the day when Vat was introduced (which are purchased within one year prior to that date) was available to dealer. For example, if Vat was introduced on 1-4-2005, credit of tax paid on stock lying as on 31-3-2005 was allowed if the goods were purchased on or after 1-4-2004.

Detailed stock statement were required to be submitted to sales tax authorities. This credit will be available over a period of six months after an interval of 3 months need for verification [*para 2.7 of White Paper on State-Level VAT*].

States have deviated from these provisions.

One to one correlation not required – VAT does not require one to one i.e. Bill to Bill correlation between input and output. Credit is available as soon as inputs/capital goods are purchased. The credit can be utilised for payment of VAT on any final product. It is not necessary to wait till the input is actually consumed/ sold.

Entry tax/Octroi will continue - There is no proposal to extend VAT to entry tax (in lieu of octroi) or Octroi levied by local authorities. These will continue.

8.5 PURCHASE TAX IN VAT OR 'REVERSE CHARGE'

Though white paper makes no mention of purchase tax, some States like Kerala and Andhra Pradesh have made provision for imposition of purchase tax when purchase is from unregistered dealers. Its credit will be available where VAT credit on purchases is available. Thus, in effect, in respect of purchases where VAT credit is not available, purchase tax will be payable.

This is termed as 'reverse charge'.

In UK, reverse charge has been introduced in 2006, on tax payable on sale of mobile phones and microchips.

Reverse charge - Normally, VAT is payable by seller of goods. However, in some cases, the liability is cast on the purchaser of goods. This is termed as 'reverse charge'.

This concept is used in service tax also. In reverse charge, the service receiver also acts as service provider. He pays tax on services received by him. He can avail Cenvat credit of tax paid by him, since the service is actually his 'input service'.

There is provision of 'tax collection at source' under section 206C of Income Tax Act. Here, seller of liquor is liable to pay tax at source. The buyer has no liability. Tax deduction at source (TDS) under Income tax is really not 'reverse charge', since basic responsibility of payment of income tax continues to be that of person earning income.

Mode of 'reverse charge' is used when it is administratively difficult to collect tax from seller of goods or service provider or income earner.

8.6 TAX RATES UNDER VAT

Ideally, VAT should have only one rate. Though this is not possible, it is certain that there should be minimum varieties of rates. Broadly, following VAT rates are proposed [*para 2.18 and 2.19 of White Paper on State-Level VAT*]

i. 0% on natural and un-processed produces in unorganised sector, goods having social implications and items which are legally barred from taxation (e.g. newspapers, national flag). This will contain 46 commodities, out of which 10 will be chosen by individual States which are of local or social importance. Other commodities will be common for all States. Certain specified life saving medicines have been exempted from VAT.

ii. No VAT on Additional Excise Duty items (textile, sugar and tobacco) in first year. Position will be reviewed later. VAT has been imposed by State Governments @ 12.5% on tobacco products w.e.f. 1-4-2007.

iii. 1% floor rate for Gold and Silver Ornaments, Precious and Semi-Precious Stones.

iv. 4% for goods of basic necessities (including medicines and drugs), all industrial and agricultural inputs, declared goods & capital goods. This will consist of about 270 commodities.

v. 12.5% RNR (Revenue Neutral Rate) on other goods.

vi. Aviation turbine fuel (ATF) and petroleum products (petrol, diesel and motor spirit) will be out of VAT regime. Liquor, cigarettes, lottery tickets, will also be taxed at a higher rate. These will have uniform floor rates for all States (generally 20%). Tax paid on these will not be eligible for input tax credit.

Broadly, VAT rates of all States follow this pattern, but still there are many variations.

For example, in some States, VAT rate on gold and silver ornaments has been reduced to 0.25%, as traders were facing competition from neighboring States. Kerala State has imposed tax @ 20% on some luxury goods, though tax on such goods should be @ 12.5% as per the white paper.

In some States, hand tools are taxed at 4%, while in some States, these are taxed at 12.5%.

8.6.1 Policy about turnover tax, surcharge, additional tax etc. imposed by State Governments

States were levying turnover tax, surcharge etc. on sales tax,. Those taxes on sale will go. However, Octroi and Entry tax (which is in lieu of octroi) will continue. Other type of Entry Tax will either be discontinued or will be made Vatable [*para 2.16 of White Paper on State-Level VAT*] .

8.6.2 Concessions for small dealers

A. VAT tax will be payable only by those dealers whose turnover exceeds ₹ 5 lakhs per annum. The dealers whose turnover is less than ₹ 5 lakhs can register on optional basis. Dealers having turnover exceeding ₹ 5 lakhs should register within 30 days from date of liability to get registered [*para 2.9 of White Paper on State-Level VAT*]

In case of Karnataka, the limit is only ₹ 2 lakhs. Most of States have kept the limit as ₹ 5 lakhs.

B. Composition scheme for dealers with turnover upto ₹ 50 lakhs - Small dealers having gross turnover exceeding ₹ 5 lakhs but less than ₹ 50 lakhs have option of composition scheme. They will have to pay a small percentage of gross turnovers. They will not be entitled to any input tax credit [*para 2.9 of White Paper on State-Level VAT*]

The percentage has not been announced in white paper, but earlier, it was announced as 1%. This rate has been prescribed in West Bengal VAT Act, AP VAT Act, Delhi VAT Act, Kerala VAT Act and Karnataka VAT Act.

In case of Karnataka, composition scheme is available only to a dealer whose turnover in a period of four consecutive quarters does not exceed ₹ 15 lakhs.

In Maharashtra, tax payable under composition scheme is 8% of difference between value of turnover of sales less value of turnover of purchases including tax (other than excluded goods) (in short, it is 8% of gross margin of trader). Second hand car dealer is required to pay sales tax @ 4%. In case of works contract, tax can be paid @ 8% of total contract value after deducting amount payable towards sub-contracts to the sub-contractors.

C. Dealers who make inter-State purchases are not eligible for the composition scheme. This provision applies to VAT law of almost all States.

The scheme is optional. They can opt to pay normal VAT tax and avail credit of input tax.

Composition scheme is a practical scheme considering ground realities, though it dilutes the basic concept of VAT that tax is payable at consumption stage. Of course, such schemes are provided in almost all VAT regimes prevailing in Europe and elsewhere, considering practical difficulties in assessing and collecting tax from small traders.

8.6.3 Where Input Credit will not be Available

Credit of tax paid on inputs will be denied in following situations -

i. No credit if final product is exempt - Credit of tax paid on inputs is available only if tax is paid on final products. Thus, when final product is exempt from tax, credit will not be availed. If availed, it will have to be reversed on *pro-rata* basis.

ii. Restricted credit if output goods are transferred to another State - If the final products are transferred to another State as stock transfer or branch transfer, input credit availed will have to be reversed on *pro-rata* basis, which is in excess of 2%. In other words, in case of goods sent on stock transfer/branch transfer out of State, 2% tax on inputs will become payable e.g. if tax paid on inputs is 12.5%, credit of 10.5% is available. If tax paid on inputs is 2%, no credit is available (This is termed as 'retention'). Thus, the VAT as introduced is State VAT and not a national VAT (In case of some States, even if CST is reduced to 2%, retention has been kept @ 4% only).

iii. No input credit in certain cases - In following cases, the dealer is not entitled to input credit —

(a) Final product is exempted from VAT.

(b) Inter-state purchases i.e. goods purchased from outside the State.

(c) Goods imported (obvious, since there will be no VAT invoice).

(d) Goods purchased from unregistered dealer (as he cannot charge VAT).

(e) Goods purchased from dealer who is paying VAT under composition scheme (as he cannot charge VAT separately in invoice).

(f) Purchase where final goods sold are exempt from VAT.

(g) Final product is given free i.e. goods not sold.

(h) Inputs stolen/lost/damaged before use/sale as there is no sale.

(i) Proper Tax Invoice showing VAT separately is not available.

(j) Ineligible purchases like automobiles, fuel, certain capital goods etc. as specified in relevant State VAT Law i.e. items in negative list.

iv. No credit on Certain Purchases – Generally, in following cases, credit is not available – (a) Purchase of automobiles (except in case of purchase of automobiles by automobile dealers for re-sale), (b) fuel.

There are variations between provisions of different States.

Note: VAT on purchases if not allowed as input tax credit then the portion of VAT becomes form part of cost of purchases.

8.6.4 Distinction Between 'Zero Rated Sale' and 'Exempt Sale'

Certain sales are 'Zero Rated' i.e. tax is not payable on final product in certain specified circumstances. In such cases, credit will be available on the inputs i.e. credit will not have to be reversed. Distinction between 'Zero Rated Sale' and 'Exempt Sale' is that in case of 'Zero Rated Sale', credit is available on tax paid on inputs, while in case of exempt goods, credit of tax paid on inputs is not available.

As per para 2.5 of White Paper on State-Level VAT, export sales are zero rated, i.e. though sales tax is not payable on export sales, credit will be available of tax paid on inputs.

In respect of sale to EOU/SEZ, there will be either exemption of input tax or tax paid will be refunded to them within 3 months. If supplies to EOU/SEZ are exempt from sales tax, then the question will arise whether these are 'Zero Rated' or 'Exempt Goods'.

In case of stock transfer to another State, CST is not payable, but input credit will have to be reversed to the extent of 3%. Thus, stock transfer of goods to another State is 'Exempt' and not 'Zero Rated'.

It is not clear what will be the policy after CST is reduced to 2% or when CST is reduced to zero. As per basic concept of VAT, inter-state transactions should be 'Zero Rated' and not 'Exempt'.

8.6.5 Refund if VAT Credit of Input Tax available cannot be Utilised for any Reason

Entire input tax will be refundable within three months, when final product is exported. In respect of sale to EOU/SEZ, there will be either exemption of input tax or tax paid will be refunded within three months [*para 2.5 of White Paper on State-Level VAT*].

If tax credit exceeds tax payable on sales, the excess credit will be carried to end of next financial year. Excess unadjusted credit at end of second year will be eligible for refund [*para 2.4 of White Paper on State-Level VAT*]

Such excess credit can arise when purchases of inputs are made locally, but final product is mainly exported or stock transferred to another State.

8.6.6 Exemptions and Incentives to New Industries Already Granted to Continue

All State Governments were offering sales tax incentives to new industries set up in the State. The incentives were broadly of three types - (a) Exemption - Don't charge tax and don't pay, (b) Deferral - Charge sales tax in invoice but pay after long period of (say) 12 to 18 years (c) Remission - Charge in the invoice but retain and do not pay to Government. State Governments have stopped giving incentives to new industries after January, 2000. However, there are commitments in respect of industries set up

prior to January, 2000. State Governments to continue with the incentives which were already granted [*para 2.15 of White Paper on State-Level VAT*). [Some States may allow industries under exemption scheme to convert to deferral scheme so that such industries can pass on benefit of VAT to their buyers].

8.7 VALUTION OF TAXABLE TURNOVER

The dealer paying VAT shall deduct the following from the taxable turnover if these are already included in the taxable turnover:-

(a) Discount which is a regular discount in a regular practice

(b) Amount charged separately as interest

(c) Finance charges/interest if any in case of hire-purchase transaction or installment payment system

(d) Sales cancelled

(e) Goods returned to the seller within a period of 12 months from the date of sale and dealer making the sale has accepted the return of goods. [some states have restricted this time limit for 6 months]

Note:

In the above list from (a) to (d) where either a tax invoice or an invoice has not yet been issued, the sale price shall be suitably adjusted in the tax invoice or in the said invoice. Where a tax invoice or invoice has been issued, a credit or debit note shall be used to make the necessary adjustment.

The VAT dealer shall be eligible to make an adjustment of an excess payment of output tax. However, such an adjustment is not permissible if the sale has been made to a person who is not a VAT dealer unless the amount of the excess tax has been repaid by the VAT dealer to the recipient.

Where the output tax liability due in respect of the sale exceeds the output tax actually accounted for by the VAT dealer making the sale, the amount of the excess shall be regarded as tax charged by the VAT dealer in relation to a taxable sale made in the tax period in which the adjustment took place.

In the case of a VAT dealer namely a VAT dealer who is running any restaurant, eating house or hotel, being food or any other articles for human consumption or drink other than liquor, such a dealer may opt to pay tax by way of composition at the rate of twelve and half per cent (12.5%) on sixty percent (60%) of the total amount charged by the said VAT dealer for such supply. This means that 40% of the total amount of consideration charged by such dealer shall be allowed as deduction. This type of tax is called compounding levy of tax, which is generally not applicable for input tax credit.

Example: Mr. Amit the owner of a restaurant selling food. He opted to pay the VAT by way of composition of tax. For January, 2013, his total sales was ₹1,50,000. He also purchased the input material after payment of VAT of ₹3,000.

The net VAT payable is as follows:

Particulars	Amount (₹)
Output tax payable = ₹1,50,000 × 60% × 12.5% =	11,250
Less : Input Tax Credit	Nil
VAT Payable	11,250

8.8 PROCEDURAL PROVISION RELATING TO VAT

A system of audit checks will have to be established to keep check on bogus invoices. One essential requirement is to give TIN (Tax Identification Number) to all registered dealers, so that a check is maintained that (a) The tax as shown in the invoice has indeed been paid, (b) There is no double credit on basis of same invoice. TIN will have to be indicated on each invoice issued. It will be a 11 digit numerical code. First two digits will indicate State Code. Thus, State level computer network with check based on TIN will be established. Otherwise, misuse will be rampant.

8.8.1 Documentation required to avail credit of Tax paid on Inputs and Capital Goods

Tax credit will be given on basis of document, which will be a 'Tax Invoice', cash memo or bill. Such invoice can be issued only by a registered dealer, who is liable to pay sales tax. The invoice should be serially numbered and duly signed, containing prescribed details. The tax payable should be shown separately in the Invoice. The dealer should keep counterfoil/duplicate of such invoice duly signed and dated.

In case of manufacturer, Invoice issued under Central Excise Rules should serve purpose of VAT also, if the invoice contains required particulars.

Dealers availing composition scheme shall not show any tax in their invoice. They are not entitled to any credit of tax paid on their purchases.

Debit Note and Credit Note - If sale price is increased/reduced subsequent to sale, the transaction will be recorded through proper debit/credit note. The buyer will adjust the input credit available to him accordingly.

8.8.2 Records and Accounts

Each State has prescribed records to be maintained. Broadly, following records will be required:-

i. Records of purchases of Inputs.
ii. Record of debit notes and credit notes.
iii. Quantity record of inputs.
iv. Record of credit notes received from supplier.
v. Record of capital goods.
vi. Sale register and tax charged on sales.

Record of Tax credit available - Monthly/quarterly totals of the following should be taken - (a) Input credit available, (b) Credit available on capital goods, (c) Credit notes from suppliers.

Carry forward/refund of tax credit - If input tax credit cannot be utilised in a particular month/year, the credit can be carried forward and used in subsequent months/year. Refund of such excess credit is permitted only if goods were exported out of India. If credit is not utilised in two years, refund will be granted.

Preservation of records - Since assessment can be opened for prescribed period (usually five to eight years), it is necessary to preserve all relevant records for prescribed period from the close of the financial year. The records can be audited by departmental audit party.

8.8.3 Payment of VAT Tax and Filing of Returns

Every dealer is required to file returns on monthly/quarterly basis. If the records are kept properly, filing the return will be very easy and mistakes will be minimum.

Net Tax payable - Net tax payable will have to be calculated as follows - (a) Output tax: *plus* (b) Reversal of Credit (On exempted goods, stock transfers, free samples, lost inputs) : *Less* (c) Input tax credit available.

This net amount is required to be paid through prescribed challan on or before due date.

8.8.4 Accounting Treatment of VAT

ICAI has issued Guidance Note on Accounting for State level VAT on 15-4-2005. The guidance note is based on principles of VAT as contained in White paper released on 17-1-2005. However, there are variations in respect of each State. Hence, accounting policies will have to be adopted to suit provisions of VAT law of the particular State. Following broad principles should be kept in mind -

i. As per AS-2, cost of purchase for the purpose of inventory valuation should not include tax, if credit of tax paid is available.

ii. For purpose of income tax, inventory valuation should be inclusive of taxes, even if its credit is available, as per section 145A of Income Tax Act.

iii. Purchase account should be debited with net amount. VAT credit receivable on purchases should go to 'VAT Credit receivable (Input) Account.

iv. Account of each rate i.e. 0%, 1%, 4%, 12.5% etc. is required to be kept separately.

v. In case of capital goods, as per AS-10, cost of fixed assets should include only non-refundable duties or taxes.

vi. If entire credit of tax on capital goods is not available immediately, the credit that is available immediately should be debited to VAT Credit Receivable (Capital Goods) Account and credit which is not available immediately should be taken to 'VAT Credit Deferred Account'.

vii. In case of sales, the sales account should be credited only with net amount (i.e. exclusive of VAT). Tax payable should be credited to separate account 'VAT Payable Account' [This is 'exclusion method'. Interestingly, in case of excise duty paid on final product, 'inclusive method' is permitted, i.e. sale account is credited inclusive of excise duty on final product].

viii. If any VAT is payable at the end of period (after adjusting VAT credit available), the balance is to be shown as 'current liability'.

8.9 ASSESSMENT OF TAX

Dealer is required to assess his tax and pay himself. It will be basically self assessment. There will be no compulsory assessment at end of the year. If notice is not issued within prescribed time, dealer will be deemed to have been self assessed [*para 2.12 of White Paper on State-Level VAT*]

Returns will be filed monthly/quarterly, as prescribed, along with challans. Returns will be scrutinised and if there is technical mistake, it will have to be rectified by dealer [*para 2.11 of White Paper on State-Level VAT*]

As per West Bengal VAT Act, if dealer does not receive any intimation within two years from end of the accounting year, it is deemed that his return has been accepted by Sales Tax Authority. In case of Andhra Pradesh, the time limit is four years from the date of filing of return.

Audit of records - There will be audit wing in department and certain percentage of dealers will be taken up for audit every year on scientific basis. The audit wing will be independent of tax collection wing, to remove bias. There will be cross verification with Central Excise and Income Tax also. [*para 2.13 of White Paper on State-Level VAT*]

Audit by outside Agencies – VAT laws of some States provide for audit by outside agencies. AP Vat Act provides for audit by CA, cost Auditor or Sales tax Practitioner (STP), if audit is ordered by Commissioner.

In Karnataka, audit report is required if turnover exceeds ₹ 25 lakhs.

In Delhi, the dealer is required to submit copy of audit report u/s 44AB of Income Tax Act (This report is required when turnover exceeds ₹ 40 lakhs per annum). No separate audit is prescribed, unless special audit is ordered by department.

In Maharashtra, audit report from Chartered Accountant or Cost Accountant is required if sales turnover exceeds ₹ 40 lakhs.

8.10 IMPACT OF VAT ON CST

The provisions in respect of Central Sales Tax are summarised below –

i. Para 4.3 of White Paper on State-Level VAT had stated that present CST rate (earlier it was 4%) will continue for some time. CST may go after decision in respect of loss of revenue to States is taken and comprehensive Taxation information System is put in place. Accordingly, CST rate has been reduced to 2% or LST Whichever is lower.

ii. Present CST forms i.e. C, E-I/E-II, F, H, I and J will also continue.

iii. There will be no credit of CST paid on inter-state purchases [para 2.6 of White Paper on State-Level VAT].

iv. If goods are sent on stock transfer outside the State, input tax paid in excess of 4% will be allowed as credit. In other words, input tax to the extent of 4% will not be allowed as credit if goods are sent inter-state (The CST rates has been reduced to 2%. When goods one sold against declaration in Form C.

Unfortunately, the way sales tax VAT is to be implemented by States, it is only Local (i.e. State) VAT and not National VAT. This is because –

(a) If goods are purchased from another State, credit (set off) of CST paid in other State will not be granted by the State where the goods are consumed/used/sold.

(b) If goods are sent to another State on stock transfer basis, only restricted input credit will be given, i.e. there will be no credit on first 4% tax paid on inputs.

Obviously, this is against basic concept of VAT. Thus, the State Level VAT is a truncated version of VAT. It can at the most be termed as 'Local Sales Tax VAT' and not 'National Sales Tax VAT'.

8.10.1 Discriminatory Treatment to CST

Provision of not granting credit of CST seems discriminatory. Article 303 of Constitution of India provides as follows, 'Neither Parliament nor the Legislature of State shall have power to make any law giving any preference to one State over another, or making any discrimination between one State and another'.

As per Article 304(a), State Government can impose tax on goods imported from other States, but cannot discriminate between goods imported from other States and goods manufactured within the State.

Kelkar Committee in para 7.2 of its final report submitted in December 2002, has expressed apprehensions about legal implications of Article 304(a) in State Level VAT. The Kelkar Committee has expressed apprehension that investment decisions will tend towards States where the market within the State is larger than outside.

Giving credit only for locally purchased goods appears to be discriminatory and it appears that this will discourage inter-state purchases.

States indirectly Taxing Inter-State Transaction - If goods sent on stock transfer basis, credit will be granted only in excess of 4% tax paid on inputs. Thus, indirectly, tax will be levied on stock transfers.

As per Article 286, State Government cannot impose tax on sale or purchase during imports or exports; or tax on sale outside the State. It means that State Government can impose sales tax only on sale within the State.

8.10.2 Will Inter-State Sale be Zero Rated?

The VAT system will be VAT compliant if inter-state sale or stock transfer is 'zero rated' i.e. no tax will be payable on inter-state sale or stock transfers, but entire credit of taxes paid on inputs and capital goods is available. If CST is reduced to Nil, but restricted credit of tax paid inputs is available, then the inter-state sales will be 'exempt' and not 'zero rated'. Then the VAT system will not be as per principles of VAT.

The intention seems to be to make inter-state sales 'zero rated' and not merely 'exempt'. However, white paper issued by Empowered Committee does not categorically say so.

Deemed sales

Deemed sales are those which are not really "sales" but have been deemed as sales.

Examples:

- leasing
- hire purchase transaction,
- works contract,

These deemed sales that are taxable under the Value Added Tax (VAT).

It is pertinent to note that the inclusion or otherwise of deemed sales under VAT differs from State to State.

A. Leasing and hire Purchase transactions:

As per Accounting Standard 19 on "Lease" issued by the Institute of Chartered Accountants of India, is an agreement whereby the lessor conveys the lessee in return for a payment or series of payments the right to use an asset for an agreed period of time. *A lease agreement also includes a Hire Purchase Agreement.*

Taxable event attracts at the time of transfer of right to use any goods for any purpose for cash or deferred payment or other valuable consideration. This is known as deemed sale. Sub-lease of an asset is also attracting VAT, unless the State VAT law permits exemption.

Sale of leased asset after the lease period over is taxable in the manner in which normal sale of such asset would have been taxed. Normally, such sale effected to the same lessee and hence such sale would be local one taxable under the VAT laws of the State in which the asset is located.

The lessor would pay VAT at the time of purchase of goods. However, liability to pay VAT on lease rentals will be spread over the tenure of the lease. Input Tax Credit allowed to the lessor against payment of VAT on lease rentals or VAT payable on any other goods.

Example 3: M/s Fin Finance Ltd. purchased equipment on 1.7.2012 from a vendor for ₹ 100 lakhs (exclusive of VAT @4%) on behalf of a dealer for giving on lease. The deemed sale Price of such goods is ₹ 1,20,00,000 (principal amount), taxable @4% of VAT and interest for the lease period is ₹ 30,00,000. The lease term covers substantially the whole useful life of the equipment. Assume input tax credit on purchased equipment is fully allowed in the first year.

Find VAT payable by M/s Fin Finance Ltd.

Answer:

Particulars	Amount ₹
VAT on deemed sale @4% x ₹ 120 L	4,80,000
Less: input tax credit ₹ 100 L x 4%	4,00,000
Net VAT liability	80,000

Note: the interest of ₹ 30 lakhs will be subject to service tax with an abatement of 90%.

B. Hire-purchase sale

Under this transaction, the hire-purchaser acquires the goods immediately on signing the hire purchase agreement but ownership is transferred only when all installments including last installment is paid. VAT attracts at the time of physical delivery of goods. VAT paid on hire-purchase goods allowed as input tax credit.

If goods are repossessed, for any reason then these goods are treated par with sales return. Many States have provided the time limit for granting the claim of returned goods. Therefore, repossessed goods are allowed as sales returns if these goods are repossessed within the specified period of time.

C. Works contract

As per Central Sales Tax Act, 1956 works contract means a contract for carrying out any work which, includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

A dealer dealing with works contract is liable to pay VAT on value of material transferred while executing works contract and service tax on value of services.

Works contract dealer can also opt to pay composition of VAT (i.e. reduced rate of VAT) on the entire value of contract inclusive of value of service, where bifurcation towards value of material and services not possible. Dealers who opts composition scheme not eligible to avail the input tax credit.

8.11 ROLE OF COST ACCOUNTANT UNDER VAT

Cost Accountants have the following key role to play in proper implementation of VAT:

(i) **Record keeping:** VAT requires proper record keeping and accounting. Systematic records of input credit and its proper utilization is necessary for the dealer to take input tax credit. No doubt, Cost Accountants are well equipped to perform these activities.

(ii) **Tax planning:** Cost Accountant is competent to analyze various alternatives and its impact on dealer so as to minimize the tax impact.

(iii) **Negotiations with suppliers to reduce price:** VAT credit alters cost structure of goods supplied as inputs. A Cost Accountant will ensure that the benefit of such cost reduction is passed on by the suppliers to his company.

(iv) **Helping to departmental officers:** There will be audit wing in department and certain percentage of dealers will be taken up for audit every year on scientific basis. Cost Accountant can ensure proper record keeping so as to satisfy the departmental auditors.

(v) **External audit of VAT records:** Under VAT system, self assessment has been brought into force. Cost Accountants can play a very vital role in ensuring tax compliance by audit of VAT accounts.

As per the Bombay High Court in the case of Sales Tax Practitioners Association of Maharashtra v State of Maharashtra (2008), has held that VAT audit can be conducted only by Chartered Accountants and Cost Accountants.

8.12 AGRICULTURAL PRODUCTS OR COMMODITIES

Some State Government have given some concessions to farmers under the VAT regime.

Farmers are not dealers if they are selling their own agricultural produce. They are thus outside the scope of VAT.

However, if they process them into some other from and sell, they are liable to tax provided their turnover is above the thershold limits as specified above.

For example:

- Conversion of paddy into rice.
- Sugar cane into Jaggery
- Oilseeds into vegetable oil

Farm products are exemptied from the VAT in the hands of farmers.

Persons other than farmers who are in the business of buying, selling, supplying and distributing such farm products are liable to pay tax under the State VAT Act, provided their turnover exceeds the threshold limits.

8.13 HIGH SEAS

Excluse economic zone extends to 200 nautical miles from the base line of the coast. Beyond 200 nautical miles from the base line called as High Seas. Goods purchased from High Seas, VAT does not attract. Hence, High Seas purchases are not eligible for input tax credit.

8.14 PHASED OUT INTER - STATE SALE - TAX (I.E. CENTRAL SALES TAX)

As per White Paper of VAT, there is a need for phasing out of Central Sales Tax (CST) after introduction of Value Added Tax (VAT) system in India. Otherwise, cascading effect of tax can not be eliminated to the extent of CST. Hence, Empowered Committee of States for implementation of VAT and the Government of India agreed upon an agreement to phase out CST from 4% to 3% with effect from 1.4.2007. The rate of CST has been further reduced to 2% with effect from 1st June 2008. However, CST rate 2% against Form 'C' continues till the date.

Practical Problems on VAT

Intra State Sales:

Example 4: Purchases by A & Co. for the month of December 2012 are as follows:

(1) ₹ 1,00,000 at 4% Vat

(2) ₹ 5,00,000 at 12.5% Vat.

Sales of A & Co. for the month of December 2012 are as follows:

(1) Sales of ₹ 3,00,000 at 4% Vat

(2) Sales of ₹ 3,00,000 at 12.5% Vat

Compute eligible inputs tax credit and Vat payable for the month.

Answer:

(a) Statement showing VAT payable on sales

Description	Value (₹)	VAT (₹)
4% VAT Sales	3,00,000	12,000
12.5% VAT Sales	3,00,000	37,500
Total	6,00,000	49,500

Eligible input tax credit is ₹ 49,500

(b) Statement showing input tax credit:

Description	Value (₹)	ITC (₹)
4% VAT Purchases (raw material)	1,00,000	4,000
12.5% VAT Purchases (Plant and machinery)	5,00,000	62,500
Total	6,00,000	66,500

Excess Input Tax Credit (ITC) carried forward into next month:

VAT payable on Sales	=	₹ 49,500
Less: ITC	=	₹ 66,500
Excess ITC	=	₹ 17,000

Example 5: Compute the VAT amount payable by Mr. A who purchases goods from a manufacturer on payment of ₹ 2,25,000 (including VAT) and earn 10% profit on cost to retailers? VAT rate on purchase and sale is 12.50%.

Answer :

Cost of purchases	₹ 2,25,000 x 100/112.5	=	₹ 2,00,000
Add: Profit	₹ 2,00,000 x 10%	=	₹ 20,000
Taxable turnover		=	₹ 2,20,000
VAT payable on sales	₹ 2,20,000 x 12.5%	=	₹ 27,500
Less: Input tax credit	₹ 2,25,000 x 12.5/112.5	=	₹ 25,000
Net VAT liability		=	₹ 2,500

Example 6: Calculate the total VAT liability under the State VAT law for the month of October 2012 from the following particulars:

Particulars	₹
Inputs purchased within the state	1,70,000
Capital goods used in the manufacture of the taxable goods	50,000
Finished goods sold within the state	2,00,000

Applicable tax rates are as follows:-

VAT rate on capital goods 12.5%

Input tax rate within the state 12.5%

Output tax rate within the state 4%

Answer:

Input Tax Credit available = (1,70,000 + 50,000) x 12.50%	=	₹ 27,500
Output Tax payable on sales = 2,00,000 x 4%	=	₹ 8,000
Excess of credit can be carried forward into next month	=	₹ 19,500

Example 7: Compute the VAT liability of Mr. X for the month of January 2013, using 'invoice method' of computation of VAT, from the following particulars:-Particulars

Purchase price of the inputs purchased from the local market (inclusive of VAT) ₹ 52,000

VAT rate on purchases 4%

Storage cost incurred ₹ 2,000

Transportation cost ₹ 8,000

Goods sold at a profit margin of 5% on cost of such goods

VAT rate on sales 12.5%

Answer:

Cost of Purchases = ₹ 52,000 x 100/104	=	₹ 50,000
Add: Storage cost and transportation cost	=	₹ 10,000
Total cost	=	₹ 60,000
Addl profit 5% on Cost (₹ 60,000 x 5%)	=	₹ 3,000
Taxable Turnover	=	₹ 63,000
Add; VAT on Taxable Turnover (₹ 63,000 x 12.50%)	=	₹ 7,875
Net VAT Tax liability		
VAT payable on Sales	=	₹ 7,875
Less: ITC (₹ 52,000 – ₹ 50,000)	=	₹ 2,000
Net VAT liability payable by Mr. X for the month of Jan 2013	=	₹ 5,875

Example 8: Mr. X, a manufacturer sells goods to Mr. B, a distributor for ₹ 2,000 (excluding of VAT). Mr. B sells goods to Mr. K, a wholesale dealer for ₹ 2,400. The wholesale dealer sells the goods to a retailer for ₹ 3,000, who ultimately sells to the consumers for ₹ 4,000.

Compute the Tax Liability, input credit availed and tax payable by the manufacturer, distributor, wholesale dealer and retailer under Invoice method assuming VAT rate @ 12.5%.

Answer: (invoice method)

Particulars		Amount (₹)	VAT Liability (₹)	VAT Credit (₹)	TAX to Government (₹)
Mr. X sold to Mr. B					
Taxable turnover @12.50%	=	2,000	250	--	250
Mr. B sold to Mr. K	=	2,400	300	250	50
Mr. K sold to Retailer	=	3,000	375	300	75
Retail sold to consumer	=	4,000	500	375	125

Note: Total VAT paid into the credit of Government (*i.e.* from the Manufacturer to Consumer) is ₹ 500/- (i.e. ₹ 250 + 50 + 75 + 125).

Example 9: Mr. Y dealer, purchases goods for ₹ 2,50,000 (exclusive of VAT). He incurs ₹ 35,000 on the goods and sells them at a profit of ₹ 15,000. Compute the invoice value to be charged and amount of tax payable under VAT. The rate of VAT on purchases and sales is 4%.

Answer:

Computation of invoice value

Particulars	₹
Cost of goods purchased	2,50,000
Add: Expenses	35,000
Profit margin	15,000
Taxable turnover	3,00,000
Add: VAT @ 4 % on ₹ 3,00,000	12,000
Invoice Value	**3,12,000**

Computation of amount of tax payable under VAT

VAT payable on sales	12,000
Less: Input credit of VAT paid on purchases @ 4% on 2,50,000	10,000
Tax Payable under VAT	**2,000**

Example 10: Mr. X is regularly paying excise duty and value added tax on his manufacturing and sales activities respectively. He seeks your advice while calculating the Value Added Tax on sales as well as net VAT liability from the following information:

Purchases from local market (VAT inclusive of @12.5%) ₹ 1,40,625.

Manufacturing expenses is ₹ 75,000.

Profit on Cost @80%.

Excise Duty @10.30%

Output VAT @12.5%

Answer:

Cost of Purchases	₹ 1,25,000	(i.e. ₹1,40,625 x 100/112.5)
Manufacturing expenses	₹ 75,000	
Total cost	₹ 2,00,000	
Profit @80% on cost	₹ 1,60,000	(i.e. ₹2,00,000 x 80/100)
Assessable Value	₹ 3,60,000	
Add: Excise Duty	₹ 37,080	(i.e. ₹3,60,000 x 10.30/100)
Taxable Turnover	₹ 3,97,080	
Add: VAT	₹ 49,635	(i.e. ₹3,97,080 x 12.50%/100)
Aggregate Sales	₹ 4,46,715	
Value Added Tax payable	₹ 49,635	
Less: Input Tax Credit	₹ 15,625	
Net Value Tax Payable	₹ **34,010**	

Example 11: Mr. G, a trader selling raw materials to a manufacturer of finished products. He imports his stock in trade as well as purchases the same from the local markets. Following transactions took place during financial year 2012-13.

Calculate the VAT and invoice value charged by him to a manufacturer. Assume the rate of VAT @ 12.50%:

	(₹)
Cost of imported materials (from other State) excluding tax	1,00,000
Cost of local materials including VAT	2,25,000
Other expenditure includes storage, transport, interest and loading and unloading and profit earned by him	87,500

Answer :

Cost of Imported material from other states	₹ 1,00,000
Cost of local material ₹ 2,25,000 x 100/112.50	₹ 2,00,000
Cost of other expenditure and profit	87,500
Taxable Turnover	₹ 3,87,500
VAT payable on sales	₹ 48,438
Invoice Value or Sale Value	₹ 4,35,934

Net VAT payable by Mr. G is ₹ 23,438 (i.e. ₹ 48,438 – ₹ 25,000)

Example 12: R Ltd. of Gujarat made total purchases of input and capital goods for ₹ 65,00,000 during the month of January 2013. The following further information are as follows:

(i) Goods worth ₹ 25,00,000 were purchased from Tamil Nadu on which C.S.T @2% was paid.

(ii) The purchase made in January 2013 includes goods purchased from un-registered dealers amounting to ₹ 18,50,000.

(iii) It purchased capital goods for ₹ 6,50,000 (not eligible for Input Tax Credit) and those eligible for input tax credit for ₹ 9,00,000.

Sales made in the state of Gujarat for ₹ 10,00,000 on which VAT @12.50% during the month of January 2013. All purchases are exclusive of tax and VAT on purchases @4%. Calculate net VAT liability.

Note: Credit on capital goods is available in 36 equal monthly installments.

Answer :

Total Purchases in the month of January, 2013	=	₹ 65,00,000
Less: Interstate purchases	=	₹ (25,00,000)
Purchases from unregistered dealer	=	₹ (18,50,000)
Capital goods for which no ITC	=	₹ (6,50,000)
Total Purchases eligible for input tax credit	=	₹ 15,00 000
Less: Purchases (capital goods) eligible for input tax credit	=	₹ (9,00,000)

Purchases (other than capital goods) eligible for ITC	=	₹ 6,00,000
ITC on capital goods ₹ 9 lacs x 4% x 1/36	=	₹ 1,000
ITC on input goods ₹ 6 lacs x 4%	=	₹ 24,000
Total ITC	=	₹ 25,000
VAT payable on sales ₹ 10 lacs x 12.5%	=	₹ 1,25,000
Less: Input Tax Credit (ITC) receivable	=	₹ (25,000)
Net VAT payable	=	₹ 1,00,000

Example 13: Compute the net VAT liability from the following information:-

Particulars	₹
Raw material purchased from foreign market (including duty paid on imports @ 20%)	12,000
Raw material purchased from local market (including VAT charged on the material @4%)	20,800
Raw material purchased from neighbouring state (including CST paid on purchases @ 2%)	7,140
Storage, transportation cost and interest	2,500
Other manufacturing expenses incurred	600

The goods are sold at 10% profit on cost of production. VAT rate on sale of such goods is 12.5%.

Answer:

	₹
Raw material purchased from foreign market	12,000
Add: Raw material purchased from local market (₹ 20,800 – ₹ 800)	20,000
[₹ 20,800 x 4/104 = ₹ 800]	
Raw material purchased from neighbouring state	7,140
Storage, transportation cost and interest	2,500
Other manufacturing expenses incurred	600
Cost of production	42,240
Add: Profit @10% on ₹ 42,240	4,224
Sale Price	46,464
VAT @ 12.5% x 46,464	5,808
Computation of VAT liability:-	
VAT on sale price	5,808
Less: Input tax credit on purchases	800
Net VAT payable	5,008

Example 14: Compute net VAT liability of Mr. Ram from the following information:

Particulars	(₹)	(₹)
Raw material from the foreign market		1,20,000
(Including duty paid on imports @20%)		
Raw material purchased from local market		
Cost of material	2,50,000	
Add: Excise duty 16%	40,000	
	2,90,000	
Add: VAT @4%	11,600	3,01,600
Raw material purchase from neighboring State (includes CST @2%)		51,000
Storage and transportation cost		9,000
Manufacturing expenses		30,000

Mr. Ram sold goods to Mohan and earned profit @12% on cost of production.

VAT rate on sale of such goods is 4%.

Answer:

Statement showing net VAT liability of Mr. Ram

Raw material from the foreign market	=	₹ 1,20,000
Raw material from local market	=	₹ 2,90,000
Raw material from neighboring State	=	₹ 51,000
Storage and transport cost	=	₹ 9,000
Manufacturing expenses	=	₹ 30,000
Cost of production	=	₹ 5,00,000
Add: profit @12% on cost of production	=	₹ 60,000
Taxable turnover	=	₹ 5,60,000
Add: VAT @4% on taxable turnover	=	₹ 22,400
Sale value	=	₹ 5,82,400
VAT payable on sales	=	₹ 22,400
Less: ITC on purchases	=	₹ 11,600
Net VAT liability	=	₹ 10,800

Example 15: Mr. Raj is a registered dealer and gives the following information. You are required to compute the net tax liability and total sales under the VAT from the following information.

Raj sells his products to dealers in his state and other states as well.

The profit margin in 15% of cost of production and VAT rate of sales is 12.5% of sales.

(i) Intra state purchase of raw material is ₹ 2,50,000 (excluding VAT of 4%)

(ii) Purchase of raw material from an unregistered dealer ₹ 80,000 (including VAT of 12.5%)

(iii) Import of raw material ₹ 1,85,000 (excluding custom duty of 10%)

(iv) Purchase of raw material from other state ₹ 50,000 (excluding CST of 2%)

(v) Transportation charges, wages and other manufacturing expenses excluding tax ₹ 1,45,000

(vi) Interest on bank loan ₹ 1,60,000.

Answer:

Statement showing net VAT liability and total sales for Mr. Raj

	₹
Intra state purchases	2,50,000
Raw material purchased from unregistered dealer including VAT	80,000
Import of raw material (including customs duty)	2,03,500
Purchase of raw material from other states (including CST)	51,000
Transportation charges, wages etc.	1,45,000
Total cost of production	7,29,500
Add: profit @15%	1,09,425
Taxable turnover	8,38,925
Add: VAT @ 12.5%	1,04,866
Sales	9,43,791

Net VAT liability is ₹ 94,866 (i.e. ₹ 1,04,866 – ₹10,000)

Taxable as Well as Exempted Turnover:

Example 16: Mr. Y, a dealer in Mumbai dealing in consumer goods, submits the following information pertaining to the Month of March, 2013.

(i) Exempt goods 'P' purchased for ₹ 2,00,000 and sold for ₹ 2,50,000.

(ii) Goods 'Q' purchased for ₹ 2,25,000 (including VAT) and sold at a margin of 10% profit on purchases (VAT rate 12.5%);

(iii) Goods 'R' purchased for ₹ 1,00,000 (excluding VAT) and sold for ₹ 1,50,000 (VAT rate 4%);

(iv) His unutilized balance in VAT input credit on 1.3.2013 was ₹ 1,500.

Compute the turnover, Input VAT, Output VAT and Net VAT payable by Mr. Y.

Answer:

Hints:

Net VAT liability payable by Mr. Y

VAT payable		₹ 33,500
Less: Input Tax Credit		
Opening balance	1,500	
During the month	29,000	₹ 30,500
Net VAT payable		₹ 3,000

Works Contract

Example 17: Determine the taxable turnover, input tax credit and net VAT payable by a works contractor from the details given below on the assumption that the contractor maintains sufficient records to quantify the labour charges. Assume output VAT at 12.5%:

		₹ lakhs
(i)	Total contract price (excluding VAT)	100
(ii)	Labour charges paid for execution of the contract	35
(iii)	Cost of consumables used not involving transfer of property in goods	5
(iv)	Material purchased and used for the contract taxable at 12.5% VAT (VAT included)	45

The contractor also purchased a plant for use in the contract for ₹ 10.4 lakhs. In the VAT invoice relating to the same VAT was charged at 4% separately and the said amount of ₹ 10.4 lakhs is inclusive of VAT. Assume 100% input credit on capital goods.

Make suitable assumption wherever required and show the working notes.

Answer:

	₹ lakhs
Total contract price (excluding VAT)	100.00
Less: Labour charges paid for execution of the contract	(35.00)
Less: Cost of consumables used not involving transfer of property in goods	(5.00)
Taxable Turnover	60.00
VAT @12.50% on ₹ 60 lakhs	7.50
Less: ITC ₹ 45 lakhs x 12.50/112.50	(5.00)
Less: ITC ₹ 10.40 lakhs x 4/104	(0.40)
Net VAT payable	2.10

Miscellaneous

Example 18: Compute the purchases eligible for availing input tax credit from the following particulars:-

Purchases	₹
Goods for resale within the State	10,000
Capital goods required for the purpose of the Manufacture or resale of taxable goods	14,000
Goods purchased from the unregistered dealer	3,200
Goods which are being utilized in the manufacture of exempted goods	6,600
High seas purchases	2,300

Answer:

Goods for resale within the State	10,000
Capital goods required for the purpose of the Manufacture or resale of taxable goods	14,000
Eligible input tax credit	**24,000**

Study Note - 9

CENTRAL SALES TAX ACT, 1956

This Study Note includes

9.1 Introduction
9.2 Constitutional Provisions & Nexus Theory
9.3 Principles & Objects of CST Act, 1956
9.4 Definitions
9.5 Sale or purchase in the course of Interstate Sale
9.6 Sale or purchase outside a State
9.7 Sale in the course of Export/Import
9.8 Person liable to pay CST
9.9 Exemption in respect of Subsequent Sale
9.10 Taxability of Transfer of Goods made otherwise than by way of Sale
9.11 Registration of Dealer
9.12 Rates of Tax in the course of Interstate Trade or Commerce
9.13 Purchase of Goods by a Registered Dealer
9.14 Furnishing of Declaration
9.15 Power to Exempt or Impose Tax at Concessional Rates
9.16 Sale for units located in Special Economic Zone
9.17 Determination of Taxable Turnover
9.18 Levy & Collection of Tax
9.19 Penal provisions under CST Act
9.20 Imposition of Penalty in Lieu of Prosecution
9.21 Cognizance of Offences
9.22 Goods of Special Importance
9.23 Liability of liquidator of company in Liquidation
9.24 Liability of Directors of Private Company in liquidation
9.25 Central Sales Tax Appellate Authority [Section 19]
9.26 Appeal [Section 20]
9.27 Procedure on Receipt of Appeal
9.28 Powers of the CST Appellate Authority
9.29 Authority for Advance Rulings
9.30 Transfer of Pending Proceedings
9.31 Applicability of Order Passed
9.32 Forms under CST

9.1 INTRODUCTION

i. Central Sales Tax is an indirect tax which is levied by the Central Government.

ii. In this case, the taxable event is 'sale of goods inter-state'.

iii. CST applies to the whole of India including the state of Jammu & Kashmir.

iv. CST is payable in the state in which the movement of goods commences.

v. Though it is called CST, it is actually assessed, collected & administered by the local (i.e. State) sales tax authorities (namely Commercial Tax Department of the State) only.

vi. Also, the tax collected under CST is actually retained by the state (in which it is collected). It means CST is the revenue of the State Government.

Seller is liable to pay CST on interstate sale to the State Government Commercial Tax Department where he has the place of business.

9.2 CONSTITUTIONAL PROVISIONS & NEXUS THEORY

(A) Constitutional Provisions

i. The power to levy tax is given through the constitution of India. (Entry No.92A and 92B of List I, called the Union List, in the Seventh Schedule to the Constitution of India, as per Article 246(1).

ii. Article 265 of the Constitution of India states that no tax shall be levied or collected except by authority of law.

iii. Article 269 (1)(G) empowers the Central Government to levy taxes on sale or purchase of goods other than newspapers, which takes place in the course of inter-state trade or commerce. (Entry No.92A and 92B)

iv. Article 269(2) assigns the levy of such tax to the States.

v. Article 269(3) empowers the Parliament to formulate principles for determining when a sale or purchase takes place in the course of interstate trade or commerce.

vi. Article 286 prohibits the States to levy tax on transactions which are covered by the CST Act.

(B) Nexus Theory

Sales tax is levied on the transaction of sale of goods. A sale of goods has various elements such as goods, agreement to sell, transfer of property, valuable consideration, seller, buyer etc.

It is possible that each such element of sale may be distributed over more than one state.

For e.g. : the seller is in one state, the buyer is in another state, transfer takes place in the third state, consideration may pass in the fourth state etc.

Earlier, each such state tried to subject a single sale transaction to its own sales tax under the 'Nexus Doctrine'. 'Nexus' means connection or link.

Under the guise of having a territorial nexus each state brought a single sale transaction to its own sales tax.

This consequently resulted in the same sale transaction being subject to multiple taxation.

To put an end to this unfair multiple taxation on a single sale transaction, Article 286 of the Constitution of India was amended.

Article 286 provides that no law of a State shall impose, or authorize the imposition, of a tax on the sale or purchase of goods where such sale or purchase takes place

(a) Outside the State, or

(b) In the course of the import of the goods into, or export out of, the territory of India.

9.3 PRINCIPLES & OBJECTS OF CST ACT, 1956

(A) Principles of Central Sales Tax Act

Entry 92 (a) of the List-I (Union List) to the Seventh Schedule of the Constitution of India empowers the

Union Government to levy tax on the sale or purchase of goods, which takes place in the inter-state Trade or Commerce. Accordingly, the Central Sales Tax Act was enacted.

(B) Objective of the CST Act:

The objects of the Central Sales Tax Act, 1956 as given in the Preamble of the Act are as follows:

i. To formulate principles for determining when a sale or purchase of goods takes place:
   (a) In the course of interstate trade or commerce (Sec 3)
   (b) Outside a state (Sec 4)
   (c) In the course of import into or export from India (Sec 5).

ii. To provide for the levy, collection and distribution of taxes on the sale of goods in the course of interstate trade or commerce (Sec 9).

iii. To declare certain goods to be of special importance in inter-state trade or commerce (Sec 14).

iv. To specify the restrictions and conditions on the State laws imposing taxes on the sale or purchase of such goods of special importance (Sec 15).

v. To provide for collection of taxes from companies under liquidation (Sec 16 - 18).

9.4 DEFINITIONS (SEC 2)

1. Sec 2(a) -'Appropriate State' means:

(a) in relation to a dealer who has one or more places of business situated in the same state, that state.

(b) In relation to a dealer who has places of business situated in different states, every such state with respect to the place or places of business situated within its territory.

Significance of 'Appropriate State'.

i. Administration, levy and collection of tax have been delegated to Appropriate State (Sec 9).

ii. Registration should be made with the authorities of the Appropriate State.

iii. Monthly returns, appeals, reviews, references, refunds and compounding of penalties are to be dealt with by the Appropriate State.

iv. Appropriate state is equally significant in the application of :
   (a) Sec 8(2) (rate of tax on sales not covered by C Form);
   (b) Sec 8(1) and Sec 8(2)(c) (extension of tax concessions on intra state sales to inter-state sales) and
   (c) Sec 9(2A) (offences under General Sales Tax Acts are offences under CST Act too in the respective states).

2. Sec 2(aa) -'Business' includes:

(a) Any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture,

   i. whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and

   ii. whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern;

(b) Any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

Analysis of the definition:

i. The meaning of 'business' is significant since dealer u/s 2(b) is a person who carries on the business of buying, selling, supplying or distributing goods.

ii. The definition of business is inclusive and not exhaustive.

iii. For determining whether a transaction is in the nature of business, frequency regularity and volume of such transaction has to be looked into.

iv. It is not necessary that the business is carried on with a profit motive. Even an activity suffering a loss may be called a business.

v. Business may be legal or illegal. It may be carried on regularly or otherwise.

vi. If the main activity of a dealer is business under clause (a) above - only then incidental or ancillary activities under clause (b) above will also be business.

Example 1: (a) Temples sell prasadam which is an ancillary activity. However, the main activity of temples is not business. Hence, sale of prasadams cannot be taxed. *(Tirumala Tirupathi Devasthanam Case)*.

(b) The sale of assets by bank for realisation of loans (an ancillary activity) cannot be taxed as the main activity of bank is not business (trade, commerce, manufacture etc.) *(Canara Bank Case)*.

3. Sec 2(ab) - 'Crossing the Customs Frontiers of India' means crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.

Customs station means a customs port, customs airport or a land customs station as defined under the Customs Act, 1962.

4. Sec 2(b) - 'Dealer' means any person

(i) who carries on (whether regularly or otherwise), the business of

(ii) buying, selling, supplying or distributing goods, directly or indirectly,

(iii) for cash or for deferred payment, or for commission, remuneration or other valuable consideration.

Dealer includes the following :

(a) A Local Authority, a Body Corporate, a Company, any Co-operative Society or other Society, Club, Firm, HUF or Other Association of Persons which carries on such business.

(b) A Factor, Broker, Commission Agent, Del-credre Agent, or any other Mercantile Agent, by whatever name called, and whether of the same description as herein before mentioned or not, who carries on the business of buying, selling, supplying or distributing, goods belonging to any principal whether disclosed or not, and

(c) An auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

5. Deemed Dealers

Explanation 1 : Every person who acts as an agent, in any State, of a dealer residing outside that state and buys, sells, supplies, or distributes, goods in the State or acts on behalf of such dealers as —

(a) A Mercantile Agent as defined in the Sale of Goods Act, 1930, or

(b) An Agent for handling of goods or documents of title relating to goods, or

(c) An agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment, and every local branch or office in a state of a firm registered outside that State or a Company or other Body Corporate, the principal office or headquarters whereof is outside that state, shall be deemed to be a dealer for the purposes of this Act.

Explanation 2: A Government which, whether or not the course of business buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall except in relation to any sale, supply or distribution of surplus, un-serviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of the CST Act.

Example 2: 'Central Government can become a dealer, but the State Government cannot - is the statement correct? Give reasons.

Answer:

(i) The statement is not correct. According to Explanation 2 under Sec 2(b), "a Government which, whether or not the course of business buys, sells, supplies or distributes goods……shall….. be deemed to be a dealer for the purposes of CST Act',

(ii) The word used is 'Government' and not Central Government,

(iii) No distinction is sought to be made between Central Government and State Government,

(iv) Hence every government, be it Central or State, buying / selling goods will be deemed to be a dealer.

6. Sec 2(c) - 'Declared Goods' means goods declared under Section 14 to be of special importance in Interstate Trade or Commerce.

7. Sec 2(d) - 'Goods' includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares & securities.

Analysis of definition:

The definition of 'Goods' is inclusive definition. It does not bring out the essential characteristics of goods, but declares that all materials, articles commodities and all other kinds of movable property are goods and excludes some specified items. Article 366(12) of the Constitution of India, defines the term 'Goods' to include all materials, commodities and articles. But this definition is very wide, when compared with the definition of goods under the CST Act.

Held to be 'Goods'	**Held not to be 'Goods'**
Electricity and electric meters	Labour
Animals or Birds in captivity and livestock	Money (Cash/Currency/Cheque/DD)
Copyrights, Branded software programs	Oil Tanker embedded in earth
of Floppies or Discs	
Lottery tickets, incomplete films, steam etc.	Claim for loss or damages

Goods include all Movable Property :

(i) The immovable property is excluded from the definition of Goods. Immovable property includes land, benefits arising out of land and things attached to earth or permanently fastened to anything that is attached to the earth.

(ii) However, goods include standing crop, grass and things attached to and forming part of land, which is agreed to be severed before sale or under contract of sale. But standing trees are not goods and not taxable, unless timber is identified, contract is unconditional and the timber is in deliverable state.

(iii) The securities like shares, debentures, stocks or money certificates are not goods and hence not taxable.

Example 3: Arun sells his land along with the standing crops and trees for ₹ 20 lakhs. Sales tax officer wants to assess for sales tax the value of standing crops and trees. Comment.

Answer:

(i) What is sold is land along with standing crops and trees.

(ii) The sale does not pertain to the latter alone in which case they are uprooted and removed. Consequently, they become goods.

(iii) In the instant case, the standing crops and trees are immovable.

(iv) They are not goods and hence do not attract sales tax.

Example 4: Are sale of bundles of old newspapers as waste papers exempt from CST?

Answer:

As per section 2(d), goods do not include 'news paper'.

In *Sait Rikhaji Furtarnal Vs State of AP*, the Supreme Court held that when old newspapers are sold as newspapers, they are only in the character of newspapers and they are not goods.

However, when the newspapers are sold as waste papers, they are not newspapers and hence they are goods. Therefore, sale of bundles of old newspapers as waste papers is taxable**.** *(The Hindu vs. State of Tamil Nadu)*

8. Sec 2(dd) -'Place of Business' includes:

(a) In any case, where a dealer carries on business through an agent (by whatever name called), the place of business of such agent;

(b) A warehouse, godown or other place where a dealer stores his goods; and

(c) A place where a dealer keeps his books of account.

Significance of 'Place of Business'

(i) The 'Place of Business' has significance in the context of registration of dealers for Sec 7, 8 & 9 of the CST Act, 1956.

(ii) A dealer having a place of business in more than one state - has to get himself registered under each state.

(iii) If a dealer has different places of business in one state, then he can apply for registration through a single application for that state.

9. Sec 2(g) - 'Sale' means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, but does not include a mortgage or hypothecation of or a charge or pledge on goods.

10. Deemed Sale:

Pursuant to amendment of *Article 366* of the Constitution, the following deemed transactions are also covered:

i. A transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

ii. A transfer of property in goods (whether as goods or in some other form) involved in the execution of a Works Contract;

iii. A delivery of goods on Hire-Purchase or any system of payment by installments;

iv. A transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

v. A supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

vi. A supply, by way of or as part of any service of goods, being food or any other article for human consumption or any drink (whether or not intoxication), where such supply or service is for cash, deferred payment or other valuable consideration.

Essential ingredients of a sale:

i. There must be two parties to the contract of sale (i.e.) the buyer & the seller.

ii. There must be valid consent of both the above parties.

iii. There must be an actual transfer of property in goods (i.e. agreement to sell is not a sale).

iv. There must be a consideration in cash or in deferred payment or any other valuable consideration in money or money's worth.

v. Sale includes deemed sales.

vi. Sale does not include a mortgage or hypothecation of or a charge or pledge on goods.

Example 5: Is transfer of property in goods without consideration chargeable to CST?

Answer:

Sale u/s 2(g) means transfer of property for cash or deferred payment or for any other valuable consideration. Where there is transfer of property in goods without consideration, it does not amount to sale within the meaning of the definition under the act and therefore CST is not attracted.

Example 6: Is transfer by way of mortgage chargeable to CST?

Answer:

The definition of 'sale' u/s 2(g) specifically excluded mortgage, hypothecation of goods, charge or pledge on goods. Hence, CST cannot be charged when there is transfer by way or mortgage.

11. Sec 2(h) -'Sale price' means the amount payable to a dealer as consideration for the sale of any goods, less, any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof, other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

Inclusions in Sale Price:

i. Central Sales Tax - whether or not shown separately in invoice (then back calculations are made).

ii. Excise Duty- the excise duty payable is includible in 'Sale Price'. *Hindustan Sugar Mills vs. State of Rajasthan(1979); Ramco Cement Distribution Co.(P) Ltd. V. State of Tamilnadu* Sales tax is also

payable on excise duty whether or not shown separately in invoice and even if paid directly by purchaser. However, this is so only when liability to pay duty is on seller.-*McDowell and Co.Ltd v. CTO.*

Excise duty is a part of turnover, even in that case, the duty was payable by the purchaser, as primary liability to pay duty is of the manufacturer-*Mohan Breweries & Distilleries Ltd v.CTO(1997), State of Kerala V.MRF(1997)*-the judgement was in case of 'cess' payable.

iii. **Packing material and packing charges** - sales tax is leviable on packing material as well as packing charges (i.e. labour charges for packing goods). Sales tax is leviable on packing charges, even if shown separately-CST v. Rai Bharat Das (1988); *Ramco Cement Distribution Co .(P) Ltd. V. State of Tamilnadu; Dalmia Cement (Bharat)Ltd. V. State of Tamilnadu(1991). Cost of packing material is includible in sale price-HPCL v .State of Kerala(1993).*

iv. **Bonus discount or incentive bonus-** for additional sales affected by the distributor/dealer.

v. **Insurance charges-** if the goods are insured by the seller.

vi. **Freight and delivery charges incidental to sale only are deductible-** if the goods are sold from depot, transport charges from factory to the depot cannot be allowed as deduction-*Dyer Meakin Breweries Ltd.V. State of Kerala(1970).*

vii. **Design charges-** in case of goods includible if charged separately in respect of goods manufactured as per design and sold to buyer,as it is a pre-sale expense and forms part of manufacturing cost-*American Refrigerator Co.Ltd.v.State of Tamilnadu(1994).*

viii. **Compulsory warranty charges-** includible if a manufacturer sales goods with service warranty on which customer has no option, the charges for warranty are includible as there is no sale without it-*State of AP V. Hyderabad Allwyn Ltd(1970).*

ix. **Weighment charges paid for goods-** includible in the sale price.

x. **Subsidy/incentive paid to supplier -** these are not post sale expense, hence includible. *EID Parry V.ACCT(1997).*

xi. **Tax paid by buyer when liability is of seller -** if the liability to pay tax/cess/duty is in the buyer, the same cannot be considered for purpose of 'sale price'-*P.V.Beedies(P)Ltd v. State of Mysore (1963); G M S Prakash Rice Mills v. State of Punjab(1993).* Market Cess collected by dealer from buyer and paid to Government is not part of consideration for sale and hence is not taxable-*State of AP v. T. Siddaiah Naidu (1997).*

xii. **Any sum charged for anything done by the dealer-** in respect of goods at the time of or before delivery of such goods.

Exclusions from Sale Price:

The following items shall not be a part of sale price for the calculation of sales tax liability :

i. **Freight / transport charges for delivery of goods**- CST is not payable on freight and transport charges. However, CST is payable on freight charges if (a)Freight Charges are not shown separately in invoice or (b) contract is for FOR destination.

Supreme Court envisaged three situations: (1) Price at the factory gate, i.e. ex-works price. Here tax is not payable on freight, (2) Contract for sale is FOR destination & (3) the price is FOR destination, but contract does not have all ingredients of FOR destination railway contract. *Hindustan Sugar Mills Ltd. V. State of Rajasthan(SC); Kurkunta and Seram Stones (P)Ltd. V.State of Karnataka; Black Diamond Beverages v.CTO, Hyderabad Asbestos Cement Products Ltd v.State of AP; CST v. Ballarpur Industries Ltd(1995).*

ii. **Cost of Installation if charged separately**- is not to be includible.

iii. **Cash discount** for making timely payments- is not includible.

iv. **Trade discounts**- is deduction from list price to wholesalers/dealers, cannot be considered for calculation of CST. *Dy.CST v .Advani Oerlikons (P) Ltd (SC); State of Tamilnadu V.Alkali Chemical Corporation (1994); Dy.CST v.Kerala Rubber and Allied Products (1993); Dy.CST v.Motor Industries Co (SC).*

v. **Insurance on transit if incurred at the request of buyer**- are not chargeable to CST.

vi. **Goods returned within 6 months of the date of sale**- Sec 8A(b) provides that if goods are returned by buyer within six months, its sale price will be deducted from 'aggregate sale price', if satisfactory evidence is produced before sales tax authority in respect of the same. *Dy.CST v.Motor Industries Co (SC); State of Maharashtra v.BASF (India) Ltd (SC).*

vii. **Goods Rejected**- In such case, the period of six months is not applicable, as in case of rejected goods, there is no 'complete sale' at all within the meaning of CST Act or Sale of Goods Act, as the purchasing party has not accepted the goods. Return of goods is a bilateral transaction brought about by consent of seller and purchaser, while rejection of goods is a unilateral transaction, open only to purchaser. It means that sale has not taken place to attract tax. *Metal Alloy Co.(P) Ltd. V. CTO, Bhavanipur Charge Calcutta(1977); State of Tamilnadu v. General Engineering Stores(1993)*

viii. **Government subsidy & other subsidy**- is excludible from the sale price for CST.

ix. **Deposits for returnable containers**- Deposits taken for returnable bottles or tin containers are not sales. Even if the customer does not return the container for long time and security deposit is transferred to profit and loss account that will convert the deposits as part of sale proceeds. There is no intention to sale the container. If the container is not returned the deposit is retained as liquidated damages for loss of bottle. *United Breweries Ltd. V.State of AP (SC); State of Tamilnadu V McDowell (SC); Kalyani Breweries v.State of West Bengal.*

x. **Customs duty paid by Buyer-** when sale is by transfer of documents-*Gujarat Export Corporation Ltd.V. State of Maharashtra(1990)*

xi. **Taxes and fees statutorily recoverable from Buyer-** *Anand Swarup Mahesh Kumar v.CST(SC); State of AP v. T Siddaiah Naidu*

12. Sec. 2 (i) : Sales Tax Law and General Sales Tax Law

'Sales Tax Law' means any law for the time being in force in any state or part thereof which provides for the levy of taxes on the sale or purchases of goods generally or on any specified goods expressly mentioned in that behalf.

'General Sales Tax Law' means the law for the time being in force in any state or part thereof which provides for the levy of tax on the sale or purchase of goods generally.

13. Sec 2 (j) -'Turnover' means the aggregate of the sale prices received and receivable by him in respect of sales of any goods in the course of interstate trade or commerce made during any prescribed period and determined in accordance with the provisions of the CST Act and the Rules made there under.

14. Sec 2(k) -'Year' in relation to a dealer means the year applicable in relation to him under the General Sales Tax Law of the appropriate State and where there is no such year applicable, the financial year.

9.5 SALE OR PURCHASE IN THE COURSE OF INTERSTATE SALE (SECTION 3)

According to Section 3 of the Central Sales Tax Act, 1956, a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase :

(a) Occasions the movement of goods from one state to another; or

(b) Is effected by a transfer of documents of title to goods during their movement from one state to another.

The essential ingredients of interstate sale are as follows:

i. The transaction should be a complete sale.

ii. There should be movement of goods from one state to another state by virtue of agreement to sale.

iii. The completed sale must take place in a state different from the state in which movement of goods commences.

iv. It is not necessary that completed sale precedes the movement of goods. Sale can be either before or after the movement of goods.

v. There must be physical movement of goods from one state to another state.

vi. Where the movement of goods commences and terminates in the same state, it shall not be deemed to be a movement of goods from one state to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other state.

vii. The movement of goods shall commence when the goods are delivered to the carrier or other bailee for transmission and the movement of the goods shall end when the delivery is taken from such carrier or bailee. Thus, the transfer of documents to the title of the goods (Lorry receipt/ Railway Receipt, Bill of Lading, Airway Bill) shall be made during the movement of the goods from one state to another.

Case Laws :

In *Union of India Vs K.G. Khosla Co. Ltd* it was held that a sale can be 'interstate sale' even if the contract of sale does not itself provide for the movement of goods from one state to another. However, such movement should be the result of a covenant of sale or an incidence of that contract.

In *East India Corporation Ltd. Vs State of Tamil Nadu*, the assessee and the customer were from the same state (i.e. Tamil Nadu). However, it was held as an interstate sale u/s 3(b) since goods had moved in from a state outside Tamil Nadu.

In *Mewalal Kawal Kishore v CST*, it was held that there can well be an interstate sale between the two persons belonging to the same state, if the goods move from one state to another, as a result of a contract of sale or the goods are sold, while they are in transit by transfer of documents.

Exceptions to Section 3 :

i. Generally, CST is leviable on interstate sale transactions which cover movement of goods from one state to another.

ii. However, all dispatches of goods from one state to another state do not ipso facto result in interstate sale u/s. 3 of the CST Act.

iii. Only when the movement is on account of a covenant or the sale effected by a transfer of document of title to the goods during their movement from one state to another, it will be an interstate sale U/s 3.

iv. The following are the instances where goods move from one state to another but do not amount to interstate sales:

   (a) A movement of goods from one state to another will not amount to interstate sales unless the seller had the responsibility to deliver the goods outside that state or the movement was as a result of a covenant or incident of contract of sale;

   (b) Stock transfer between head office & branch office will not amount to interstate sales as the basic elements of sale i.e., the presence of a buyer & seller; consideration & transfer of ownership etc. are not present;

(c) Sale or purchase in the course of Export/ Import does not attract levy of CST since these have been specifically covered u/s 5 of the CST Act, 1956;

(d) Sale through commission agent / on account sales will not amount to interstate sales as the agent only acts on behalf of the seller and he does not acquire any ownership of the goods. The agent is only entitled to receive commission on the sales effected by him and will also get re-imbursement of the expenses incurred by him.

Examples 7: Is sale by VPP liable to Central Sales Tax?

Answer:

i. In order to be an interstate sale, there must be movement of goods in connection with the sale as stipulated in Section 3.

ii. In a sale by VPP, both the requirements of Section 3 are satisfied. In a sale by VPP, there is an order by the buyer on the seller.

iii. The seller dispatches the goods by post parcel and the goods are to be delivered by postal authorities to the buyer on payment of price.

iv. The sale takes place in the state where the parcel is received and its value is paid to the post office.

9.6 SALE OR PURCHASE OUTSIDE A STATE (SECTION 4)

i. Section 4(1) provides that subject to the provisions of Section 3, if a sale or purchase of goods is said to take place inside a state, then, such sale or purchase shall be deemed to have taken place outside all other states.

ii. According to Section 4(2), a sale or purchase of goods shall be deemed to take place inside a state, if :

In case of ascertained or specific goods	If the goods are within the State at the time of contract of sale
In case of unascertained or future goods	If the goods are within the State at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation

iii. Where there is a single contract for sale or purchase of goods situated at more than one place, it shall be treated as separate contracts in respect of goods at each such place.

9.7 SALE IN THE COURSE OF EXPORT /IMPORT (SECTION 5)

(A) Sale in the course of export [Section 5(1)]

i. Section 5(1) provides that a sale or purchase of goods shall be deemed to take place in the course of export only if:

(a) The sale or purchase occasions such export, or

(b) It is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

ii. The requisites of an export sale are:

(a) There is a contract of sale between an Indian exporter and a foreign buyer.

(b) There must be an obligation to export as a result of the above foreign contract.

(c) There must be an actual export of goods to a foreign destination.

iii. An export sale can also be effected by transferring documents of title to the goods to a foreign buyer after the goods have crossed the Customs Frontiers of India.

(B) Sale in the course of Import [Section 5(2)]

i. Section 5(2) provides that a sale or purchase of goods shall be deemed to take place in the course of import only if:

(a) The sale or purchase occasions such import, or

(b) It is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

ii. The requisites of an import sale are :

(a) There is a contract of sale between an Indian importer and a foreign seller.

(b) There must be an obligation to import as a result of the above foreign contract.

(c) There must be an actual import of goods from a foreign destination.

iii. An import sale can also be effected by transferring documents of title to the goods in favour of an Indian buyer before the goods have crossed the customs frontiers of India.

(C) Penultimate sale for export of goods [Section 5(3)]

i. Penultimate sale is the last sale immediately prior to the original export.

ii. According to Section 5(3) of the CST Act, the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export if the following conditions are satisfied :

(a) There must have been pre-existing agreement or order to sell the specific goods to a foreign buyer.

(b) The last purchase as referred above, must have taken place after that agreement with the foreign buyer was entered into.

(c) The last purchase must have been made for the purpose of complying with the pre-existing agreement or order.

(d) The same goods, which are purchased in the penultimate sale, must be exported.

(e) The dealer should obtain proof of export from the original exporter.

(f) The original exporter should give Form H to the dealer and only on that basis the dealer can claim exemption of deemed export.

(D) Difference between a Sale for Export and Sale in the Course of Export

	Sale for Export	Sale in the Course of Export
i.	A sale effected by the dealer (seller) and he is not connected with the export of the goods which actually takes place subsequently.	Seller has an express between the sale and the export.
ii.	Seller may or may not have the knowledge that the buyer intends to export the goods purchased.	The seller who purchases goods in India subsequently exports as such.
iii.	Seller does not know the ultimate destination of the goods he has sold.	Seller has clear address for ultimate destination of his goods.

Sale for Export	Sale in the Course of Export
iv. Seller has no intention for export.	Seller has clear intention to export.
v. This sale may be called as penultimate sale.	This sale is called as export sale.
vi. Sale exempted from CST provided Form 'H' received from his buyer.	Sale exempted from CST automatically.
vii. This sale is covered under Section 5(3) of the CST Act, 1956.	This sale is covered under Section 5(1) of the CST Act, 1956.

9.8 PERSON LIABLE TO PAY CST [SECTION 6(1) & 6(1A)]

Section 6(1) of the CST Act provides that subject to the other provisions contained in this Act, every dealer shall, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, not being earlier than thirty days from the date of such notification, be liable to pay tax under this Act on all sales of goods other than electrical energy effected by him in the course of interstate trade or commerce during any year on and from the date so notified.

However, a dealer shall not be liable to pay tax under this Act on any sale of goods which, in accordance with the provisions of section 5(3), is a sale in the course of export of those goods out of the territory of India.

Analysis of Section 6(1) :

Section 6(1) is the charging Section. It reveals the following ingredients:

(a) The taxability under this Section is subject to other provisions of the Act.

(b) A sale under this Section shall be taxed only if it comes within the scope of section 3 of the Act, to be determined as Interstate Sale.

(c) An assessee, to become liable to pay tax, should be dealer within the meaning of section 2(b) of the Act.

(d) The liability to tax shall arise in respect of all goods, except electrical energy.

(e) The penultimate sales in the course of export of goods outside the territory of India are exempt from tax liability.

i. Section 6(1A) provides that a dealer shall be liable to pay tax under the CST Act on sale of any goods effected in the course of interstate trade or commerce notwithstanding that no tax would have been leviable under the Local Sales Tax Act of the appropriate state if such sale had taken place inside that State.

ii. Thus, the absence of levy in intra state sales has no bearing on the levy in respect of interstate sale

9.9 EXEMPTION IN RESPECT OF SUBSEQUENT SALE [SEC 6(2)]

i. According to Section 6(2) of the Central Sales tax Act, 1956, any sale effected during the movement of goods from one state to another by transfer of document of title is known as subsequent sale.

ii. Such subsequent sale shall be exempted from CST when the following conditions are fulfilled:

(a) The first sale should be an interstate sale.

(b) A sale subsequent to the sale mentioned here in above should take place.

(c) The subsequent sale should be during the course of movement of goods from one state to another.

(d) Such subsequent sale shall be effected by a transfer of documents of title to such goods.

(e) The subsequent sale shall be made to the government or a registered dealer other than the government.

(f) Where the subsequent sale is made to a registered dealer other than the government, the goods are of the description referred to in Section 8(3).

(g) The dealer effecting the subsequent sale furnishes the prescribed certificate or declaration to the appropriate authority.

(h) The entire transaction of sale shall be supported by the following supporting documents:

Nature of Sales	**Form to be issued by the Buyer***	**Form to be issued by the Seller**
Original Inter State Sale [Section 3(1)]	Form C	Form E-I
Next Inter State sale by transfer of documents of title to goods	Form C	Form E-II
Subsequent sale u/s 6 (2)	Form C	Form E-II
Second subsequent sale during same transit	Form C	Form E-II

* If the sale is made to Government, Form D will be issued.

iii. In case of subsequent sale in the course of Interstate sale, the dealer effecting subsequent sale can avail exemption by submitting Form C issued by his customer and by submitting Form E-I, issued by his seller.

iv. Form, E-I, E-II & E-III etc. are printed by the Sales Tax department and are supplied to the registered dealer for their use. Form E-I & E-III will have to be issued, in case there are more than one subsequent sale.

v. Thus, it should be noted that Form E-I can be issued by the first seller alone. Form E-II & E-III will have to be submitted by those selling dealer (other than the first dealer) to their purchaser, who can avail of the exemption under section 6(2), subject to the condition that Form C is submitted as well.

vi. Where a Government Department has submitted Form D there cannot be subsequent resale by it.

Thus, any number of subsequent sales effected in the course of such single interstate movement of the goods from one state to another by transfer of documents of title to the goods by one dealer to another shall be exempt provided that the above conditions are fulfilled and relevant f6rms are obtained and filed.

9.10 TAXABILITY OF TRANSFER OF GOODS MADE OTHERWISE THAN BY WAY OF SALE (SEC 6A)

i. Where any dealer claims that he is not liable to pay tax under the CST Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer.

ii. The dealer may furnish to the assessing authority, within the prescribed time a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, containing the prescribed particulars in the prescribed form (Form F) obtained from the prescribed authority, along with the evidence of dispatch of such goods.

iii. If the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed to have been occasioned as a result of sale.

iv. If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer are true, he may make an order to that effect.

v. Thereupon, the movement of goods to which the declaration relates shall be deemed to have been occasioned otherwise than as a result of sale.

9.11 REGISTRATION OF DEALER

9.11.1 Mode of Registration

Section 7 of the CST Act lays down the provisions for registration of Dealers as under:

(A) Compulsory Registration: [Section 7(1)]

Section 7(1) provides that every dealer liable to pay tax under the CST Act shall, within such time as may be prescribed for the purpose, make an application for registration to such authority in the appropriate Stale as the Central Government may, by general or special order, specify, and every such application shall contain such particulars as may be prescribed.

(B) Voluntary Registration: [Section 7(2)]

i. Section 7(2) provides that any dealer liable to pay tax under the sales tax law of the appropriate State, or where there is no such law in force in the appropriate State or any part thereof, any dealer having a place of business in that State or part, as the case may be, may, notwithstanding that he is not liable to pay tax under the CST Act, apply for registration to the authority referred to in Section 7(1), and every such application shall contain such particulars as may be prescribed.

ii. A dealer shall be deemed to be liable to pay tax under the sales tax law of the appropriate State notwithstanding that under such law a sale or purchase made by him is exempt from tax or a refund or rebate of tax is admissible in respect thereof.

9.11.2 Issue of Certificate of Registration [Section 7(2A) & 7(3)]

i. Section 7(2A) provides that where it appears necessary to the authority to whom an application is made for registration, he may for the proper realisation of the tax payable under the CST Act or for the proper custody and use of the forms impose as a condition for the issue of a certificate of registration, by an order in writing and for reasons to be recorded therein, a requirement that the dealer shall furnish in the prescribed manner and within such time as may be specified in the order specified security for all or any of the aforesaid purposes.

ii. Section 7(3) provides that if the authority is satisfied that the application is in conformity with the provisions of the CST Act and the rules made thereunder and the condition, if any, imposed, has been complied with, he shall register the applicant and grant to him a certificate of registration in the prescribed form which shall specify the class or classes of goods for the purposes of Section 8(1).

9.11.3 Security for Registration [Section 7(3A), 7(3B), 7(3BB) & 7(3C)]

i. Section 7(3A) provides that where it appears necessary to the authority granting a certificate of registration he may for the proper realisation of tax payable under the CST Act or for the proper custody and use of the forms require, at any time while such certificate is in force, by an order in writing and for reasons to be recorded therein, require from the dealer, to whom the certificate has been granted, to furnish within such time as may be specified in the order and in the prescribed manner such security, or, if the dealer has already furnished any security, such additional security, as may be specified in the order, for all or any of the aforesaid purposes.

ii. Section 7(3B) provides that no dealer shall be required to furnish any security or additional security unless he has been given an opportunity of being heard.

iii. Section 7 (3BB) provides that the amount of security which a dealer may be required to furnish or the aggregate of the amount of such security and the amount of additional security which he may be required to furnish by the authority referred to therein, shall not exceed :

(a) in the case of a dealer other than a dealer who has made an application, or who has been registered in pursuance of an application, a sum equal to the tax payable under this Act, in accordance with the estimate of such authority on the turnover of such dealer for the year in which such security or as the case may be, additional security is required to be furnished; and

(b) in the case of a dealer who has made an application, or who has been registered in pursuance of an application a sum equal to the tax leviable under this Act, in accordance with the estimate of such authority on the sales to such dealer in the course of inter-State trade or commerce in the year in which such security or, as the case may be, additional security is required to be furnished, had such dealer been not registered under the CST Act.

iv. Section 7(3C) provides that where the security furnished by a dealer is in the form of a surety bond and the surety becomes insolvent or dies, the dealer shall, within thirty days of the occurrence of any of the aforesaid events, inform the authority granting the certificate of registration and shall within ninety days of such occurrence furnish a fresh surety bond or furnish in the prescribed manner other security for the amount of the bond.

9.11.4 Forfeiture of Security [Section 7(3D) & 7(3E)]

i. Section 7(3D) provides that the authority granting the certificate of registration may by order and for good and sufficient cause forfeit the whole or any part of the security furnished by a dealer:

(a) for realising any amount of tax or penalty payable by the dealer;

(b) if the dealer is found to have misused any of the forms or to have failed to keep them in proper custody.

ii. However, no order shall be passed under this sub-section without giving the dealer an opportunity of being heard.

iii. Section 7(3E) provides that where by reason of an order, the security furnished by any dealer is rendered insufficient; he shall make up the deficiency in such manner and within such time as may be prescribed.

9.11.5 Refund of Security [Section 7(3G)]

Section 7(3G) provides that the authority granting a certificate of registration may, on application by the dealer to whom it has been granted, order the refund of any amount or part thereof deposited by the dealer by way of security under Section 7, if it is not required for the purposes of the CST Act.

9.11.6 Refusal to issue forms [Section 7(3F)]

Section 7(3F) provides that the authority issuing the forms may refuse to issue such forms to a dealer who has failed to comply with an order or with the provisions of, until the dealer has complied with such order or such provisions, as the case may be.

9.11.7 Appeal against the order [Section 7(3H), 7(31) & 7(3J)]

i. Section 7(3H) provides that any person aggrieved by an order may, within thirty days of the service of the order on him, but after furnishing the security, prefer, in prescribed form and manner, an appeal against such order to the prescribed appellate authority.

ii. However, the appellate authority may, for sufficient cause, permit such person to present the appeal:

(a) after the expiry of the said period of 30 days; or

(b) without furnishing the whole or any part of such security.

iii. Section 7(3I) provides the procedure to be followed in hearing any appeal and the fees payable in respect of such appeals. This shall be such as may be prescribed.

iv. Section 7(3J) provides that the order passed by the appellate authority in any appeal shall be final.

9.11.8 Cancellation of Registration: [Section 7(4) & 7(5)]

i. Section 7(4) provides that a certificate of registration granted under Section 7 may :

(a) Either on the application of the dealer to whom it has been granted, or, where no such application has been made, after due notice to the dealer, be amended by the authority granting it if he is satisfied that by reason of the registered dealer having changed the name, place or nature of his business or the class or classes of goods in which he carries on business or for any other reason the certificate of registration granted to him requires to be amended; or

(b) Be cancelled by the authority granting it where he is satisfied, after due notice to the dealer to whom it has been granted, that he has ceased to carry on business or has ceased to exist or has failed without sufficient cause, to comply with an order or with the provisions or has failed to pay any tax or penalty payable under the CST Act, or in the case of a dealer registered has ceased to be liable to pay tax under the sales tax law of the appropriate State or for any other sufficient reason.

ii. Section 7(5) provides that a registered dealer may apply in the prescribed manner not later than six months before the end of a year to the authority which granted his certificate of registration for the cancellation of such registration, and the authority shall, unless the dealer is liable to pay tax under this Act, cancel the registration accordingly, and where he does so, the cancellation shall take effect from the end of the year.

9.11.9 Amendment in Certificate

i. A certificate of registration can be amended in any of the following cases :

(a) Where the dealer changes his place of business;

(b) Where there is a change in the goods dealt with by the dealer;

(c) Where there is change in the constitution of the firm.

ii. The dealer should get his Certificate of Registration modified in the above cases, in order to avoid penalty.

9.11.10 Benefits of Certificate of Registration

i. A certificate of registration provides the following benefits to the dealer :

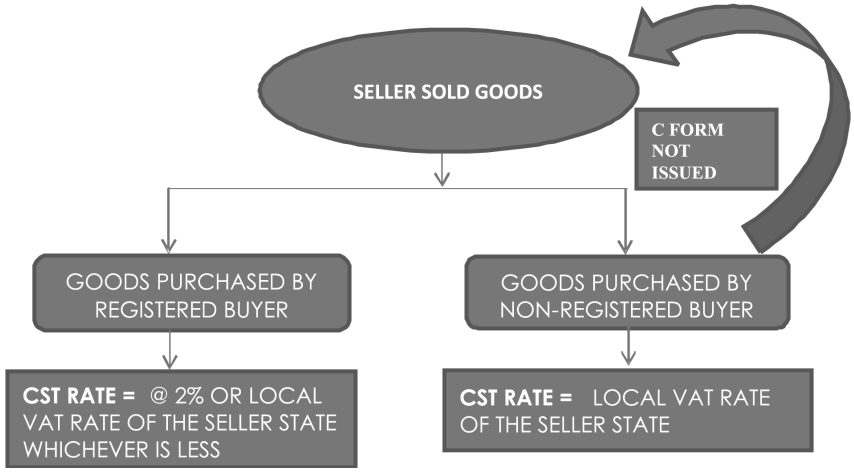
(a) By obtaining the requisite declaration forms from the department and using them, he can make interstate purchase @ 4%.

(b) The dealer can also obtain form, which will enable him to claim total exemption in respect of subsequent sales, as laid down by section 6(2).

ii. Failure to get registered under the CST Act prevents a dealer from effecting interstate sale, even where the turnover is only ₹ 1.

9.12 RATES OF TAX IN THE COURSE OF INTERSTATE TRADE OR COMMERCE [SECTION 8(1) & 8(2)]

Incidence of central sales tax



If a sale or purchase takes place as per section 3(a) or 3(b) of the CST Act, 1956, then such sale or purchase falls within the ambit of the CST Act. Appropriate rate of tax will be levied on such taxable turnover based on the sale or purchase taken place between two registered dealers or between registered and unregistered dealer.

Example 8: Goods worth ₹ 1,02,000 are sold by A of Andhra Pradesh to C of Chennai, CST @ 2% is included in the above. If the local sales tax rate is 0%, 1%, 4% or 12.5% on such sale within the state of Andhra Pradesh. What will be the tax liability?

(i) If buyer is the registered dealer and C Form given.

(ii) If buyer is the unregistered dealer.

Answer:

First we have to find the taxable turnover

Taxable turnover ₹ 1,02,000 x 100/102 = ₹ 1,00,000

Local sales tax rate:	0%	1%	4%	12.5%
(i) Buyer is the registered Dealer	0%	1%	2%	2%
(ii) Buyer is the Unregistered Dealer	0%	1%	4%	12.5%

Tax liability

(i) Buyer is the registered Dealer	0	₹ 1,000	₹ 2,000	₹ 2,000
(ii) Buyer is the unregistered Dealer	0	₹ 1,000	₹ 4,000	₹ 12,500

From the above discussion we came to know the tax implicit and its relevance under CST Act, 1956. The concept of minimum of 10% CST has been removed w.e.f. 1-4-2007, the CST for sale to persons other than registered dealers, would be equal to the local VAT rate applicable in the state of the selling dealer, which may be 1%, 4% or 12.5%.

One Form C, E-I, E-II can be issued to cover one quarter transactions. Declaration in form C,E-I,E-II or F is required to be submitted to assessing authority within 3 three months after the end of the period to which it relates.

In case of Form F, it is required to be obtained on a monthly basis. Hence, within three months after the end of the month, Form F is to be submitted.

In case of Form H, I and J, no time limit has been prescribed. Submission of these forms at any time before assessment should be sufficient.

9.13 PURCHASE OF GOODS BY A REGISTERED DEALER [SECTION 8(3)]

Under section 8(3), a registered dealer can purchase goods as under:

i. Goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended:
   (a) for re-sale by him or subject to any rules made by the Central Government in this behalf, or
   (b) for use by him in the manufacture of processing of 'goods for sale, or
   (c) in mining, or
   (d) in the generation or distribution of 'electricity or any other form of power.

ii. Containers or other materials specified in the certificate of registration of the registered dealer purchasing the goods, being containers or materials intended for being used for the packing of goods for sale or in the telecommunications network.

iii. Containers or other materials used for the packing of any goods or classes of goods specified in the certificate of registration referred to above or for the packing of any containers or other materials specified in the certificate of registration referred to above.

Thus, the purpose for which the dealer purchases goods will have to conform to the purpose for which he was registered under the CST Act.

9.14 FURNISHING OF DECLARATION [SECTION 8(4)]

i. Section 8(4) provides that the provisions of Section 8(1) shall not apply to any sale in the course of interstate trade or commerce, unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner :
   (a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority; or
   (b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government.

ii. However the declaration in prescribed Form, is required to be furnished within the prescribed time or within such further time as that authority may, for sufficient cause, permit.

9.15 POWER TO EXEMPT OR IMPOSE TAX AT CONCESSIONAL RATES [SECTION 8(5)]

Section 8(5) provides that 'the State Government' may, on the fulfillment of the requirements laid down in Section 8(4) by the dealer, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette and subject to such conditions as may be specified therein, direct that :

(a) No tax under this Act shall be payable by any dealer having his place of business in the State in respect of the sales by him, in the course of interstate trade or commerce to a registered dealer or the Government, from any such place of business of any such goods or classes of goods as may be specified in the notification, or that the tax on such sales shall be calculated at such lower rates than those specified in Section 8(1) or Section 8(2), as may be mentioned in the notification;

(b) In respect of all sales of goods or sales of such classes of goods, as may be specified in the notification, which are made, in the course of interstate trade or commerce to a registered dealer or the Government, by any dealer having his place of business in the State or by any class of such dealers as may be specified in the notification to any person orto such class of persons as may be specified in the notification, no tax under the CST Act shall be payable or specified the tax on such sales shall be calculated at such lower rates than those specified in Section 8(1) or Section 8(2), as may be mentioned in the notification.

9.16 SALE FOR UNITS LOCATED IN SPECIAL ECONOMIC ZONE [SECTION 8(6)]

Section 8(6) provides that sale made by a dealer in the course of interstate trade or commerce to a registered dealer in any Special Economic Zone is not liable for tax subject to the following conditions:

i. The sale should be to a registered dealer in Special Economic Zone.

ii. The registered dealer has been purchasing the goods for the purpose of setting up operation, maintenance, manufacture, trading, production, processing, assembling, repairing, reconditioning, reengineering, packaging or for use as packing material or packing accessories in an unit located in any Special Economic Zone.

iii. The establishment of such unit is authorized by the Authority specified by the Central Government.

iv. The goods or class of goods shall be specified in the certificate of registration of such dealer.

v. The dealer selling the goods should obtain a declaration in the prescribed form duly filled and signed by the dealer in Special Economic Zone to whom such goods are sold.

vi. The above declaration should be furnished, by the dealer, who sold the goods to the prescribed authority.

9.17 DETERMINATION OF TAXABLE TURNOVER (SECTION 8A)

(A) Deduction from Aggregate of the Sale Prices [Section 8A(I)]

The following deductions are permitted for the aggregate of sales prices, in determining the turnover:

i. The amount arrived at by applying the following formula :

No deduction on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer has been otherwise deducted from the aggregate of sale prices.

Where the turnover of a dealer is taxable at different rates, the aforesaid formula shall be applied separately in respect of each part of the turnover liable to a different rate of tax.

ii. The sale price of all goods returned to the dealer by the purchasers of such goods within a period of 6 months from the date of delivery of the goods.

However, satisfactory evidence of such return of goods and of refund or adjustment in accounts of the sale price thereof is produced before the authority competent to assess or, as the case may be, reassess the tax payable by the dealer under the CST Act; and

iii. Such other deductions as the Central Government may prescribe, having regard to the prevalent market conditions, facility of trade and interests of consumers.

(B) No Other Deduction from Aggregate Sale Prices [Section 8A(2)]

No other deductions are allowed from the aggregate of the sale prices except which are provided in Section 8A(2).

To determine the turnover from the Turnover inclusive of CST (as calculated above), following formula shall be applied:

$$\text{Turnover} = \frac{\text{(Turnover inclusive of CST)}}{\text{(100 + Rate of Tax)}} \times 100$$

$$\text{CST} = \frac{\text{(Turnover inclusive of CST) x (Rate of Tax)}}{\text{(100 + Rate of Tax)}}$$

9.18 LEVY & COLLECTION OF TAX (SECTION 9)

A. Section 9(1):

Nature of Transaction	State empowered to levy tax
i. Interstate sale transaction whether covered by Section 3(a) or 3(b).	State in which movement of goods commenced.
ii. Subsequent sale not 'exempt' u/s 6(2) effected by a registered dealer.	State from which the registered dealer obtained the relevant forms for claiming exemption.
iii. Subsequent sale not 'exempt' u/s 6(2) effected by an unregistered dealer.	State from which such subsequent sale has been effected by the unregistered dealer.

B. Section 9(2): Powers of Authorities of the Appropriate State under CST Act.

i. The authorities of the appropriate state are empowered to assess, re-assess, collect and enforce payment of any tax, including any penalty payable by a dealer under the CST Act as if it is a tax or penalty payable under the local sales tax law.

ii. For the aforementioned purpose, the authorities may exercise all or any of the powers they have under the general sales tax law of the State.

iii. All the provisions of the local sales tax law in relation to offences, penalties and penalties in lieu of prosecution shall, with necessary modifications, apply to offences under CST Act, except for the provisions of Section 10 and 10A of the Act.

C. Section 9A: Collection of Tax to be only by Registered Dealers-

Section 9A provides that no person who is not a registered dealer shall collect in respect of any sale by him of goods in the course of interstate trade or commerce any amount by way of tax under the CST Act, and no registered dealer shall make any such collection except in accordance with the CST Act and the rules made thereunder.

9.19 PENAL PROVISIONS UNDER CST ACT (SECTION 10)

Section 10 of the CST Act, 1956 provides for levy of penalty as provided below :

Sec.	Offence	Penalty
10(a)	Issue of false certificate under Sections 6(2) or 6A(1) or 8 (4).	Simple imprisonment, which may extened to six months, or with fine or with both.
10 (aa)	Failure to get registered under Section 7.	Fine of ₹ 50 per day till the offence continues.
10(b)	Falsely represents that to purchase of goods of such class which are not covered by his registration certificate.	Upto 1.5 times of the tax due.

Sec.	Offence	Penalty
10 (c)	Purchase of goods without having a registration certificate.	Upto 1.5 times of the tax due.
10 (d)	Purchase of goods for the purpose mentioned in Section 8 (3) but failure to make use of goods for any such specified purpose.	Upto 1.5 times of the tax due.
10 (e)	Having possession of any prescribed form, which has not been obtained as per prescribed procedure.	Upto 1.5 times of the tax due.
10 (f)	Collecting any amount of tax in contravention of the provision of Section 9A.	Upto 1.5 times of the tax due.

9.20 IMPOSITION OF PENALTY IN LIEU OF PROSECUTION (SECTION 10A)

i. Section 10A(1) provides that if any person purchasing goods is guilty of an offence under section -10(b), (c) or (d), the authority who granted to him or, as the case may be, is competent to giant to him a certificate of registration may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax which would have been levied under Section 8(2) in respect of the sale to him of the goods, if the sale had been one falling under that provision.

ii. No prosecution for an offence under section 10 shall be instituted in respect of the same facts on which a penalty has been imposed under Section 10A.

iii. Section 10A(2) provides that the penalty imposed upon any dealer shall be collected by the Government of India in the manner provided in Section 9(2) :

Nature of offence	Manner of collection
Offence u/s 10(b) or 10(d)	Collected in the State in which the dealer purchasing the goods obtained in form prescribed u/s 8(4) (a) in connection with the purchase of such goods
Offence u/s 10(c)	Collected in the State in which the person purchasing the goods should have registered himself if the offence had not been committed.

9.21 COGNIZANCE OF OFFENCES (SECTION 11 & 12)

1. No Court shall take cognizance of any offence punishable under the CST Act or the rules made thereunder except with the previous sanction of : (a) The Government within the local limits of whose jurisdiction the offence has been committed or (b) Such officer of that Government as it may, by general or special order, specify in this behalf.
2. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any such offence.
3. All offences punishable under the Act shall be cognizable and bailable.
4. However, no suit, prosecution or other legal proceeding shall lie against any officer of Government for anything which is in good faith done or intended to be done under the Act or the rules made thereunder.

9.22 GOODS OF SPECIAL IMPORTANCE (SECTION 14)

The following categories of goods are declared as goods of special importance in interstate trade or commerce:

(a) Cereals (paddy, rice, wheat, maize, barley etc.)

(b) Coal (including coke in all its forms but excluding charcoal)

(c) Cotton of all kinds, cotton fabrics, cotton yarn

(d) Crude oil (including crude petroleum oils and mineral oils)

(e) Hides and skins (whether in a raw or dressed state)

(f) Jute

(g) Oilseeds (Peanut, Til, Cotton seed, Soyabean, etc)

(h) Pulses (Black gram, Green gram etc.)

(i) Man-made fabrics

(j) Sugars

(k) Tobacco (including unmanufactured tobacco, cigars, cigarettes etc.)

(l) Woven fabrics of wool

(m) Iron and steel (including pig & cast iron, steel semis, bars, plates, discs, rings, forgings and castings etc)

Restrictions and Conditions with reference to Declared Goods :

Section 15 provides that every sales tax law of a State shall imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions:

i. The tax payable under the Sales tax law in respect of sales inside the State shall not exceed 4%. Thus, the maximum rate of tax on declared goods for interstate or local sales shall be only 4%.

ii. Where local sales tax has been levied in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of interstate trade or commerce, and CST having been paid thereupon, the local sales tax paid shall be reimbursed to the seller making the interstate sale.

iii. Where a tax has been levied under the State law in respect of the sale or purchase inside the State of any paddy, the tax leviable on rice procured out of such paddy shall be reduced by the amount of tax levied on such paddy.

iv. Where a tax on sale or purchase of paddy is leviable under that law and the rice procured out of such paddy is exported out of India, then, for the purposes of section 5(3), the paddy and rice shall be treated as a single commodity.

v. Each of the pulses referred to in Section 14, whether whole or separated, and whether with or without husk, shall be treated as a single commodity for the purposes of levy of tax under State law.

Analysis of section 14 & 15

i. While section 14 declares certain goods to be of special importance, Section 15 places restriction on the tax that can be levied on such declared goods.

ii. One of the primary conditions laid down by section 15 is that on the declared goods the sales tax shall not be levied in excess of 4%. Further, Sales tax will not be levied at more than one stage.

iii. Secondly where under the local sales tax law tax has been levied on sale or purchase of goods within a state and where such goods are subsequently sold in the course of interstate sale and sales tax has been paid on such a sale, the local sales tax paid will have to be refunded to the dealer, making the Interstate sale.

iv. Also, where there are more than one enactments levying tax like sales tax, surcharge, turnover, additional tax etc. on the sale of goods, the aggregate of the multiple rates shall not exceed 4%.

v. When declared goods are sold in the same condition in which they are purchased without any further manufacture or processing, the subsequent sale will be exempted from tax. "Single point Sales Tax" exemptions can be claimed only if the declared goods purchased, are sold subsequently in the same form.

9.23 LIABILITY OF LIQUIDATOR OF COMPANY IN LIQUIDATION (SECTION 17)

i. Notice of Appointment of Liquidator/Receiver : Every person-

(a) Who is the liquidator of any company, which is being wound up, whether under the orders of a Court or otherwise; or

(b) Who has been appointed the receiver of any assets of a company, shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the appropriate authority.

ii. Notification by Appropriate Authority: On receipt of notice from the Liquidator

(a) The appropriate authority should notify to the liquidator the amount, which in the opinion of the appropriate authority would be sufficient to provide for any tax which is then or is likely thereafter to become payable by the company.

(b) The above intimation should be made within 3 months of the receipt of notice of appointment.

(c) The appropriate authority is empowered to make such inquiry or call for such information, as it may deem fit, for arriving at the tax liability.

(d) The Company's liability under the CST Act, upto the date of winding up, shall be notified to the liquidator, in writing.

iii. Duties of Liquidator: The liquidator shall not part with any of the assets of the company or the properties in his hands until he has been notified by the appropriate authority. On being so notified, he shall set aside an amount equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands.

iv. However, the Liquidator can part with such assets or properties of the Company for the following purposes:

(a) Compliance with any order of a Court;

(b) Payment of the tax payable by the Company under the CST Act;

(c) Payment to secured creditors whose debts are entitled under law to priority of payment over debts due to Government on the date of liquidation;

(d) Meeting reasonable costs and expenses of the winding up.

v. **Personal Liability of Liquidator:** The liquidator shall be personally liable for the payment of the tax, which the company would be liable to pay, if he: (a) fails to give the notice, as provided or (b) fails to set aside the amount as required by, or (c) parts with any of the assets of the company or the properties in his hands in contravention of the provisions.

vi. Where there are more liquidators than one, the obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally.

vii. **Effect of these Provisions:** The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

9.24 LIABILITY OF DIRECTORS OF PRIVATE COMPANY IN LIQUIDATION (SECTION 18)

i. Directors of a private company shall be jointly & severally liable for tax due under the CST Act if the following conditions are fulfilled:

(a) The private company is wound up after the commencement of the CST Act.

(b) Any tax assessed on the Company under the CST Act for any period, whether before or in the course of or after its liquidation, cannot be recovered.

(c) The person was a director of the private company at anytime during the period for which the taxes due.

ii. The Director shall not be jointly and severally liable for the payment of such tax if 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.

9.25 CENTRAL SALES TAX APPELLATE AUTHORITY [Section 19]

i. Section 19 provides that the Central Government shall constitute an Authority, to be known as ''the Central Sales Tax Appellate Authority," which would settle inter-State disputes failing under Section 6A read with Section 9 of the CST Act.

ii. **Composition of Authority:** The Authority shall consist of the following Members appointed by the Central Government:

Member	Qualification
A Chairman	Retired Judge of the Supreme Court, or a retired Chief Justice of a High Court
An officer of the Indian Legal Service	Is or qualified to be, an Additional Secretary to the Government of India
An officer of a State Government	Not below the rank of Secretary or an officer of the Central Government not below the rank of Additional Secretary, who is an expert in sales tax matters.

iii. **Staff & Officers:** The Central Government shall provide the Authority with such officers and staff as may be necessary for the efficient exercise of the powers of the Authority under this Act.

iv. **Terms & Conditions:** The salaries and allowances payable to, and the terms and conditions of service of, the Chairman and Members shall be such as may be prescribed.

9.26 APPEALS [Section 20]

i. This section shall apply to appeals filed by the aggrieved dealer against any order of the assessing authority made under Section 6A or Section 9 of the CST Act.

ii. The appeal shall be filed by the aggrieved dealer within 45 days from the date on which the order is served on him.

iii. However, the Authority may entertain any appeal after the expiry of 45 days, but not later than 60 days from the date of such service, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

iv. The application shall be made in quadruplicate and be accompanied by a fees of ₹ 5,000.

9.27 PROCEDURE ON RECEIPT OF APPEAL (SECTION 21)

i. On receipt of an appeal, the Authority shall cause a copy thereof to be forwarded to the Assessing Authority concerned as well as to each State Government concerned with the appeal and to call upon them to furnish the relevant records.

ii. The Authority shall adjudicate and decide upon the appeal filed against an order of the assessing authority.

iii. The Authority, after examining the appeal and the records called for either allow or reject the appeal.

iv. The appeal shall not be rejected without giving the appellant dealer a reasonable opportunity of being heard.

v. Whether an appeal is rejected or accepted, reasons for such rejection or acceptance shall be given in the order.

vi. The order shall be passed by the Authority within 6 months from the receipt of the appeal.

vii. A copy of every order shall be sent to the appellant and to the assessing authority.

9.28 POWERS OF THE CST APPELLATE AUTHORITY (SECTION 22 & 23)

Section 22:

i. The Authority shall have the same powers as are vested in a court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:

   (a) Enforcing the attendance of any person, examining him on oath or affirmation;

   (b) Compelling the production of accounts and documents;

   (c) Issuing commission for the examination of witnesses;

   (d) The reception of evidence on affidavits;

   (e) Any other matter which may be prescribed.

ii. Every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of the Indian Penal Code.

Section 23 :

The Authority shall have the power to regulate its own procedure in all matters arising out of the exercise of power under the CST Act.

9.29 AUTHORITY FOR ADVANCE RULINGS (SECTION 24)

The Authority for Advance Rulings constituted under section 245-0 of the Income-tax Act, 1961 shall be the authority under the CST Act till such time an authority is constituted under Section 19.

On and from the date of the constitution of the Authority in under the CST Act, the proceedings pending with the Authority for Advance Rulings under Section 245-0 shall be transferred to the Authority under Section 19.

9.30 TRANSFER OF PENDING PROCEEDINGS (SECTION 25)

Section 25 provides that on and from the date when the Authority is constituted under Section 19, every appeal arising out of the provisions contained in Chapter VI :

(a) Which is pending immediately before the constitution of such Authority before the appellate authority constituted under the general sales tax law of a State or of the Union territory, as the case may be; or

(b) Which would have been required to be taken before such appellate Authority; shall stand transferred to such Authority on the date on which it is established.

9.31 APPLICABILITY OF ORDER PASSED (SECTION 26)

An order passed by the Authority shall bt, binding on each State Government concerned, the assessing authorities and other authorities created by or under any law relating to general sales tax, in force for the time being in any State or Union territory.

9.32 FORMS UNDER CST

Form A	This form is prescribed for application to get registered u/s 7 of CST Act.
	Details such as name, status, place of business, warehouses, nature of business, nature and purpose of goods to be dealt, goods to be bought from outside the state etc., are required to be furnished.
	Care should be taken to list the goods sought to be bought from outside the state and the purposes for which they are proposed to be utilized as the benefit of Form C is restricted to the goods and end use listed only.
Form B	Certificate of registration shall be issued by the authority in this form.
	The certificate of registration should be kept in the principal place of business an copies thereof in the branches inside the appropriate state
Form C	Registered dealers are entitled to certain exemptions under CST Act, 1956
	Form C is used by a purchasing dealer to get the goods at confessional rate of duty and is issued in favour of the dealer who effects interstate sale.
	It is obtained from the sales tax authorities in the state in which the purchasing dealer is registered.
	It contains particulars such as name of purchasing dealer, sales tax registration no., its validity, details of goods obtained (whether for resale, manufacture, processing or as packing material), name and address of the seller etc.
Form D	Abolished w.e.f. 1.4.2007
Form EI, E II & EIII	In case of subsequent sale in the course of Interstate sale, the dealer effecting subsequent sale can avail exemption by submitting Form C issued by his customer and by submitting Form E-1, issued by his seller. Form, E-I, E-II & E-III etc. are printed by the Sales Tax department and are supplied to the registered dealer for their use. Form E-II & E-III will have to be issued, in case there are more than one subsequent sale.
Form F	Thus, it should be noted that Form E-I can be issued by the first seller alone. Form E-II & E-III will have to be submitted by those selling dealer (other than the first dealer) to their purchaser, who can avail of the exemption under section 6(2), subject to the condition that Form C is submitted as well.

	Contents of Form E-I: Declaration contains the name of the issuing state, date of issue, name of selling dealer, name of purchasing dealer name and place of state in which movement of goods commence, quantity, weight, value, number and date of declaration in Form C received by the purchasing dealer.
	Contents of Form E-II: the. Declaration contains the name of the issuing state, date of issue, name and address of dealer effecting sate by transfer of documents to the title name of purchasing dealer, name and place of state in which movement of goods commence, quantity, weight, value, invoice, number and date of declaration in Form C received by the purchasing dealer.
Form G	This form is used by registered dealer for making a declaration to the effect that the transfer of goods from one state to another by him is done otherwise than by way of sale as per the provisions of Section 6A of the CST Act, 1956.
	These forms are issued by the sales tax authorities of the concerned state where the goods are received.
	It contains the name of the issuing state, date of issue, name and address of consignee and his registration no., name and registration no. of the transferor, description of goods, quantity, weight value etc.
	The declaration shall be signed by the authorized signatory.
Form H	Form G relates to the indemnity which is required to be furnished by the dealer in regard to matters of security deposit (section 7A).
	The value of the stamp duty on which this should be executed has to be determined at the time of furnishing the indemnity after discussing with the Officer concerned.
	This form is used by the exporters who purchase the goods for the purpose of export.
	The actual exporter shall issue a certificate to the penultimate seller in Form H.
	These forms are obtained from the sales tax authorities by the exporter.
	Form H contains the name of the issuing state, date of issue name and address of exporter and his registration no., name and registration no. of the selling dealer, description of goods, quantity, weight, value details of export etc.
	It also contains an undertaking by the exporter that if the goods are re-imported they will inform the sales tax authorities about the re-import within 1 month of such re-import.

Practical Problems on CST

Example 9: Mr. Ram furnishes the following information pertaining to inter-state sales effected by him:

	Products		
	L	M	N
Local VAT rates	12.5%	4%	1%
Total sales value	7,84,000	5,40,000	4,12,000

Additional information (i) In respect of product L sold in May, 2012, goods of total sales value of ₹ 67,200 were returned in July, 2012 and ₹ 44,800 in December, 2012: ₹ 56,000 were rejected and returned in January, 2013.

(ii) Buyer of product N did not produce C forms.

(iii) Buyer of product M for total sale value ₹ 43,200 did not furnish C form as the product was not covered in his registration certificate.

Compute the taxable turnover and the sales tax liability of the three products L, M and N, for the financial year 2012-13.

Answer:

Product-L		(₹)
Total Sales		7,84,000
(Less)	Sales return within 6 months	(67,200)
(Less)	Rejection	(56,000)
		6,60,800

₹ 6,68,800

Sales

₹ 6,16,000

'C' Form Given

CST=2% (or) 12.5% whichever is lower

(For 2012-13)

Therefore,

CST = ₹ 6,16,000 x 100/112.5 x 2 /100

= ₹ 10,951

Sales Return

beyond 6 months

₹ 44,800

Form 'C' not given

Hence CST=12.5%

CST= 44,800 x 12.50/112.5

CST = ₹ 4,978/-

Product-M	(₹)
Total Sales	5,40,000

'C' Form given

₹ 4,96,800

CST = 2% or local VAT rate 4%

CST = ₹ 4,96,800 x 100/104 x 2/100

CST = ₹ 9,554

'C' Form not given

₹ 43,200

inclusive of CST 4%

CST = ₹ 43,200x4/104

CST = ₹ 1,662

Product-N	(₹)
Total Sales	4,12,000

Buyer of product 'N' did not produce 'C' Forms

Therefore CST = Local VAT rate

Hence CST = 4,12,000 x 100 /101 x 1% = ₹ 4,079

Example 10: (a) State with proper reasons whether the following statements are True/False with regard to the provisions of the Central Sales Tax Act, 1956:

(i) Works contract does not include a contract of alteration of a building.

(ii) The damaged goods of the insured are taken possession by the insurance company. The insurance company is a dealer if such goods are sold by it later on.

(iii) Rajkumar of Rajkot of Gujarat comes to Jaipur of Rajasthan and purchases goods and brings them with him to Rajkot of Gujarat. The sale is an Inter-State Sale.

(iv) During the course of penultimate sale, the declaration is to be signed by the dealer selling the goods.

(v) The burden of proving that the transfer of goods is otherwise than by way of sale shall be on the Sales Tax Authority.

(b) Fill in the blanks with reference to the provisions of the Central Sales Tax Act, 1956:

(i) Mr. A, a dealer in West Bengal, has sold goods to Mr. S in Gujarat for which the sales-tax rate in West Bengal is 2% and the rate in Gujarat is 4%. The CST leviable is .....

(ii) The copy of every order passed by the Appellate Authority shall be sent to…….and .....

(iii) Government subsidy ……form part of sale price.

(iv) A newspaper publisher sold the unsold copies of the paper as waste. This sale is ……to Central Sales-tax.

(v) Praveen effected his first inter-State sale on 25.3.13 and applied for registration on 15.4.13. The effective date of registration will be .....

Answer (a):

(i) **False:** The definition of 'Works Contract' under section 2(ja) of the Central Sales Act, 1956 includes a contract for alteration of any movable or immovable property.

(ii) **True:** Selling of damaged goods is incidental or ancillary to the business of insurance and hence, the insurance company is a dealer.

(iii) **False:** the sale is an intra-State sale.

(iv) **False:** It is to be filled in and signed by the exporter to whom the goods are sold and it is to be furnished to the prescribed authority by the dealer selling the goods.

(v) **False:** the burden of proving that the transfer of goods is otherwise than by way of sale shall lie on the dealer claiming the exemption of tax.

Answer (b):

(i) 2%

(ii) Appellant, Assessing Authority

(iii) Does not

(iv) Liable

(v) 25.03.2013

Example 11: Mr. A, a first stage dealer in pharmaceutical plant and boiler in the State of Tamil Nadu, furnishes the under mentioned information:

		(₹)
(i)	Total inter-State sales during financial year 2012-13 (CST not shown separately)	2,31,25,000
(ii)	Trade commission for which credit notes have to be issued separately	5,78,125
(iii)	Freight and transportation charges (of this ₹ 1,50,000 is on inclusive basis)	4,50,000
(iv)	Insurance premium paid prior to delivery of goods	70,000
(v)	Installation and commissioning charges levied separately in invoices	75,000

Compute the tax liability under the CST Act, assuming the rate of tax @ 2%.

Answer :

	(₹)
Sales turnover	2,31,25,000
Less: Trade Commission	5,78,125
Freight and transportation charges to the extent shown separately in the invoices	3,00,000
Installation and commissioning charges levied separately in invoices	75,000
Total Turnover	2,21,71,875
Less: Central Sales Tax (₹ 2,21,71,875 x 2/102)	4,34,743
Taxable turnover	2,17,37,132

Example 12: W dispatches goods from Karnataka and raises invoice on X in Madhya Pradesh, W charges 2% CST and pays the same in Karnataka. During the course of movement of goods, X sells goods to Y in West Bengal and Y ultimately sells goods to Z in Kolkata. Z takes delivery of goods and the movement of goods comes to end. Sales from X to Y and Y to Z are by transfer of lorry way bill receipts. Explain the forms to be issued so that the first and subsequent sales are exempt from central sales tax.

Answer :

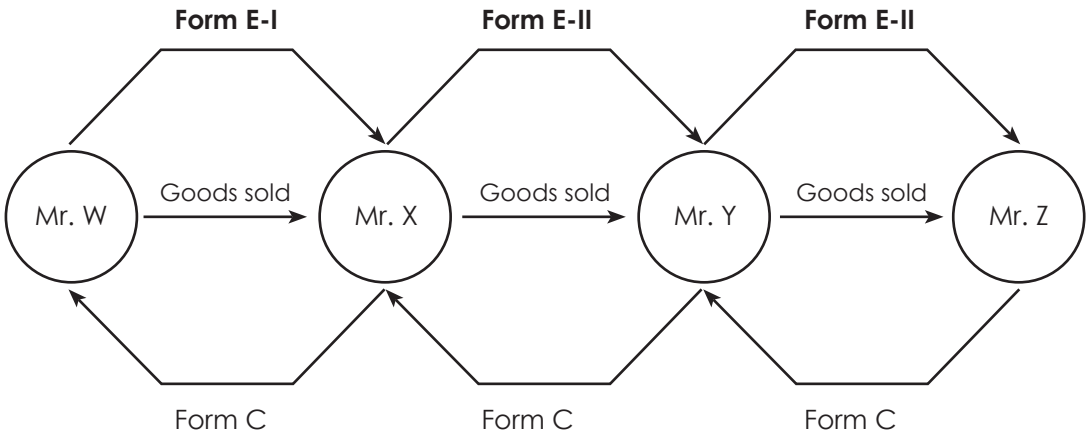
W will receive declaration in 'C' Form from X and will issue declaration in E-I Form to X.

Later, X will issue declaration in E-II Form to Y and receive declaration in 'C' Form from 'Y'

Finally, Y will issue declaration in E-II Form to Z and receive declaration in 'C' Form from Z, which will complete the chain. Because, Z has taken the possession of goods, thereby movement of goods from one state to another ends.

If the chain is broken, CST will be payable again. Otherwise, all subsequent sales will be exempt from sales tax.

The same can be explained in the following diagrammatic presentation:



Example 13: A dealer effected following inter-state sales during the quarter July, 2013-September, 2013. (a) Invoice No. 25 dated 5th July, 2013: ₹ 1,12,400 (tax not shown separately), (b) Invoice No. 26, dated 13th August, 2013: ₹ 50,000 plus tax @ 4% i.e. ₹ 2,000. Total ₹ 52,000, (c) Invoice No. 27 dated 18th September, 2013: ₹ 20,000 plus tax @ 4% ₹ 800 i.e. Total ₹ 20,800, (d) Invoice No. 28 dated 27th September, 2013: ₹ 31,200. Tax not shown separately. Goods returned within 6 months were ₹ 8400? (inclusive of taxes). Sales Tax rate is 4% if goods are sold within the State.

(a) What is the turnover and what is tax payable, if the buyers did not issue C Form?

(b) What is the impact of VAT on CST?

Answer :

(a) Statement showing total turnover, taxable turnover and central sales tax payable for the quarter July 2012 to September 2012:

Date	Invoice No.	Total Turnover (₹)	Taxable Turnover (₹)	Central Sales Tax payable (₹)	Workings
5th July 2013	25	1,12,400	1,08,077 (1,12,400 – 4,323)	4,323	₹ 1,12,400 x 4/104 = ₹ 4,323
13th Aug 2013	26	52,000	50,000	2,000	₹ 50,000 x 4% = ₹ 2,000
18th Sep 2013	27	20,800	20,000	800	₹ 20,000 x 4% = ₹ 800
27th Sep 2013	28	31,200	30,000 (31,200 – 1,200)	1,200	₹ 31,200 x 4/104 = ₹ 1,200
Sub-total		2,16,400	2,08,077	8,323	
Less: sales return within six months from the date of sale		8,400	8,077	323	₹ 8,400 x 4/104 = ₹ 323
Net amount		2,08,000	2,00,000	8,000	

(b) The impact of VAT on CST:

(i) If goods are purchased from another state, Input Tax Credit (ITC) of CST paid in other state will not be granted by the State where the goods are consumed or sold.

(ii) If goods are sent to another State on stock transfer basis, only restricted input credit will be given. It means up to @2% tax paid on inputs ITC not allowed.

Example 14: Vivitha & Co., is a dealer in an electronic product, chargeable to CST at 2%. For the year ended 31.3.2013, the dealer has shown total turnover (including CST) at ₹ 38,76,000. In the above, the dealer has treated the following amounts thus:

(i)	Dharmada collected from buyers, shown separately in invoice	₹ 28,000.
(ii)	Weighment Charges incidental to sale	₹ 14,000.
(iii)	Central excise duty collected (including cess)	₹ 2,06,000.

The dealer has recorded the following amount in separate folios in the ledger:

(i)	Packing charges (These have been collected from buyers through Debit notes)	₹ 45,000
(ii)	Cash discount allowed to buyer	₹ 18,000
(iii)	Indemnity/guarantee charges collected from buyer to cover loss during transit	₹ 12,000
(iv)	Marine insurance premium for transporting goods to the premises of buyers, collected from buyers	₹ 32,000

Determine the total and taxable turnover under CST Act 1956 for the financial year 2012-13. You are required to show the treatment of each and every item distinctly.

Answer :

Determination of turnover for CST purposes	(₹)
Turnover including CST as per books	38,76,000
Less: CST included in above 38,76,000 x 2/102	76,000
Turnover as per books excluding CST	**38,00,000**
Add: Packing Charges	45,000
Marine insurance	32,000
Taxable turnover	**38,77,000**
Add: CST @2% on 38,77,000	77,540
Total Turnover	**39,54,540**

Note:

The following items addable in the selling price, which has been added already in the sale price:

(i)	Dharmada collected from buyers, shown separately in invoice	₹ 28,000.
(ii)	Weighment Charges incidental to sale	₹ 14,000.
(iii)	Central excise duty collected (including cess)	₹ 2,06,000.

The dealer has recorded the following amount in separate folios in the ledger:

(i) Packing charges (These have been collected from buyers through Debit notes) is ₹ 45,000. It is addable into the assessable value even though the same has been charged separately. The Honorable Supreme Court of India in *Rai Bhart Das and Brothers* v *CST* (1988) 71 STC 277 held that the packing charges realized by the dealer was an integral part of the sale price. (Service charges are different from charges for packing materials).

(ii) Cash discount allowed to buyer is ₹ 18,000, it is assumed to be already deducted from the sale price.

(iii) Indemnity/guarantee charges collected from buyer to cover loss during transit is ₹ 12,000 charged separately. Hence, not Included in the sale price.

(iv) Marine insurance premium for transporting goods to the premises of buyers, collected from buyers is ₹ 32,000 is included in the selling price, because Freight and insurance charges incurred by the assessee prior to the delivery of the goods at their places of business to their customers, form part of turnover.

Example 15: Sri Ram, a Registered Dealer at Mumbai, furnishes the following information:

		(₹)
(i)	Inter-state sale of goods	40,00,000
	This includes the following—	
(ii)	Excise duty	42,000
(iii)	Goods returned on 17/1/2013 [These goods were sold on 12/4/2012]	1,05,000
(iv)	Cash discount shown in invoice and allowed according to prevailing trade practice	50,000
(v)	Freight and transportation charges (of this ₹ 1,50,000 is on inclusive basis)	4,50,000
(vi)	Insurance premium paid prior to delivery of goods	70,000
(vii)	Installation and commissioning charges levied separately in invoices	75,000

Compute the tax liability under the CST Act, assuming the rate of tax @ 2%.

Answer :

	(₹)
Sales turnover	40,00,000
Less: Deductions	
Cash discount according to normal trade practice	50,000
Freight and transportation charges – deductible to the extent shown separately in the invoices	3,00,000
Installation and commissioning charges levied separately in invoices	75,000
Turnover inclusive of CST	35,75,000
Less: Central Sales Tax	70,098
Taxable turnover	**35,04,902**

Note: it is assumed that local VAT rate of the seller state is @2%. Therefore, goods returned after 6 months from the date of sale attracted CST @2%.

Example 16: Diamond Ltd., Mumbai sells goods for a value of ₹ 20,00,000 inclusive of central sales tax @ 4% to Goldie Ltd. in Cochin, both of them are registered dealers. The local sales tax on goods in Mumbai is 2%. Ascertain sales tax payable. If Goldie Ltd. were unable to submit Form-C, being an unregistered dealer, what will be the central sales tax liability, if the local sales tax rate is 12.50%?

Answer :

Central Sales Tax payable against Form 'C' sales = ₹ 38,462 [i.e. (₹ 20,00,000 x 100/104) x 2/100].

Central Sales Tax payable (if Form 'C' not received) = ₹ 2,40,385 [i.e. (₹ 20,00,000 x 100/104) x 12.50/100]

Example 17: Mr. Vishal is a dealer. His sales during the first quarter of 2013-14 (April to June) are as under:

	Date	Invoice No.	Amount (₹)
(i)	05-4-2013	103/FCA/01/2013	10,000 plus tax @2%
(ii)	12-4-2013	103/FCA/02/2013	80,000 plus tax @2%
(iii)	05-5-2013	103/FCA/03/2013	62,400 (inclusive of tax)
(iv)	06-6-2013	103/FCA/04/2013	14,000 plus C.S.T. @2%
(v)	27-6-2013	103/FCA/05/2013	18,000 plus C.S.T. @2%
(vi)	Goods worth ₹ 7,000 (exclusive of tax) against Invoice No.103/FCA/04/2013 were returned on 29-6-2013.		
(vii)	Goods worth ₹ 13,000 (inclusive of tax @2%) sold on 26-12-2012 were returned on 30-6-2013.		
(viii)	Goods worth ₹ 6,500 (inclusive of tax @2%) sold on 27-12-2012 were returned on 30-6-2013.		

All the above sales were made in the course of interstate trade against Form 'C'. Calculate the turnover and CST payable @2%. Value Added Tax in the state of seller 4%.

Answer :

Statement showing taxable turnover and central sales tax payable for the first quarter from April 2013 to June 2013:

Date	Invoice No.	Taxable Turnover (₹)	Central Sales Tax payable (₹)	Total Turn-over (₹)	Workings (₹)
05-4-2013	103/FCA/01/2013	10,000	200	10,200	10,000 x 2% = 200
12-4-2013	103/FCA/02/2013	80,000	1,600	81,600	
05-5-2013	103/FCA/03/2013	61,176	1,224	62,400	62,400 x 2/102 = ₹ 1,224
06-6-2013	103/FCA/04/2013	14,000	280	14,280	14,000 x 2% = 280
27-6-2013	103/FCA/05/2013	18,000	360	18,360	18,000 x 2% = 360
Sub-total		1,83,176	3,664	1,86,840	
Less: sales returns within six months from the date of sales		7,000	140	7,140	7,000 x 2% = 140
Net amount		**1,76,176**	**3,524**	**1,79,700**	

Sales returns beyond six months from the date of sale considered as sales made to unregistered dealer (since, buyer can not issue Form 'C' for returns):

Sales returns beyond six months from the date of sales attract CST @4%. (i.e. 2% or Local VAT rate 4% whichever is higher):

Taxable turnover = ₹ 19,118 [(i.e. ₹ 13,000 + ₹ 6,500) x 100/102]

CST payable = ₹ 765 (i.e. ₹ 19,118 x 4/100)

Summary:

CST payable against Form 'C' sales	= ₹ 3,524	
Add: CST payable (Form 'C' not received)	= ₹ 765	
	= ₹ 4,289	
Less: CST already paid on sales returns beyond six months	= ₹ 382	(i.e. ₹ 19,118 x 2%)
Net CST liability for the 1st quarter (April – June)	= ₹ 3,907	

Example 18: Mr. Y reported sales turnover of ₹ 36,20,000. This includes the following:

(i) Excise duty ₹ 3,00,000; and

(ii) Deposit for returnable containers and packages ₹ 5,00,000.

Sales Tax was not included separately in the sales invoice.

Compute tax liability under the CST Act, assuming the rate of tax @ 2%.

Answer :

Computation of Central Sales Tax liability of Mr. Y

Turnover (including Central sales tax and deposit received towards returnable containers and packages)	36,20,000
Less: Deposit received towards returnable containers and packages not to be considered in turnover	5,00,000
Turnover (including central sales tax)	31,20,000
Less: Central sales tax thereon = 31,20,000 x 2/102	61,176
Taxable Turnover (excluding central sales tax)	30,58,824

Note: Excise duty is part of turnover and hence should not be excluded from turnover.

Example 19: Mr. H, the proprietress of Aarav Enterprises is a registered dealer in Vadodara (Gujarat). From the under mentioned particulars relating to the quarter ended 31st March, 2013. Find out her taxable turnover and the tax payable under the Central Sales Tax Act, 1956:

(a) Goods worth ₹ 2,20,000 were invoiced to its against at NOIDA (U.P) while the goods were in transit, these were sold to Uttar Pradesh Government for ₹ 2,41,020. The rate of tax in respect of such goods in the appropriate state is 12.5%.

(b) Sale to a 100% Export Oriented Undertaking (EOU), goods worth ₹ 20,20,000 in Mumbai. The rate of tax in the State is 1%.

The above selling prices are inclusive of the central sales tax. The dealer has submitted all necessary declarations, wherever required.

Answer :

Taxable Turnover = ₹ 2,14,240 (i.e. ₹ 2,41,020 x 100/112.5)
Taxable Turnover = ₹ 20,00,000 (i.e. ₹ 20,20,000 x 100/101)

Total = ₹ 22,14,240

Central Sales Tax payable

CST on sale of goods to UP Government	= ₹ 26,780 (i.e. ₹ 2,14,240 x 12.5/100)
CST on sale of goods to 100% EOU	= ₹ 20,000 (i.e. ₹ 20,00,000 x 1/100)
Total	= ₹ 46,780

Notes: (a) Branch transfer exempted from Central Sales Tax against Form F. However, goods are sold during the movement from one state to another state which will attract CST.

(b) Goods sold to 100% Export Oriented Units subject to Central Sales Tax.

Example 20: Mrs. Vasudha, a registered dealer in Chennai, furnishes the following information relating to Inter-State sales made by her during the year ended 31.3.2013:

	₹
Sales turnover as per books	36,72,000
Above includes	
(a) Excise duty	3,20,000
(b) Freight (of this ₹ 30,000 alone is shown separately in sales invoices)	1,10,000
(c) Deposit for returnable containers	2,40,000
(d) Transfer to branch (covered by Form F)	12,15,000
(e) Packing charges	35,000

Further, in ascertaining the sales turnover above which includes CST also, the dealer has deducted the following:

1. Turnover relating to goods worth ₹ 10,000 (exclusive of tax) covered by invoice dated 2.4.2012, which were returned on 1.10.2012.
2. Goods worth ₹ 12,400 (including tax) covered by invoice dated 13.4.2012 were rejected by the customer and the dealer received back the goods on 14.10.2012.

Vasudha deals only in one type of commodity which is chargeable to VAT at 2% in Tamil Nadu.

You are required to compute the total turnover, CST and taxable turnover for the financial year 2012-13. Treatment of each item above should be shown distinctly.

Answer:

Statement showing taxable turnover, CST and total sales for the year 2012-13:

Particulars	Taxable Turnover (₹)	Workings
Total sales	36,72,000	
Less: Freight shown separately	30,000	
Less: Deposit of returnable containers	2,40,000	
Less: Transfer to Branch	12,15,000	No CST against Form F
Less: sales returns within 6 months from the date of sales	—	Deductible, already deducted
Less: Goods rejected	—	Allowed to deduct irrespective of time, already deducted
Total sales	21,87,000	
Less: Central Sales Tax	42,882	₹ 21,87,000 x 2/102
Taxable Turnover	21,44,118	

Example 21: Ram & Co., a registered dealer with head office at Kolkata, furnishes to you the following information:

	₹
Inter-State sale of goods (it includes ₹ 10,00,000 being the value of goods transferred to Chennai Branch covered by Form F)	49,20,000
Dharmada collected	25,000
Weighment dues charged separately from buyers	2,15,000
Cash discount shown in invoice as per trade practice	60,000
Indemnity charges (recovered from buyers to cover transit loss based on their request)	53,000

Calculate the turnover and CST payable, on the assumption that all the sales were made to registered dealers.

Answer:

Statement Showing Tanable Turnover & CST Payable

Particulars	Amount (₹)
Inter-State sale of goods	49,20,000
Less: Branch transfer against Form F	(10,00,000)
Add: Weighment charges charged separately	2,15,000
Add: Dharmada Collected	25,000
Less: Cash discount	(60,000)
Taxable Turnover	41,00,000
CST @2% on taxable turnover	82,000

***Notes*:**

Indemnity charges do not form part of sale price – Hence, should not be added

It is assumed that dharmada, weighment dues and indemnity charges are shown separately in the invoice and have not been included in the total value of inter-State sale of ₹ 49.20 lakh and cash discount has also not been deducted therefrom.

It is also assumed that the sale value of ₹ 49.20 lakh does not include Central Sales-tax.

Cash discount allowed as per trade practices does not form part of sale price. Hence, should be deducted.

Example 22: Mr. Raja, a first stage dealer in packing machinery in the State of Tamil Nadu furnishes the following data:

	₹
(i) Total inter-state sales during F.Y. 2012-13(CST not shown separately)	92,50,000
(ii) Above sales include:	
Excise duty	9,00,000
Freight (Of this ₹ 50,000 is not shown separately in invoices)	1,50,000
Insurance charges incurred prior to delivery of goods	32,000
Installation and commissioning charges shown separately	15,000
Incentive on sales received from manufacturer	30,000

Determine the turnover and CST payable, assuming that all transactions were covered by valid 'C' Forms.

Answer:

Computation of Mr. Raja turnover and central sales tax payable

Particulars	₹
Total inter-State sales	92,50,000
Less: Freight shown separately in the invoices	1,00,000
Installation and commissioning charges shown separately	15,000
Aggregate turnover	91,35,000

CST payable is ₹ 1,79,118 (i.e. ₹ 91,35,000 x 2/102)

Taxable turnover is ₹ 89,55,882 (*i.e.* ₹ 91,35,000 – 1,79,118)

Notes:

Excise duty forms part of the sale price and is not deductible.

Freight not shown separately in the invoices and insurance charges incurred prior to delivery of goods are not deductible in calculating the turnover.

Sale price includes incentive on sales received from manufacturer.

The CST on transactions covered by valid 'C' forms is 2% or the State sales-tax rate, whichever is lower. It has been assumed that in this case, the State VAT rate is higher than 2%. Therefore, the rate of CST is taken as 2%.

Example 23: Total interstate sale for the Financial Year 2012-13 of X Ltd. is ₹ 1,50,70,000, which consists of the following:

	₹
4 % CST sales	91,50,000
2% CST sales	59,20,000

Out of the goods sold for ₹ 91,50,000, on 16.7.2012 that were liable to CST @ 4% goods worth ₹ 50,000 were returned on 12.12.2012 and goods worth ₹ 1,20,000 were returned on 01.2.2013. A buyer to whom goods worth ₹ 55,000 carrying 2% CST was dispatched on 16.4.2012, rejected the goods and the same were received back on 15.1.2012.

Compute the taxable turnover and tax liability of X Ltd., since all the relevant Forms have been received.

Answer:

Statements showing taxable turnover and CST payable:

Particulars	Taxable Turnover (₹)	CST payable (₹)	Workings
Sales against Form 'C'	86,34,615	1,72,692	91,00,000 – 1,20,000 = **(₹)** 89,80,000. CST = ₹ 1,72,692 (89,80,000x100x104) x 2/100
Sales against Form 'C'	57,50,000	1,15,000	58,65,000 x 100/102 = ₹ 57,50,000
Sales without Form 'C'	1,15,385	4,615	1,20,000 x 100/104 = ₹ 1,15,385
Total	1,45,00,000	2,92,307	

Working Note:

Particulars	4% CST sales (₹)	2% CST sales (₹)
Sales	91,50,000	59,20,000
Less: sales returns within six months from the date of sales	50,000	
Less: rejected	—	55,000
Sub-total	91,00,000	58,65,000

Example 24: M/s. Snow White Ltd., Mumbai sells iron rods to M/s. Hyderabad Ltd. in Vijayawada for a value of ₹ 10,00,000 inclusive of Central Sales Tax @ 2%. The local sales tax on iron rods in Mumbai is 12.5%. Both the dealers are registered dealers.

(i) Ascertain the Central Sales-tax payable.

(ii) If Hyderabad Ltd. were unable to submit Form 'C', being an unregistered dealer, what will be the Central Sales Tax liability, if the local sales tax rate is 12.5%?

Note: Iron rods are not declared goods.

Answer :

CST payable = ₹ 19,608 [(i.e. ₹ 10,00,000 x 100/102) x 2/100]

CST payable = ₹ 1,22,549 [(i.e. ₹ 10,00,000 x 100/102) x 12.5/100]

Example 25: Mr. K of Kolkata sells goods to Mr. C of Chennai and delivers the same at Kolkata to MKS Transport. The lorry receipt was sent to Mr. C by post. While goods were in transit, Mr. C sells the goods to Mr. V of Vijayawada by making an endorsement of LR and goods were diverted to Vijayawada. Is the second sale between Mr. C and Mr. V chargeable to tax?

Answer:

The first sale by Mr. K to Mr. C is chargeable to central sales tax. However, sale of goods by C to V is exempt under Section 6(2) i.e. subsequent sale by transfer of documents to avoid multiple tax incidences.

Note: Form E-I from K and Form C from V has to be received by C.

Study Note - 10

INTERNATIONAL TAXATION AND TRANSFER PRICING

This Study Note includes

10.1 International Taxation and Transfer Pricing – in the context of Indirect Taxation– Introduction
10.2 International Transaction
10.3 Arm's Length Principle
10.4 Transfer Pricing – Classification of Methods
10.5 Steps in the process of computing Arm's length price – Transfer Pricing (TP)Study
10.6 Transfer pricing issues in the content of Indirect Taxation
10.7 Indirect Taxation issues in Cross-Border Services
10.8 Classification of "Cross-Border Services"

10. 1 INTERNATIONAL TAXATION AND TRANSFER PRICING – IN THE CONTEXT OF INDIRECT TAXATION– INTRODUCTION

The source rule/statutory provision relating to levy and collection of tax liability on international transactions is empowered through Sec.92 to 92F of the Income Tax Act, 1961. These provisions were inserted by the Finance Act, 1976. With the opening up of global economy, apart from goods, there has been transfer or transaction relating to rendering of services cross-border. There is a magnanimous increase in the volume of cross-border transactions, which calls for attracting the provisions of Indirect Taxes in India. There arises the necessity and therefore leads to computation of reasonable, fair and equitable profit and tax in India are not being eroded of Indian tax revenue. Any income arising from an international transaction shall have to be computed having regard to arm's length price.

10.2 INTERNATIONAL TRANSACTION

As per Sec. 92B of the Income Tax Act,1961,

(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

10.3 ARM'S LENGTH PRINCIPLE

The arm's length principle seeks to ensure that transfer prices between members of an MNE ("controlled transactions"), which are the effect of special relationships between the enterprises, are either eliminated or reduced to a large extent. It requires that, for tax purposes, the transfer prices of controlled transactions

should be similar to those of comparable transactions between independent parties in comparable circumstances ("uncontrolled transactions"). In other words, the arm's length principle is based on the concept that prices in uncontrolled transactions are determined by market forces and, therefore, these are, by definition, at arm's length. In practice, the "arm's-length price" is also called "market price". Consequently, it provides a benchmark against which the controlled transaction can be compared.

The Arm's Length Principle is currently the most widely accepted guiding principle in arriving at an acceptable transfer price. As circulated in 1995 OECD guidelines, it requires that a transaction between two related parties is priced just as it would have been if they were unrelated. The need for such a condition arises from the premise that intra-group transactions are not governed by the market forces like those between two unrelated entities. The principle simply attempts to place uncontrolled and controlled transactions on an equal footing.

10.3.1 Why Arm's Length Pricing?

The basic object of determining Arm's Length Price is to find out whether any addition to income is warranted or not, if the following situations arises:

Selling Price of the Goods < Arm's Length Price

Purchase Price > Arm's Length Price

Total Income as disclosed by an Assessee	XXXX
Add: Understatement of profit due to overstatement of purchase price	XXX
Add: Understatement of profit due to understatement of selling price	XXX
Total Income after Assessment	XXXX

10.3.2 Role of market forces in determining the "Arm's Length Price"

In case of transactions between Independent enterprises, the conditions of their commercial and financial relations (eg. The price of goods transferred or services provided and the conditions of the transfer or provision) are, ordinarily, determined by the market force.

Whereas,

In case of transactions between MNEs (Multinational Enterprises), their commercial and financial relations may not be affected by the external forces in the same way, although associated enterprises often seek to replicate the dynamics of the market forces in their dealings with each other.

10.3.3 Difficulties in applying the arm's length principle

The arm's length principle, although survives upon the international consensus, does not necessarily mean that it is perfect. There are difficulties in applying this principle in a number of situations.

(a) The most serious problem is the need to find transactions between independent parties which can be said to be exact compared to the controlled transaction.

(b) It is important to appreciate that in an MNE system, a group first identifies the goal and then goes on to create the associated enterprise and finally, the transactions entered into. This procedure obviously does not apply to independent enterprises. Due to these facts, there may be transactions within an MNE group which may not be between independent enterprises.

(c) Further, the reductionist approach of splitting an MNE group into its component parts before evaluating transfer pricing may mean that the benefits of economies of scale, or integration between the parties, is not appropriately allocated between the MNE group.

(d) The application of the arm's length principle also imposes a burden on business, as it may require the MNE to do things that it would otherwise not do (i.e. searching for comparable transactions, documenting transactions in detail, etc).

(e) Arm's length principle involves a lot of cost to the group.

10.4 TRANSFER PRICING – CLASSIFICATION OF METHODS

In order to ensure that a transfer price meets the arm's length standard, the OECD (Organization for Economic Co-operation and Development) guidelines have indicated five transfer pricing methods that can be used. These methods fall in two categories:

(1) Traditional Transaction Methods;

(2) Transactional Profit Methods.

As per Sec.92C of the Income Tax Act, 1961, the methods for determining Arm's Length Price may be represented as under:

(1) Comparable Uncontrolled Price Method,

(2) Resale Price Method,

(3) Cost plus Method,

(4) Profit Split Method,

(5) Transactional Net Margin Method,

(6) Such other method as may be prescribed by the Board.

TRANSACTION BASED METHODS

- COMPARABLE UNCONTROLLED PRICE METHOD
- RESALE PRICE METHOD
- COST PLUS METHOD

PROFIT BASED METHODS

- PROFIT SPLIT METHOD
- TRANSACTION NET MARGIN METHOD
-

10.5 STEPS IN THE PROCESS OF COMPUTING ARM'S LENGTH PRICE – TRANSFER PRICING(TP)STUDY

Transfer Pricing Study (TP Study) is the prime document which is used during transfer pricing assessment. The statement of particulars to be furnished in the Annexure to Form No.3CEB for the Income Tax Act, 1961 assessment, has thirteen clauses.

The following are the steps to be followed:-

Step 1	Selection of comparable companies
Step 2	Use of different filters
Step 3	Screening of comparables based on FAR
Step 4	Use of Power under Indirect Tax laws [special reference to Sec.133(6) of the Income Tax Act,1961]
Step 5	Adjustments
Step 6	5% Safe Harbour

The steps may be enumerated as follows:

Step 1: Selection of Comparable Companies

The first step for doing this study is to select comparable companies. This can be selected in the following four ways:-

(a) Industry-wise selection

(b) Product-wise selection

(c) NIC Code-wise selection

(d) Segment-wise selection

The data relating to the financial year in which the international transaction has been entered into must be used in analyzing the comparability of an uncontrolled transaction with an international transaction.

Step 2: Use of different filters

Once there is a selection of comparable companies, the next step is to filter these companies with the use of quantitative and qualitative filters. The following filters are also used sometimes:

(a) Companies whose data is not available for the relevant year

(b) Companies for which sufficient financial data is not available to undertake analysis

(c) Different financial year filter

(d) Turnover filter

(e) Service Income filter

(f) Export filter

(g) Diminishing Loss filter

(h) Related party filter

(i) Companies that had exceptional year/(s) of operation

(j) Employee cost filter

(k) Onsite and offsite filter

(l) Fixed Asset filter

(m) Research & Development Expense filter

(n) Income Tax filter

Step 3: Screening of comparables based on FAR

Comparability of an international transaction with an uncontrolled transaction shall have to be judged with relevance to the following factors:

(a) The specific characteristics of the property transferred or services provided in either transaction;

(b) FAR Analysis- the (F) functions performed, taking into account (A)assets employed or to be employed or the (R) risks assumed by the respective parties to the transactions;

(c) The contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) Conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

There may arise situation, where it requires further analysis of the following factors:-

(i) Is there a public issue in the relevant year or previous year?

(ii) Are the entity's profits exempted from tax?

(ii) Is there any merger/de-merger, etc., during the relevant time?

(iv) Is the depreciation policy different?

(v) Is there a wide difference between various segments' profitability?

(vi) Is the area of operation, i.e. geography different?

(vii) Is the volume of operation different?

Step 4: Use of power under Indirect Tax Laws

This power is usually used by the Revenue Department/Authorities, with a special reference to Sec.133(6) of the Income Tax Act,1961. The authorities may exercise such powers for getting details which are generally not available in the annual reports of the companies. This power is used more in the earlier years.

Step 5: Adjustments

Based on specific characteristics of the property transferred or the services rendered in either transaction and the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions. The following enterprise level and transaction level adjustments are suggested:

(a) Functional differences

(b) Asset differences

(c) Risk differences

(d) Geographical location

(e) Size of the market

(f) Wholesale or retail market

(g) The laws and governmental orders in force

(h) Cost of labour

(i) Cost of capital in the markets

(j) Overall economic development

(k) Level of competition

(l) Accounting practices

(m) However, in practice the following adjustments are provided:

(n) Working capital adjustment

(o) Risk adjustment

(p) Volume/geographical/depreciation/idle capacity/first year operation, etc.

Step 6: 5% Safe Harbour

(a) If the application of the MAM (Most Appropriate Method) leads to determination of more than one price, the arithmetical mean of such prices shall be taken to be the Arm's Length Price (ALP) in relation to the international transaction.

(b) If the ALP so determined is within +/- 5% range of international transaction price, then no adjustments are required

(c) If the ALP is not within +/- 5% range of the international transaction price, then adjustments are required for the whole difference between the ALP and international transactions and benefit of 5% will not be available.

(d) However, the Finance Act,2012 has fixed the upper limit of safe harbor as 3%.

10.6 TRANSFER PRICING ISSUES IN THE CONTENT OF INDIRECT TAXATION

In the content of International Transactions and ascertainment of arm's length price, the following issues are surfaced. These needs to be further examined in the light of applicable statutory provisions of Indirect Tax laws in India.

10.6.1 Key current and emerging TP Audit issues in India

Indian transfer pricing administration over the past 10 years has witnessed several challenges in administration of transfer pricing law. In the above backdrop, this chapter highlights some of the emerging transfer pricing issues and difficulties in implementation of arm's length principle.

10.6.2. Key Issues for consideration

(a) Challenges in the comparability analysis - Increased market volatility and increased complexity in international transaction have thrown open serious challenges to comparability analysis and determination of arm's length price.

(b) Issue relating to risks - A comparison of functions performed, assets employed and risks assumed is basic to any comparability analysis. India believes that the risk of a MNE is a by product of performance of functions and ownership, exploitation or use of assets employed over a period of time. Accordingly, risk is not an independent element but is similar in nature to functions and assets. In this context, India believes that it is unfair to give undue importance to risk in determination of arm's length price in comparison to functions performed and assets employed.

(c) Arm's length range - Application of most appropriate method may set up comparable data which may result in computation of more than one arm's length price. Where there may be more than one arm's length price, mean of such prices is considered. Indian transfer pricing regulations provide that in such a case the arithmetic mean of the prices should be adopted as arm's length price. If the variation between the arithmetic mean of uncontrolled prices and price of international transaction does not exceed 3% or notified percentage of such transfer pricing, then transfer price will be considered to be at arm's length. In case transfer price crosses the tolerance limit, the adjustment is made from the central point determined on the basis of arithmetic mean. Indian transfer pricing regulation do not mandate use of inter quartile range.

(d) Comparability adjustment - Like many other countries, Indian transfer pricing regulations provide for "reasonably accurate comparability adjustments". The onus to prove "reasonably accurate comparability adjustment" is on the taxpayer. The experience of Indian transfer pricing administration indicates that it is possible to address the issue of accounting difference and difference in capacity utilization and intensities of working capital by making comparability adjustments. However, Indian transfer pricing administration finds it extremely difficult to make risk adjustments in absence of any reliable and robust and internationally agreed methodology to provide risk adjustment. In some cases taxpayers have used Capital Asset Pricing Method (CAPM).

(e) Location Savings - It is view of the Indian transfer pricing administration that the concept of "location savings" which refer to cost savings in a low cost jurisdiction like India – should be one of the major aspects to be considered while carrying out comparability analysis during transfer pricing audits. Location savings has a much broader meaning; it goes beyond the issue of relocating a business from a 'high cost' location to a 'low cost' location and relates to any cost advantage. MNEs continuously search options to lower their costs in order to increase profits. India provides operational advantages to the MNEs such as labour or skill employee cost, raw material cost, transaction costs, rent, training cost, infrastructure cost, tax incentive etc.

- Highly specialized skilled manpower and knowledge
- Access and proximity to growing local/regional market
- Large customer base with increased spending capacity

- Superior information network
- Superior distribution network
- Incentives
- Market premium

The incremental profit from LSAs is known as "location rents". The main issue in transfer pricing is the quantification and allocation of location savings and location rents among the associated enterprises.

Under arm's length pricing, allocation of location savings and rents between associated enterprises should be made by reference to what independent parties would have agreed in comparable circumstances.

The Indian transfer pricing administration believes it is possible to use the profit split method to determine arm's length allocation of location savings and rents in cases where comparable uncontrolled transactions are not available. In these circumstances, it is considered that the functional analysis of the parties to the transaction (functions performed, assets owned and risks assumed), **and** the bargaining power of the parties (which at arm's length would be determined by the competitiveness of the market availability of substitutes, cost structure etc) should both be considered appropriate factors.

(f) Intangibles - Transfer pricing of intangibles is well known as a difficult area of taxation practice. However, the pace of growth of the intangible economy has opened new challenges to the arm's length principle. Seventy five percent of all private R&D expenditure worldwide is accounted for by MNEs.

The transactions involving intangible assets are difficult to evaluate because of the following reasons:

Intangibles are seldom traded in the external market and it is very difficult to find comparables in the public domain.

Intangibles are often transferred bundled along with tangible assets.

They are difficult to be detected.

A number of difficulties arise while dealing with intangibles. Some of the key issues revolve around determination of arm's length price of rate of royalties, allocation of cost of development of market and brand in a new country, remuneration for development of marketing, Research and Development intangibles and their use, transfer pricing of co□branding etc.

(g) R&D activities - Several global MNEs have established subsidiaries in India for research and development activities on contract basis to take advantage of the large pool of skilled manpower which are available at a lower cost. These Indian subsidiaries are generally compensated on the basis of routine and low cost plus mark up. The parent MNE of these R&D centres justify low cost plus markup on the ground that they control all the risk and their subsidiaries or related parties are risk free or limited risk bearing entities.

- The claim of parent MNEs that they control the risk and are entitled for major part of profit from R&D activities is based on following contentions:
- Parent MNE designs and monitors all the research programmes of the subsidiary.
- Parent MNE provides fund needed for R&D activities.
- Parent MNE controls the annual budget of the subsidiary for R&D activities.
- Parent MNE controls and takes all the strategic decisions with regards to core functions of R&D activities of the subsidiary.

- Parent MNE bears the risk of unsuccessful R&D activities.
- The Indian transfer pricing administration always undertakes a detailed enquiry in cases of contract R&D centres. Such an enquiry seeks to ascertain correctness of the functional profile of subsidiary and parent MNE on the basis of transfer pricing report filed by the taxpayers, as well as information available in the public domain and commercial databases. After conducting detailed enquiries, the Indian tax administration often reaches the following conclusions:
- Most parent MNEs were not able to file relevant documents to justify their claim of controlling risk of core functions of R&D activities and asset (including intangible assets) which are located in the country of subsidiary or related party.
- Contrary to the above, it was found that day to day strategic decisions and monitoring of R&D activities were carried out by personnel of subsidiary who were engaged in actual R&D activities and bore relevant operational risks.

(h) Marketing Intangibles

Marketing related intangible assets are used primarily in the marketing or promotion of products or services.

This includes: Trademarks; Trade names; Service marks; Collective marks; Certification marks; Trade dress; Newspaper mastheads; Internet domain names; Non-competitive agreements

(i) Customer-related intangible assets – are generated through inter-action with various parties such as customers, entities in complimentary business, suppliers , etc. these can either be purchased from outside or generated internally.

- Contractual basis: customer contracts and customer relationships; order or production backlog
- Non-contractual basis:- customer lists; non-contractual customer relationships;

(j) Artistic-related intangible assets – are rights granted by Government or other authorized bodies to the owners or creators to reproduce or sell artistic or published work. These are on a contractual basis. These includes: Plays, opera and ballets; Books, magazines, newspapers and other literary works; Musical works; Picture and photographs; Video and audio-video material.

(k) Intra-group Services - Globalization and the drive to achieve efficiencies within MNE groups have encouraged sharing of resources to provides support between one or more location by way of shared services. Since these intra group services are the main component of "tax efficient supply chain management" within an MNE group, the Indian transfer pricing authorities attach high priority to this aspect of transfer pricing.

The tax administration has noticed that some of the services are relatively straight forward in nature like marketing, advertisement, trading, management consulting etc. However, other services may be more complex and can often be provided on stand alone basis or to be provided as part of the package and is linked one way or another to supply of goods or intangible assets. An example can be agency sale technical support which obligates the licensor to assist the licensee in setting up of manufacturing facilities, including training of staff.

The Indian transfer pricing administration generally considers following questions in order to identify intra group services requiring arm's length remuneration:

- Whether Indian subsidiaries have received any related party services i.e., intra group services?
- Nature and detail of services including quantum of services received by the related party.
- Whether services have been provided in order to meet specific need of recipient of the services?
- What are the economic and commercial benefits derived by the recipient of intra group services?

- Whether in comparable circumstances an independent enterprise would be willing to pay the price for such services?
- Whether an independent third party would be willing and able to provide such services?

The answers to above questions enable the Indian tax administration to determine if the Indian subsidiary has received or provided intra group services which requires arms' length remuneration. Determination of the arm's length price of intra group services normally involve following steps:

(i) Identification of the cost incurred by the group entity in providing intra group services to the related party.

(ii) Understanding the basis for allocation of cost to various related parties i.e., nature of allocation keys.

(iii) Whether intra group services will require reimbursement of expenditure along with markup.

(iv) Identification of arm's length price of markup for rendering of services.

(I) Financial Transactions

Intercompany loans and guarantees are becoming common international transactions between related parties due to management of cross border funding within group entities of a MNE group. Transfer pricing of inter company loans and guarantees are increasingly being considered some of the most complex transfer pricing issues in India. The Indian transfer pricing administration has followed a quite sophisticated methodology for pricing inter company loans which revolves around:

(i) comparison of terms and conditions of loan agreement;

(ii) determination of credit rating of lender and borrower;

(iii) Identification of comparables third party loan agreement;

(iv) suitable adjustments to enhance comparability.

Transfer pricing administration is more than a decade old in India. However disputes are increasing with each transfer pricing audit cycle, due to the following factors:

(i) Cross border transactions have increased exponentially in the last one decade.

(ii) Lack of international consensus on taxation of certain group cross border transactions like intangible, financial transactions, intra group services etc.

(iii) Difficulty in applying the arm's length principle to complex transactions like business restructuring.

(iv) Taxpayers in India can postpone payment of tax liability by resorting to litigation.

(v) Availability of multiple channels to resolve disputes in India.

10.7 INDIRECT TAXATION ISSUES IN CROSS-BORDER SERVICES

Cross Border Transaction services means services related to transaction which involve two or more countries. In India there are two Acts which primarily seems to show concern when a person (Indian Resident or foreign Resident) undertakes cross border transactions viz.

- Foreign Exchange Management Act,1999
- Income Tax Act,1961

Therefore it is imperative that a person needs to deal with both the above mentioned Acts to enter into a cross-border transaction.

10.7.1. Relevant provisions and the structure

In terms of the provisions of Sec.5 (2) of the Income Tax Act,1961, non-residents are also liable to tax in India on the income received or deemed to be received in India.

10.7.1.1. Major charging provision

The major charging provision is Sec.5(2) of the Income Tax Act,1961. Two major and specific tests are required to determine the incidence of tax and tax liability thereafter. The tests are related to determining:-

Whether Income Accruing or Arising in India or not;

Whether the Source of Income is India or not.

10.7.1.2. Deeming provisions

The major provisions laying down the source rule are contained in sections 9(1)(vii), 44D,44DA and 115A of the Income Tax Act,1961. There are some specific provisions also related to imposing tax liability on cross-border services, which are, Sections 44B, 44BB, 44BBA, 44BBB.

Section	Deals with	
9(1)(vii)	Fees for technical services paid by the Government or a resident is deemed to accrue or arise in India unless such services are utilized by a resident for business or profession carried on outside India or for the purpose of earning income from any source outside India.	
	Fees for technical services paid by a non-resident is deemed to accrue in India only if such services are utilized in a business carried on in India by the non-resident or are utilized for the purpose of earning income from any source in India.	
44D	Restriction on the right of foreign company to claim deduction for expenses from income in the nature of royalties or fees for technical services received from the Government or an Indian concern as follows:	
	Date of Signature of Agreement	restriction on deduction for expenses
	Before April 1,1976	deduction allowed upto 20% of gross amount of fees for technical services
	After 31st March,1976 but before April 1,2003	No deduction allowed.
	This section is applicable to foreign companies only and not to any other non-residents.	
44DA	Specific provisions dealing with royalties/fees for technical services – after 31st March,2003 Provisions laid down in this section emphasizes to harmonise the provisions relating to income from royalty or fees for technical services attributable to a fixed place of profession or permanent establishment in India with similar provisions in various tax treaties. In terms of the provisions of this section, deduction is available for expenses from royalty or fees for technical services to a non-resident if : ➢ Royalties or FTS are received from Government or an Indian concern ➢ Agreement is made after 31st March,2003 ➢ Business is carried on in India through a permanent establishment ➢ Professional services are provided from fixed place of profession ➢ Right, property or contract for which royalty/fees for technical services arises is effectively connected with the permanent establishment or fixed place of profession. "Permanent Establishment is defined in Sec.92F (iiia),which includes a fixed place of business through which the business of the enterprise is wholly or partly carried on". There are three types of Permanent Establishments (PEs): (i) Basic rule PE – a fixed place of business, office, branch, installation, etc (ii) Service PE – presence of employees (iii) Agency PE – presence of dependent agent	

44C	The provision starts with a 'non-obstante clause', i.e. "Notwithstanding anything to the contrary contained in section 28 to 43A…..". This section overrides Sections 28 to 43A and accordingly the words "computation under the head profits and gains of business or profession in accordance with the provisions of ITA" would mean that deduction of head office expenses would be allowed subject to restrictions contained in Section 44C.
44DA	This section is inserted "with a view to harmonize the provisions relating to the income from royalty or fees for technical services attributable to a fixed place of profession or a permanent establishment in India with a similar provisions in various DTAAs'.

10.7.2. Income accruing or arising

A non-resident is subject to tax in India, if the income is:

(i) Received in India, or

(ii) Deemed to be received in India, or

(iii) Accrues or arises in India, or

(iv) Deemed to be accruing or arising in India

Income from services is subject to tax in India for the non-resident, if such income/fees are received in India or are deemed to be received in India or such fees accrue or arise in India, or are deemed to be accruing or arising in India.

The dictionary meaning of the word "accrue" is to "arise or spring as a natural growth or result"; "to come by way of an increase". "Arising" means "coming into existence or notice or presenting itself".

The word "accrue" and "arise" do not mean actual receipt of the income, profits or gains; and they may be interpreted as conveying the idea of a present enforceable right to receive the income, profits or gains. It is something unclear but is being enforced or converted into money by actual receipt. The words denote a point of time anterior to the actual receipt".

10.7.3 Source of Income

The term source is used in the context of income, deduction or collection of tax, and for certain purposes. A source of income in simple terms is a source from which income gets generated or arises. The word source means a place from which something is obtained. The source in relation to an income has been construed to be where the transaction of sale takes place and not where the item of value, which was the subject of the transaction, was acquired.

"Source means not a legal concept but something which a practical man would regard as a real source of income; the ascertaining of the actual source is a practical hard matter of fact".

Example 1: A Tax Association proposes to organize its Annual Congress in Country X. For this purpose, the Association branch in Country X has hired an event management company (EMC). The EMC has finalized a five-star hotel as a venue for the Annual Congress. The delegates would also stay in the same hotels. EMC would also coordinate hotel reservations for the delegates coming from the respective countries. The delegate would do the hotel booking through EMC, although the payment would be made directly to the hotel.

For the hotel, the source of income can be said to be :

(i) Tax Association's branch in Country X

(ii) The EMC

(iii) The delegates who actually pay room rent to the hotel

(iv) The event

Different sources of income:

Considering the above analysis/example, the following may be considered as categories of source of income:

(i) Person paying income – the person from whom the income is received and earned. Accordingly, income is said to be originating from him and the payer as such becomes the source of income.

(ii) Economic activity – these ultimately result in revenue for the organization and hence such economic activities can be treated as source of income.

(iii) Business unit/industrial undertaking – these unit would produce/generate income, and hence can be referred as a "source of income".

(iv) Contractual arrangement between the parties – the relationships, rights, obligations and the income flow from such contracts, and hence such contractual arrangement can be viewed as a source of income.

(v) An Asset – tangible or intangible – income may be seen as originating from various types of assets. If an asset generating income is situated/located in a particular country, then it can be treated as a source of income in that country.

(vi) An event/ an act – there are situations, when an event or an act is considered to be a source of income.

(vii) Law/regulations/court decree - in some situations, the income may be originating from the law itself and in such cases, the law itself is treated as the source of income.

10.7.4 Place of utilization of services

With reference to terms of Sec.9(1)(vii)(b) of the Income Tax Act,1961, the issue which comes up is, what are the parameters to decide the place where the services are utilized? This correspondingly leads to the issue – whether to avail the exemption under the said provision, whether the services should necessarily be utilized outside India?

10.7.4.1. Rendition of services – some broad categories

There may be various forms of rendition of services, some of which are as follows:

(i) Services could be rendered by actually deploying people on a project, say repairing a machine, installing a machine at the location of the person availing services (onsite services).

(ii) Services can be rendered at the location of the services provider by actually deploying people for say repairing a machine, etc

(iii) Services can be rendered by preparing at the location of service provider a written report or an advice

(iv) Services can be rendered by giving advice in a physical meeting

(v) Services can be rendered by giving advice through video-conferencing

(vi) Services can be rendered by giving advice on a telephone

10.7.4.2. Place where services are immediately implemented/rendered as a place of utilization of services (immediate location)

The place where the services are immediately implemented or rendered or utilized can be said to be place of utilization of services.

Say,

Situation	Place of utilization of services
(i) Engineer of a service provider repair a machine at the location of the client	such location of the client
(ii) If a machine is repaired at the location of the service provider	location of the person availing services where the machine is put to use
(iii) Services rendered in the form of a written report	place where the report is read and implemented
(iv) Advice through electronic media or a physical meeting	place where the advice is implemented

Some more common examples could be as:-

(a) While you are busy in your office, sitting in a place in India, you are eager to know the results of an ongoing cricket match between India and Australia, which is held in Melbourne Cricket Ground. You have typed "CRI" (i.e. cricket) and sent it to "8888" from your cell phone.

(b) Within a few seconds, the reply/information/data comes back to your hand-set. The services are said to be utilized in India.

(c) While relaxing during your busy schedule, you have logged in to say 'FACEBOOK' or search engine 'Google'. The request is sent from your Cell-phone/Laptop/I-pad/Note-pad/any other electronic device, which is located with you, somewhere in India. The server of 'FACEBOOK' or 'Google' is in a place outside India. You are receiving the required information/data while you are physically present within India. Hence, the place of utilization would be India.

(d) X Ltd. has factories in four different locations A,B,C and D. The Head office of X Ltd is in Location E. Certain functions are centralized in location E. For example, if there are any technical problems in any machines in the factories, then such machines are brought at Location E. Engineers of external service providers visit Location E and repair the machines. The repaired machines are sent back to the respective locations, i.e. A,B,C or D.

(e) In this case, the machines are repaired by external service provider at location E, but the repaired machines are actually utilized in locations A,B,C and D. The immediate location of utilization of services is E but the actual and ultimate utilization of services happens at locations A,B,C and D, i.e. the ultimate locations.

(f) A & Co. is a firm of Cost Accountants. It has branches in four locations, X,Y.Z and P. the staff strength in each location is fifty professionals. A & Co. also hires an external services provider to conduct soft skill training to its professional staff. The training is given at a conference conducted in location X. The staff from the other locations also travelled to location X to avail this training.

(g) The immediate location of services is location X but the ultimate location are all X,Y,Z and P. This is because the professional staff availing the training could actually apply the skills learned in the respective locations.

10.8 CLASSIFICATION OF "CROSS-BORDER SERVICES"

(a) Advance Ruling Representative Services

The term 'advance ruling' means (a) the determination of a question of law or fact in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant and also includes the determination of the tax liability of a non-resident arising out of such transaction with a resident applicant; (b) the determination or a decision on a question of law or fact relating to the computation of total income which is pending before any Income-tax authority or the Appellate Tribunal.

(b) Branch office set up of a Foreign Company

Permission to set up a branch office is granted by the Reserve Bank of India. A Branch office of a foreign company upon approval from the RBI must be compulsorily registered under the (Indian) Companies Act, 1956.

Upon registration under the Companies Act, 1956 the branch office can carry on its business activities in the same way as a domestic company. Unlike a liaison office a branch office can generate revenue from the sales in the local market and repatriate the profits to the foreign parent company.

A branch office so approved and registered can carry on the following activities :–

(a) Export/Import of goods

(b) Rendering professional or consultancy services

(c) Carrying out research work, in which the parent company is engaged

(d) Promoting technical or financial collaborations between Indian companies and parent or overseas group company

(e) Representing the parent company in India and acting as buying selling agents in India

(f) Rendering services in Information Technology and development of software in India

(c) Business set up services

Consultancy services rendered to Non-residents and entrepreneurs in starting, growing, expanding, diversifying and in case required, closing businesses in India. The services may also include preparation of project reports, feasibility report, Market survey, Project Planning & many more.

(d) FEMARBI Compliance

The transaction involving foreign exchange is regulated by Foreign Exchange Management Act, 1999 in India. The main thrust from liberalization of economy has been on promotion of foreign exchange rather than control of foreign exchange. All transaction involving foreign exchange is regulated by FEMA and the provisions of FEMA have to comply with wherever applicable. The preamble of the act says that it is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

(e) Foreign company incorporation

In India, incorporation of a company involving foreign investment is primarily governed by two laws i.e. Companies Act, 1956 and Foreign Exchange Management Act, 1999 (FEMA). Companies Act is principally concerned with compliance with requirements and guidelines prescribed by registrar of companies whereas FEMA mandates compliances with guidelines prescribed by Reserve Bank of India in relation to Foreign Direct Investment in India. It is imperative from above that our scope of service emanate in form of consultancy services for ensuring compliance with both the above laws i.e. Companies Act, 1956 and FEMA, 1999 and liaisoning with respective authorities.

Cases for reference:

1. B Ltd., having 200 employees, engaged in manufacturing concern. The tax laws requires that the company should deduct taxes should deduct taxes from the salaries paid to its employees. To comply with the requirement, the company has recruited a pay roll manager whole role, besides other things, is to determine the taxes required to be deducted from the salaries of the employees. Similarly, payroll manager also takes care of the leave balances of the employees. The work performed by the payroll manager can be said to be managerial services.

AZ and Co., a firm of service providers, have developed payroll software which takes care of various payroll related functions of the organizations. The firm approaches to offer the services of managing payroll of B Ltd. through this software. As per revised arrangement, the employees of B Ltd. would interact with the website of AZ and Co. as against the payroll manager of B Ltd.

2. If a service provider provides services of managing canteen of an organization, it would be an ongoing process which will continue throughout the year. As against this, if a company organizes events celebrating completion of its 25th year, the service provider who manages such celebration event (i.e. event manager) would be doing a onetime assignment.

Apparently, there is no difference between the two. In both the cases, the service provider uses his managerial skills and manages various functions. Merely because the celebration event happens only, once in a year the fact that the services provided are managerial in nature cannot be denied. Further, neither the definition of "fees for technical services" contained in Explanation 2 nor Sec.9(1)(vii) suggests that the managerial services cannot be for one off transaction.

3. Indirect Taxes on Soft ware

"Software is the set of instructions that allows physical hardware to function and perform computations in a particular manner, be it a word processor, web browser or the computer's operating system. These expressions are in contrast with the concept of hardware which are the physical components of a computer system, and data, which is information that performs no computation and gives no enabling instructions to computer hardware but is ready for processing by the computer software" – LML Ltd. vs. Commissioner of Customs 2010 (258) ELT 321(SC).

Also held that CD-ROM containing images of drawings and designs of engineering goods are not classifiable as computer software.

In 2004, the Supreme Court pronounced a landmark judgement in case of Tata Consultancy Services vs. State of Andhra Pradesh(2004) 141 Taxman 132(SC) – TCS Case. The judgement stated the parameters under which software would qualify as "goods". The relevant text of the judgement read " the text, to determine whether a property is 'goods', for the purposes of sales tax (now VAT), is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. Admittedly in the case of software, both canned and uncanned, all of these are possible.'

While the Supreme Court firmly concluded that sale of branded/canned software is liable to sales tax law (now VAT), the view expressed on unbranded software was with caveat stating that 'even unbranded software, when it is marketed/sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise'.

In the light of Tax Treaty Provisions

1. A Ltd. is a tax resident in Country A and has a branch in Country B. The branch in Country B pays fees to technical services to C Ltd which is a tax resident of Country C. There is a tax treaty between Country B and Country C.

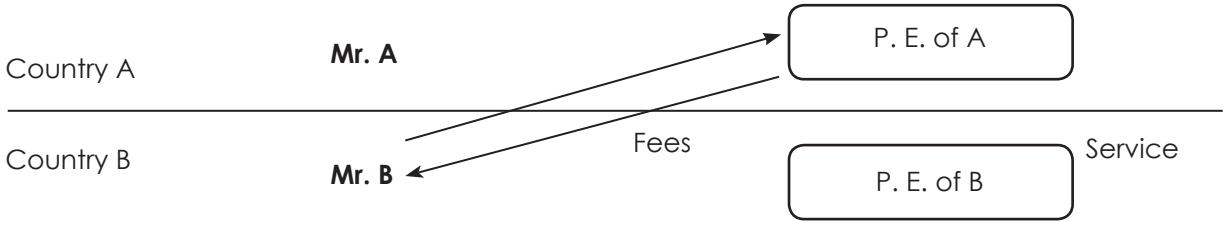
As per Para 5 of Article 12 of the tax treaty, the fees are "deemed to arise" in Country B as it is paid and borne by the branch. As per the domestic law of country A, the fees arise in Country A. Further, Article 12 shall be applicable to such fees i.e. as per Para 1, fees arising in Country B and paid to a resident of Country C may be taxed in Country C.

While interpreting Para 2 of Article 12, the same question needs to be analysed i.e. whether the term "arising" in Para 2 shall also include "deemed to arise".

As per Para 1 of Article 12, income (deemed to) arising in Country B and paid to the resident of Country C may be taxed in Country C.

Such fees may also be taxed in the country in which it arises i.e. Country B. This is on the basis that once the fees are deemed to arise in Country B, all the implications shall follow as if the income would have arouse in Country B.

2. A and B are tax residents of Country A and Country B respectively. A has an office in Country A which is its permanent establishment. B renders services to A in relation to the permanent establishment and the fees are borne by the permanent establishment.



In this example, the fees would be deemed to arise in Country A as per the second sentence of Para 5 of Article 12. However, the fees would be deemed to arise in Country A even by virtue of the first sentence of Para 5 of Article 12, this is because A is a tax resident of Country A. Further, generally a permanent establishment is generally contemplated in a country other than the country in which the head office exists i.e. the country in which the person is a resident.

Thus, although the second sentence of Para 5 of Article 12 uses the words "is a resident of a contracting state or not", it probably does not contemplate a situation described in this example i.e. a person having a permanent establishment in the country in which it is resident.

3. A, B and C are residents of countries A,B and C respectively. C has a permanent establishment in Country B and the fees are borne by it. C pays fee to A.

In this case, the payer (C) is not a resident of country B where the permanent establishment is situated. Although the payer is not a resident of country B, it has a permanent establishment in that country.

4. Credit Rating Services

X Ltd. an Indian Company availed credit rating services from B Ltd. an Australian Company, for which the Indian Company had paid the annual surveillance fee to B Ltd. Is this taxable?

In terms of tax treaty provision between India and Australia, the payment was held to be "royalty" considering the provisions of clauses (c) & (d) of Article 12(3), which are worded as follows:

"(c) the supply of scientific, technical, industrial or commercial knowledge or information;

(d) the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancilliary and subsidiary to the application or enjoyment of any such property or right as is mention in sub-paragraph(a) any such equipment as mentioned in sub-paragraph(b) or any such knowledge or information as is mentioned in sub-paragraph(c)".

Credit rating was treated as "commercial information" and fees received was falling under "Royalty".

[Essar Oil Limited (Essar) and Standard & Poor's (Australia) Pty. Ltd (S&P).

5. Procurement charges for goods

An Indian Company availed services of a German entity for the purpose of procurement of goods from outside India. As a consideration, the Indian company paid 4% of the total purchase price as fees to the German entity.

If this service is subject to tax as "fees for technical services"?

The Mumbai Bench of the Tribunal had examined this issue in the case of Linde A.G. vs ITO., where the CIT(A) held the case as "fees for technical services" in terms of Indo-German treaty. The relevant definition read as follows:

" the payment of any kind to any person other than payments to an employee of the person making the payments in consideration for services of a managerial ,technical or consultancy nature, including the provision of services of technical or other personnel".

The Tribunal held that the entire fees were in the nature of commercial profits and cannot be subject to tax in India in the absence of permanent establishment of the German Company in India.

6. Inspection fees

A German company sold certain equipment to an Indian Company. The equipment was damaged in transit. The German company sent two of its technicians and charged "inspection fees". The tax authorities taxed such fees as "fees for technical services". The German company claimed that such fees cannot be taxed as "fees for technical services".

The Tribunal held that the technician could not have been sent unless they were equipped with "technical knowledge". Accordingly, the fees were held to be 'fees for technical services" in terms of the provisions of Article 12 of the Indo-German treaty.

7. Services linked to purchase of machinery

The Indian party importing large machinery and equipment from foreign suppliers also require their assistance in installation/commissioning of such machinery, etc. At times, the foreign supplier would send his technicians to India for this purpose. The foreign supplier may also charge separate consideration for such services.

On a standalone basis, the services provided by the foreign supplier may be in the nature of technical services. However, the court has taken a view that such services are to be treated as incidental to the purchase of machinery and also inextricably linked to it. On the basis, the consideration for such services is not treated as fees for technical services, but is given the same treatment which is given to the sales consideration. Hence, it is to be considered as "make available" and not fees for technical services.

8. Dividend Income

(a) "Forming part of the Assets"

(i) A UK-based company has established a banking branch in India. The branch has also invested its funds in shares of Indian Companies. The shares of Indian companies could be said to be forming part of the assets of the permanent establishment. The branch is the economic owner of the shares

(ii) A US-based conglomerate company has a permanent establishment in India. The company has different types of business including cement, steel, etc. The Indian branch is in the business of steel. The US-based company also owns certain shares of an Indian cement company. The Indian branch, which is involved in steel business, has nothing to do with the cement business. However, it has the custody of the share certificates of the shares owned by the head office. These shares are not shown in the balance sheet of the Indian branch.

Are the shares forming part of assets of the permanent establishment? The answer seems to be 'no'. The permanent establishment is just holding the shares physically and it may be possible to say that such shares do not form part of the assets of the permanent establishment. The permanent establishment is not the economic owner of the shares, as it does not enjoy the risk and rewards of the shares.

(b) What is 'otherwise effectively connected'?

(i) A non-resident company has a subsidiary company in India. Such company, however, becomes permanent establishment of the non-resident company by virtue of provisions of Article 5(4) – dependent agent. This subsidiary company declares dividend to the parent company.

Are the shares effectively connected with the permanent establishment? The answer seems to be 'yes'. This is because the subsidiary is a permanent establishment of the foreign company and the shares are of such subsidiary.

However, considering the new guidance available in the OECD commentary, the permanent establishment may not be said to be the "economic owner" of the shares.

(ii) The Indian permanent establishment has played effective role in purchasing the shares of an Indian company on behalf of its head office outside India. In such situation, it may be difficult to say that the shares are effectively connected with the Indian permanent establishment, as it is no way connected with the shares except that it played a major role in acquisition of the shares for the head office.

9. Service PEs

An enterprise can carry on business in other country in different manners. This may be broadly divided in the following three categories:

(i) Business activities carried on in a branch, an office, etc

(ii) Business activities through a dependent agent

(iii) Business activities through employees.

Service PE is defined in clause (b) of Article 5(3) of the UN Model, as follows:

"The furnishing of services, including consultancy services,

by an enterprise through employees or other personnel engaged by the enterprise for such purpose, ut only if activities of that nature continues (for the same or a connected project) within the country for a period of periods *aggregating more than six months within any twelve month period.*"

(a) Presence of person availing services

If the person availing the services is present in the country in which the services are rendered, the service PE would be formed. This can be explained on the basis of the following example:

X Ltd a company based in Country X, specializes in rendering machine maintenance services. This service requires actual testing, cleaning, etc of the machine.

Z Ltd. a company in Country Z, wants maintenance services for the machines purchased by it . Z Ltd. engages X ltd for this purpose. The employees of X Ltd visit Country Z and carry out the maintenance for the machines.

In this case, X Ltd is furnishing services in Country Z through its employees. Service PE is created if the employees of X ltd provide services for a period exceeding 90 days.

(b) Absence of person availing services in the country –direct utilization / consumption of services

It is possible that the person availing services may not be present in the country in which services are rendered, but such services may be consumed in the same country in which the service are rendered.

The issue is whether it is necessary that the person availing services should be present in the same country in which the services are rendered. As such the language of Article 5(3)(b) does not require that the person availing services should be present in the same country. What it requires is that the services should be rendered within the country. This can be explained on the basis of the following example:

X Ltd a company based at Country X, specializes in rendering machine maintenance services. The service requires actual testing, claiming, etc of the machine.

Y ltd, a company situated in Country Y, wants maintenance services for the machines sold by it to its customers in Country Z. Y ltd. engages X Ltd for this purpose. The employees of X Ltd visit country Z and carry out maintenance for the machines sold by Y ltd.

The following issues may arise in this structure:

(i) The employees of X Ltd are rendering services to whom? To the customers in Country Z or to Y Ltd based in Country Y?

(ii) If the services are rendered to Y Ltd,. then can it be said that the services are not furnished in Country Z as the beneficiary (Y Ltd) is situated in Country Y. Does presence of employees result in service PE of X ltd in country Z?

The answer to the first querry is that the employees of X Ltd are rendering services to X Ltd only, as there is a contract of employment between them. There is no contract between employees of X Ltd and Y Ltd or the customers of Y Ltd.

The second issue is whether it can be claimed that services are furnished within Country Z as the beneficiary (Y Ltd) is not present in country Z.

The services are undoubtedly furnished in Country Z as the employees are present and render such services in Country Z. Further, Article 5(3)(b) does not suggest that the person availing such services should also be present in the same country in which the services are rendered.

(c) Absence of person availing services in the country – indirect utilization of services

It may happen that the person availing services is not present in the country where the employees carry out activities. However, the services may ultimately be utilized in the same country.

Example: X Ltd. is based in Country X, specializes in real estate related issues. Y ltd is situated in Country Y, wants to enter into real estate sector in Country Z. Y Ltd. engages X Ltd for the purpose of studying the real estate market in Country Z. The employees of X Ltd visit Country Z and carry out the market research activities. The employees of X Ltd carry out various activities in Country Z for 130 days and at the end of the assignment the employees go back to Country X, prepare the final report and sent it to Y Ltd. Y Ltd. uses such report for the purpose of future investments in Country Z.

The issue to be answered is whether X Ltd. can be considered as rendering services within Country Z? Whether the presence of such employees results in X Ltd having a service PE in Country Z?

In this example, the residence country is country X. however, the determination of the source country leads to some confusion. Should Country Y be considered as 'source country' on the basis that X Ltd earns income from the resident of country Y. Alternatively, should country Z be considered as a source country on the basis that the source of revenue for X Ltd is the activities carried out in Country Z.

Even in a situation, where the services are considered as not rendered in Country Z, the fact that the economic activities are carried out on the soil of Country Z cannot be denied. Accordingly, country Z may want to tax such activities. Country Z may have the right to tax the employees of X Ltd for the services rendered and X Ltd. However, such right can be exercised only if the provisions of DTAA permit.

NOTE