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INDIRECT TAXES LAWS—I
(CENTRAL EXCISE AND CUSTOMS)

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I INTRODUCTION

"THAT GOVERNMENT is best which governs the least". This observation of Henry David Thoreau is out of place in the modern age when governmental functions have permeated the very existence of a person from womb to tomb. Incidentally, Thoreau found himself out of place with the age in which he lived. He was a critic of government by force and coercion. So, necessarily, Thoreau objected to the imposition of taxes. Rather than paying taxes, he preferred imprisonment. Today, taxation is probably the prominent function of the state. Under the Constitution of India power of taxation is federally distributed among the union and the state governments. The local administration institutions also have their share of power of taxation.

The largest measure of taxation comes indirectly. Citizens pay taxes unknowingly as part of the price of the commodity they purchase. The figure which could be culled out from the account books of the government due to taxation from indirect taxes is mammoth compared to taxation from direct streams like income tax, gift tax, and agricultural income tax. A vast body of legislation exists in the area of taxation as Acts passed by the legislature, rules framed by the executive with the approval of the legislature, notifications issued by the statutory authorities, orders, proceedings etc. The meeting point for the application of these legal principles is the courts of law wherein ' the taxing' and 'the taxed' meet and thrash out the legality or otherwise of the process of taxation leading to decisions having general and universal jurisprudential sense in the administration of justice in the field of taxation. The Supreme Court, being the flagship which has set sail in the high seas of jurisprudence, shapes the rhythm of taxation through various decisions rendered .

There is prolific responses from the judiciary to meet the juristic needs in the realm of taxation. Supreme Court the "elder brother"[1] directs the high courts, the "younger brother" and the statutory authorities in the adjudicatory process.

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1 *Tirupati Balaji Builders Ltd.* v. *State of Bihar,* (2004) 5 SCC 1 at 14.

II CENTRAL EXCISE

The areas traversed by the Supreme Court and high courts in the administration of justice in central excise include the manufacture of goods, classification, valuation, exemptions, penalty etc. The operating pieces of legislations are Central Excise Act, 1944, Central Excise Tariff Act, 1985, and also rules, notifications and orders. There are statutory authorities and tribunals arranged in particular spheres to steer clear the channel of taxation. The Supreme Court is the final arbiter of all disputes relating to the various legal aspects of central excise jurisdiction. Central excise is a premier territory in the province of taxation in India. It is in the realm of indirect taxes. Central excise laws present a complex corpus of Central Excise Act 1944, Central Excise Tariff Act, 1985, excise rules, excise valuation rules, CESTAT (Procedure) Rules, statutory forms, Acts and rules relating to additional duties, cess and the vast number of notifications issued every year. Confusion caused by the quagmire of legislations is tried to be clarified through judicial process. The regime ruling the central excise has a hierarchy of statutory, quasi-judicial authorities. But the ultimate articulation of the legal propositions come through the utterances of the apex court.

Manufacture

The intricacies associated with the process of manufacture is perennial. The subtlety is so pervasive that in certain cases 'logic' gives way to 'experience' in finding solution in law to the case at hand. There is a definition, though prosaic, of the term 'manufacture' occurring in section 2(f) of the Central Excise Act, 1944**.** But when the principle is applied to the given fact situation the enigma surfaces. The courts have been commendably successful in arriving at a just and reasonable conclusion as to what amounts to manufacture or not. In *Commissioner Central Excise* v. *Indian Aluminium Company*,[2] the Supreme Court examined the meaning and scope of the term 'manufacture'. Referring to its earlier decisions on the point the court held that every change in an article is not manufacture. The respondent company manufactured aluminium sheets out of aluminium oxide. In the melting furnace, the top layer of the molten metal was exposed to the atmosphere and got oxidized. As a result thereof, a thin layer or film was formed which was removed by skimming. The second layer so formed was called dross, which contained at least some quantity of metal. The present appeal filed by the Revenue against the decision of CESTAT involved the question as to whether aluminium dross and flux skimming so arising were excisable articles. That question was considered in the respondent's own earlier case in *Union of India* v. *Indian Aluminium Co. Ltd*[3] and was answered in the negative. That decision was later followed in *Tata Iron and Steel Co. Ltd.* v. *Commissioner*

2 (2006) 8 SCC 314.
3 (1995) Supp (2) SCC 465.

of Central Excise, [4] The CESTAT decided the present case accordingly. It was also noticed as to how dross comes into being. In *Indian Aluminium* itself the court had held that "undoubtedly dross and skimming do arise during the process of manufacture", but it did not amount to manufacture. In *Tata Iron and Steel Company Ltd*, on the other hand, the court, though noticed that dross and skimming are capable of being sold, furthermore opined that only because the article had some saleable value, the same would not render it to be " a manufactured product".

The principles to determine as to what amounts to manufacture was discussed in *Commissioner of Central Excise & Customs, Gujarat* v. *Pan Pipes Resplendents Ltd*.[5] It was held that the process of manufacture must be one which brings into being a new substance known to the market. Manufacture implies a change. But every change is not a manufacture . Yet every change in an article is the result of some treatment, labour and manipulation. Still, something more is necessary to constitute the process one of manufacture. There must be transformation. A new article must result; having a distinct name, character or use. These conditions were not satisfied in the instant case because ceramic glaze tiles even after the process of printing and decorating remained as tiles. Persons dealing in that commodity recognize the same as wall tiles before and after printing and decorating.

According to the court to attract central excise duty transformation of a product must be such that it becomes a commercially different commodity. The department never had a case that plain ceramic glazed tiles would be commercially useless but for the process carried out by the respondent. The respondent after obtaining plain glazed tiles which were duty paid, processed them into decorated ceramic glazed wall tiles. The process, according to the respondent was of two types; the first type was screen printing tiles in which tiles were subjected to firing only for fastening the wet colours and the second variety was that of decorating glazed tiles which consisted of application of glass fritz of various colours as per the designs on the surface of the glazed tiles which on being fired would melt and blend with the surface of the tiles thereby turning the glazed tiles into decorative tiles. In the present case the decorated glazed ceramic wall tiles after their decoration did not change their basic character viz. glazed tiles and, therefore, did not undergo a process of manufacture. In the opinion of the court the respondent's case was fully covered by the decision of the court in *Union of India* v. *J.G. Glass Industries Ltd*.[6] The court did not find any infirmity in the judgment of the tribunal and the same was upheld and the appeal was dismissed.

The concept of manufacture was again considered by the Supreme Court in *Hindustan Poles Corporation* v. *Commissioner of Central Excise, Calcutta*,[7] wherein the court rejected the contention of the authorities to make

4 (2004) 9 SCC 1.
5 (2006) 1 SCC 777.
6 (1998) 2 SCC 32.
7 (2006) 4 SCC 85.

residuary entry. In *Motor Industries Company Limited* v. *Commissioner of Central Excise, Aurangabad*[8] the inter-connectivity of manufacture, classification and exemption was discussed. One of the questions which arose for determination was whether an assembly of nozzles and nozzle holders (intermediate products) brings into existence a new product called an injector and if so, whether the department was right in classifying the said injector under sub heading 8409.00. The appellant was engaged in the manufacture of nozzles, nozzle-holders and injectors. It has been alleged by the department that nozzles and nozzle-holders were components of an injector, that on coupling, which process constituted manufacture, an independent product, namely, an injector emerged.

But the appellant's submission was that fitting of nozzles into nozzle holders, did not amount to manufacture; that even after such fitment, the end result remained "nozzles and nozzle holders". The court found that the tribunal did not find an answer to this dispute. How is an injector construed and what are its components, has not been decided by any of the authorities below including the tribunal. While remitting the matter for *de novo* adjudication, the apex court observed that the burden was on the department to lead evidence on manufacture and marketability. It is for the department to prove that nozzles and nozzle holders were intermediate products which on coupling became an injector which was a saleable commodity in the market. At the same time the apex court reiterated its earlier view once again that the burden is on the assessee to prove that they are entitled to get exemption. The important points considered and decided by the court in the instant case were : with respect to liability to duty, the onus to prove its case on evidence is on the department; and with respect to exemption benefit, the onus to prove that the assessee is entitled to claim exemption under a particular provision or notification is on the assessee.

Classification of goods

Classification is a process by which the product is admitted into a particular heading under the Central Excise Tariff Act, 1985. In *Commissioner of Central Excise, Delhi* v. *Carrier Aircon Ltd*. [9] the issues considered by the Supreme Court were whether the chillers manufactured by M/s Carrier Aircon Limited, the respondent, are classifiable under chapter heading 84.18 of the schedule to the Central Excise Tariff Act as claimed by them or under chapter heading 84.15 as contended by the Revenue. The chilled water produced by the chiller is admittedly in turn being used in various industrial applications. After adverting to the harmonized system of nomenclature of the Customs Cooperation Council and the common parlance test, the court came to the conclusion thus: "End use to which the product is put to by itself cannot be determinative of the classification of the produce. There are a number of

8 (2006) 1 SCC 791.
9 (2006) 5 SCC 596.

factors which have to be taken into consideration for determining the classification of a product."[10]

For the purposes of classification the relevant factors are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to cannot determine the classification. Revenue lost the case against the background of the discussion and decision of the court which with dexterity and efficiency distinguished the technical-scientific details from the requirement of rational-legal solution to the dispute. Revenue classified the impugned chillers as parts of the air conditioning system as the same are used in central air-conditioning plants of star hotels, airports, hospitals, large office complexes and large establishments. The use of the chillers in the air-conditioning system would not take away the primary or basic function of the chiller which is to produce chilled water by using a refrigerating circuit. Heading 84.18 covers refrigerators, freezers and other refrigerating or freezing equipments. Accordingly, the chillers in question shall fall under specific heading 84.18 of the Tariff Act . The court found that this view was supported by the explanatory notes of HSN below heading 84.15. HSN provides that : "If presented as separate elements, the components of air conditioning machines are classified in accordance with the provision of Note 2 (a) to Section 16". "Chillers" manufactured by the respondent are cleared as separate elements and not as part of air conditioning machines, therefore the same have to be classified under tariff entry 84.18 as refrigerating or freezing equipments as the basic function of the chillers is to chill the water or liquid. Chillers manufactured by the respondent cannot be classified under heading 84.15 simply because 90 per cent of the chillers manufactured by the respondent were being used in the commissioning of central air conditioning plant.

In *North-west Switchgear Ltd.* v. *Commissioner of Central Excise, New Delhi*[11] two sets of appeals were filed under section 35-L of the Central Excise Act, 1944 by two different assessees separately against decisions of two different benches of CEGAT which had held that "fan regulators" would be classifiable under sub-heading 8414.20 if cleared along with fans but if cleared only as regulators (not along with fans), they would be classifiable under sub-heading 8414.99. Placing reliance on note 2 (b) to section XVI, the appellant assessees contended that since the "fan regulators" were suitable for use solely or principally with the electric fan the same were classifiable with the entry relating to electric fans i.e., sub-heading 8414.20.They also sought support for such classification from CBEC Circular No. 7 / 87 dated 24.6.1987. Alternatively, they contended that the fan regulators were classifiable under sub-heading 8414.80. The common issues involved in both the sets of appeals were, whether the "fan regulators" are classifiable under, sub-heading 8414.20

10 See *Indian Aluminiam Cables Ltd.* v. *Union of India*, (1985) 3 SCC 284.
11 (2006) 3 SCC 86.

along with fans or under sub-heading 8414.99 as "parts and accessories". It was held that "the fan regulators" manufactured by the assessee, which are sold as such "without the electric fan" would be classifiable under sub-heading 8414.99 as accessories of fans. The court used the general notes in section XVI of the harmonious system of nomenclature of the Customs Cooperation Council for interpreting the entry of item for classification.

In *Commissioner of Central Excise & Customs, Mumbai* v. *Bell Granito Ceramics Ltd.*[12] the twin questions involved were (i) the classification of the tiles manufactured by the appellant and consequential liability of the appellant to pay differential duties on the same ; and (ii) whether the notice issued demanding excise duty is barred by limitation under section 11-A of the Central Excise Act. Analyzing the sub-heading no. 69.05 of the Central Excise Tariff Act, and appreciating the texture and make of the goods, the court opined, simply because the tiles in question are polished or having a shiny look, they do not become glazed tiles. Glazed tiles, are produced when a coating of melted glass is applied on the surface of the body of the tiles. In fact, glazed tiles normally are not polished at all.

It is clear that vetrification and glazing are two distinct and separate processes - the former being a process to which the ceramic body is subjected before it is made, while the latter is a process to which the said body is subject after being made. Thus, polishing and glazing are distinct and separate processes and hence the contentions of the Revenue was not accepted. The assessee is not coating or applying substances on the tiles which it makes, and hence its tiles cannot be termed as "glazed tiles" . Moreover , the tribunal has held that there was no suppression. This being a finding of fact, the court desisted from interfering with the same in appeal.

In *HPL Chemicals Ltd*. v. *Commissioner of Central Excise Chandigarh*[13] the court held that classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. In case of dispute between the assessee and the Revenue on the applicability of a particular entry of the goods, it was held, the Revenue has to adduce proper evidence, as per Central Excise Tariff Act, 1985, section 2 and the schedule. In the present case, the said burden was not discharged by the Revenue at all. From the enquiries made by the department, and from the report of the chemical examiner, it was quite clear that the goods were classifiable as "denatured salt" falling under chapter heading 25.01. The appellant company was engaged in the manufacture of hydrazine falling under heading 28.25 of the Central Excise Tariff Act, 1985 (for short "the Act") . During the course of manufacture of the said final product a residuary product "denatured salt" came into being. The appellant classified it under heading 25.01. But the Revenue classified the same under heading 28.23 (renumbered as 38.24). The appellate authority held in favour of the appellant. But CEGAT reversed that decision on several

12 (2006) 5 SCC 188.
13 (2006) 5 SCC 208.

grounds. Firstly, that, in view of the titles of section V and chapter 25, chapter 25 covers the "mineral products" specified therein ; secondly, since the starting raw materials were not classifiable under chapter 25, the residue in question could not be a product covered by that chapter; finally, since denatured salt was a residue of a chemical industry *viz.*, hydrazine, covered by chapter 38 and not specified and provided elsewhere, denatured salt was classifiable under heading 38.24 which was a specific heading for such products. The appellant then filed appeal under section 35L of the Central Excise Act. The connected appeals were filed by other manufacturers in similar cases. Opposing the appeals, and relying on note 2 of chapter 25, the Revenue submitted that in order to be classified as "denatured salt" under heading 25.01, the starting raw material must be salt and the product must not contain any impurities. It further submitted that the goods in question were classifiable under heading 38.23 (renumbered as 38.24) as "residual products of the chemical or allied industries, not elsewhere specified or included". Allowing the appeals, the Supreme Court held that the finding of CEGAT, reached by reference to titles of section V and chapter 25 of the Act was totally incorrect and was contrary to rule 1 of the rules for interpretation of the Central Excise Tariff.

Valuation

Valuation is proximate to computation. It is distinct from manufacture, and also from excisability. In *Proctor and Gamble* v. *Commissioner of Central Excise*,[14] the Supreme Court explained the dichotomy of manufacture and valuation. In this case it was held that the concept of 'valuation' is different from the concept of excisability. The concepts of 'valuation' and 'manufacture' are two different and distinct concepts. The excisable event is the manufacture. The levy is on the manufacture. The measure or the yardstick for compelling the levy is the normal price under section 4 (1) (a) of the Act. The pertinent question raised in this case was that whether the value of the bulk packs cleared from the assessee's factory could be computed on the basis of retail price of the repacked small sachets sold through the depots of the assessee. The appellant-assessee was engaged in the manufacture of detergent powder "Ariel Micro-system" (AMS). It had removed AMS in bulk packs of 25 kg on payment of excise duty, on cost basis, for further re-packing in small sachets by a sister concern, which in turn sent such repacked AMS to the assessee's depots for sale. The appellant / assessee in turn sold the same through its depots. The assessee contended that 'repacking' did not amount to manufacture under section 2 (f) of the Central Excise Act, during the assessment period, "since repacking" amounted to manufacture only after the introduction of note 6 to chapter 34 of Central Excise Tariff Act.

But the department alleged that, the entire *modus operandi* of the appellant / assessee was to deliberately declare only the cost of 25 kg bulk packs for payment of excise duty. Hence it demanded the differential duty on

14 (2006) 1 SCC 267.

the price of the sachets. 'Manufacture', as defined by various courts, takes place only when the process results in a commercially different article or commodity.

For this view the court relied on *Union of India* v. *Bombay Tyre International Ltd.*[15] wherein it was observed that " the fundamental factor entering in computing the value of an excisable article is the price at which the excisable article is sold or is capable of being sold by the manufacturer." The apex court found that the tribunal did not consider the key question, whether the activity of repacking did amount to manufacture of the relevant item and could it be justified in computing the assessable value of the commodity based on the retail price of 20 gm and 30 gm sachets sold through the depots of the appellants. Under these circumstances, the matter was remanded to the tribunal for its fresh decision in accordance with law.

In *Commissioner of Central Excise, Delhi* v. *Action Constructions Equipment Private Limited*,[16] the question involved was computation of assessable value of mobile cranes under section 4 (4) (d) of the Central Excise Act, as it stood at the relevant time prior to the year 2000. The adjudicating authority came to the conclusion that the assessee had deliberately floated a non-functional unit to evade excise duty. Accordingly, it ordered confiscation and appropriation of an amount of Rs. 3 lakhs from the bank guarantee given by the assessee towards redemption fine in lieu of confiscation. The appellate authority, however, took the view that the normal price which is the basis of the assessable value is cum-duty price. On that basis it reduced the assessable value from Rs. 26,63,440 fixed by the adjudicating authority to Rs. 22,09,827 and correspondingly the liability of the assessee was reduced from Rs. 4,10,144 to Rs. 3,53,573. The assessee sought refund. Appeal to CESTAT preferred by the department failed. Attention was invited to the judgment of the Supreme Court in *CCE* v. *TVS Srichakra Ltd.*[17] and the judgment in *CCE* v *Maruti Udyog Ltd.*[18] In these judgments, appeals filed by the department were dismissed by the Supreme Court, upholding that the sale price realized by the assessee is to be regarded as inclusive of excise duty and therefore, in arriving at the excisable value of the goods, the element of duty which is payable is to be excluded. Court did not go into the factual details particularly when no relevant plea was taken by the department in the appeal before the tribunal and before the court in the civil appeal. The court went through the grounds mentioned in the memo of appeal filed by the department before the tribunal and also through the grounds mentioned in the civil appeal filed by the department before the court. As stated above, the only ground taken in both the appeals by the department was that the judgment of the court in *Maruti Udyog Ltd* was pending reconsideration *vide* a review petition.

15 *Union of India* v. *Bombay Tyre International Ltd.*, AIR 1984 SC 420.
16 (2006) 6 SCC 75 .
17 (2002) 142 ELT A 279 (SC).
18 (2002) 3 SCC 547.

In *Alambic Glass Industries* v. *Commissioner of Central Excise*,[19] the court considered whether expenses incurred on advertisement and as such by bulk producer was includible for assessment. The appellant assessee company was a manufacturer of glass and glassware classifiable under chapter 70 of the Central Excise Tariff Act. A prolonged strike in the factory of the appellant allegedly resulted in stoppage of work and the appellant decided to cut down expenditure in areas like labour, packing, inventory, advertisement, etc. A bulk purchaser of the appellant's products started advertising to boost its sales in respect of glass and glassware purchased from the appellant. Subsequently, during the assessment period 1.1.1988 to 28.2.1990, the said purchaser incurred several times more expenditure on publicity in comparison to that incurred in earlier years whereas the volume of sales too increased several folds. The department sent a show cause-cum-demand notice to the appellant regarding the proposed inclusion of the publicity expenditure incurred by the purchaser in the assessable value declared by the appellant. The appellant opposed the said notice on the ground that it had made all the sales to the purchaser on principal to principal basis and that the appellant and the purchaser were not related persons. The department held that once it was established that the expenses for advertisement were additional considerations, the question of related persons became immaterial. That the present case was one of implied instructions from the appellant to the purchaser to incur the expenses on publicity. That, therefore, the expenses incurred by the purchaser were includible in the assessable value under rule 5 of the Central Excise (Valuation) Rules, 1975. CEGAT upheld the department's view.

Aggrieved, the appellant assessee approached the Supreme Court in appeal. Before the Supreme Court, the appellant assessee contended that the value of an excisable article was the price at which the same was sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. The Revenue, however, supported the order of CEGAT. Allowing the appeals, the Supreme Court held that there was no material before CEGAT to conclude that there was any tacit understanding. No material was placed by it to justify that "inferential presumption", which was also not spelt out in the show cause notice. Moreover, there was no material to show that there was any arrangement for reimbursement. The factual position showed that the transaction was on a principal to principal basis. Therefore, there was no scope for making any addition as done by the authorities and upheld by CEGAT.

In *Commissioner of Central Excise, Delhi* v. *Allied Air Conditioner Corporation Registered*,[20] the court examined in depth the approach needed in valuation. CEGAT has not analyzed each item individually. It has also not indicated how the ratio in *PSI Data Systems Ltd.* v. *CCE*[20a] had any relevance,

19 (2006) 7 SCC 395 .
20 (2006) 7 SCC 735 .
20a (1997) 2 SCC 78.

which according to the court was rendered in an entirely different fact situation.

A judgment should be understood in the light of the facts of the case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment divorced from the context of the question under consideration and treat it to be complete law decided by the Supreme Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Supreme Court.

Exemption

While exemption totally excludes a product from the incidence of taxation, the law has cast the burden for eligibility to claim the facility on the assessee. In *Kartar Rolling Mills* v. *Commissioner of Central Excise, New Delhi*,[21] it was held that the provisions of an exemption notification has to be construed strictly. While dismissing the appeal the apex court observed that the appellants failed to bring any evidence on record to prove that the supplier of raw materials had supplied the materials to them under the provisions of notification no. 214 / 86 and hence the court declined to interfere with the finding of fact arrived at by the Custom, Excise, and Gold (Control) Appellate Tribunal, New Delhi.

In this case the appellants were manufacturing hot rolled untrimmed sheets / circles of copper and copper alloys. The goods were classified under chapter heading no. 74.09 of the schedule to the Central Excise Tariff Act. It was found that the products manufactured by the appellants were marketable and, therefore, eligible to the levy of excise duty. The court also held that the appellant had failed to prove the existence of the conditions laid down in the exemption notification for its applicability. It also held that an exemption notification could not be implemented with retrospective effect.

In *REIZ Electro Controls (P) Ltd.* v. *Commissioner of Central Excise, Delhi*[22] the question of eligibility for exemption to a company using the brand name of another was considered. The exemption notification had disqualified the goods manufactured under the brand name of another person. R.E. was a proprietary concern. It was engaged in the manufacture of electronic fan regulators, dimmers and remote control switches under the brand name REIZ since 1988. In the year 1993, a company, REPL was constituted with three brothers as directors. REPL was engaged in the manufacture of electronic transformers under the same brand name, viz., “REIZ”. The CCE, by his order dated 31.10.2001 held that since the brand name “REIZ” belonged to RE till its transfer to REPL in 2000, the electronic transformers manufactured under the brand name “REIZ” by REPL were ineligible for small scale exemption. Under notification no. 1/93 a manufacturer affixing the brand name of another person was ineligible for the exemption. Similarly, he held that on the transfer of the

21 (2006) 4 SCC 772 .
22 (2006) 6 SCC 213 .

brand name REIZ to REPL in 2000, RE became ineligible for the exemption. He, therefore, raised a demand and also levied interest and penalty.

In appeal before CEGAT it was contended that RE never manufactured electronic transformers and therefore in respect of that item, the brand name REIZ belonged to M/s REPL. It was also submitted that REPL had applied for registration of that brand name in their favour for electronic transformers in 1995 and, therefore, these could not be said to be manufactured under the brand name of another person. CEGAT, however, rejected the said contention and upheld the decision of CCE on that point. In further appeal before the Supreme Court the appellant reiterated the stand taken by it before CEGAT. Additionally, it submitted that the appellant had in the meantime obtained a certificate under the Trade Marks Act, 1999 and the certificate of registration of trade mark covered the period in question. Therefore, even if CEGAT's view was taken to be correct no duty could be levied. The Supreme Court relying on *Mahaan Dairies* case[22a], it was held that it made no difference whether the goods on which the trade name or mark was used were the same in respect of which the trade mark was registered. Even if the goods were different, so long as the trade name or brand name of some other company was used the benefit of the notification would not be available. Therefore, the main contention of the appellant about eligibility for exemption was sans merit.

In *South Eastern Coal Fields Ltd.* v. *Commissioner, Customs and Central Excise, M.P.*[23] the court adopting the purposive rule of interpretation, rather than the literal rule, while construing the word "precincts" in the notification, gave the benefit of exemption to the assessee. "We have to interpret the word "precincts" in the exemption notification to mean surrounding region or area as defined in Collin's English Dictionary or the surroundings or environs of a place as defined in New Shorter Oxford English Dictionary. This is because the purpose of the exemption notification is to grant exemption from excise duty to goods produced in a mine so as to encourage the mining industry. A workshop which is in an area in the environs of a mine and is existing solely for the purpose connected with the mine and under the same management, is obviously directly serving the mining operations. Hence, we have to interpret the notification so as to include such a workshop within the definition of a mine for the purpose of grant of exemption as that would encourage the mining industry".

In *Amrit Paper* v. *CCE, Ludhina*,[24] the primacy of statutory provisions over notification was considered. Accepting the contention of the respondents the court denied exemption. The court observed that the provisions of rule 57-C would be rendered nugatory and redundant if the interpretation as suggested by the appellant was accepted. It would mean that primacy has to be given to the notification over the statutory provisions contained in rule 57-C. The said

22a (2004) 11 SCC 98.
23 (2006) 6 SCC 340.
24 (2006) 6 SCC 345.

rule provided that no credit of the specified duty paid on the inputs used in the manufacture of a final product (other than those cleared either to a unit in a free trade zone or to a hundred per cent export oriented unit) shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

On the facts of the case, it was found that the manufacturer had availed of the credit at the time of clearance of the goods. Later it had *suo motu* reversed the stand to avail the exemption almost after 11 months when it claimed refund of MODVAT credit . Hence, the court held that it was not entitled to exemption . The court found that the decision in *Orissa Extrusions* case supported the stand taken by the appellant. But in view of what had been stated by a three judge bench in *Ichalkaranjii* case, the decision, the court observed, did not lay down the correct position in law. Consequently the appeal was dismissed. Hence it was not entitled to exemption.

Exemption is related to classification. Goods falling under one sub-heading cannot be brought within the purview of exemption notification when they specifically fall under a distinct sub-heading. In *Decent Laminates (P) Ltd.* v. *Collector of Central Excise and Customs*,[25] the question was whether the decorative laminated goods falling under sub-heading 3920.31/3920.37 would be entitled to the benefit of exemption for goods falling under sub-heading 4823.90 covered by notification no. 135/89 dated 12.5.1989.

The whole dispute had proceeded on the footing that the goods fall under tariff entry 4823.90. The court had, in *CCE* v. *Balkelinte Hylam Ltd* [26] held that these goods fall under the tariff entries 3920.3 / 3920.37 and not under tariff entry 4818.90/4823.90. "As it is now settled by this Court that these goods do not fall under Tariff Entry 4823.90, it is clear that the benefit of the said notification would not be available to the appellants."

In dealing with the eligibility of a cooperative society for claiming exemption, the High Court of Kerala, taking the correct signal from the apex court, and by way of establishing a milestone decision in taxation jurisprudence upheld the necessity for adhering strictly to the conditions in the notification for exemption for enjoying the benefits of exemption. In *Malanadu Cooperative Tea Factory* v. *Commissioner of Central Excise*,[27] the court was considering the claim of exemption under a notification issued under rule 173(G). An assessee is entitled to avail of any exemption that may be granted in terms of the notification issued from time to time under sub-section (1) of section 5-A CE Act, 1944. One of the principles that has been employed by the various courts in India, while dealing with a case claiming exemption, is that the provisions in an exemption notification has to be interpreted strictly. In the instant case[28] the appellant was engaged in the manufacture of tea and

25 (2006) 7 SCC 438 .
26 (1997) 10 SCC 350.
27 (2006) 1 KLT 507.
28 *Ibid*.

was availing exemption under notification no. 42/99 CE dated 26.11.1999, during the financial year 2000-2001. But the appellant was served with a show cause notice by the superintendent of central excise, to show cause why penalty under rule173 Q of the Central Excise Rules, 1944 should not be imposed for failing to assess the duty payable correctly and for clearing excisable goods without paying the duty payable. In the show cause notice, it was pointed out that the duty of excise called CENVAT, payable on 89,279 kgs of tea cleared by the appellant during the period from 1.4.2000 to 29.5.2001 had not been levied and it had violated the provisions of rule 9 (1) read with rule 173 G (1) (a) and rule 173 of the CE Rules. The short question that arose for consideration was whether the appellant was eligible to get exemption under notification no. 41/99 CE dated 26.11.1999 when the appellant had filed the undertaking with the deputy commissioner on 29.5.2001.

On behalf of the appellant, it was argued that the authorities committed an error in interpreting the scope of the notification. It was also contended that the assessee being a cooperative society a liberal interpretation was warranted and hence the mere fact that there was a delay in submitting the declaration would not take away the benefit of the notification to the appellant. But the High Court of Kerala held that the conditions prescribed in the notification had to be strictly construed. It was further observed that the notification was issued in exercise of the power conferred under sub-section (1) of section 5A of the Central Excise Act, in public interest exempting cooperative societies from payment of duty of excise leviable under section 3 of the Act, but it had to satisfy the conditions specified in column (3) of the table attachéd to the said notification. It was categorically stated that the benefit of exemption from duty would commence from the date of the undertaking with the assistant commissioner / deputy commissioner of central excise as specified in condition (b). Applying the rule of strict interpretation to the exemption notification, the High Court of Kerala dismissed the appeal and held that there was no ambiguity in the wordings of the notification. From the language of the notification it was very clear that exemption would be available only from the date of filing of the undertaking and in the event of failure to satisfy the undertaking the manufacturers shall be liable to pay duty of excise specified in the first schedule to the Central Excise Tariff Act. Thus, the appellant, was not allowed to avail of the benefit of the exemption under notification No. 41 / 99 CE dated 26.11.1999. The principles evolved by the court may be summarized as follows:

a) an assessee who claims an exemption by virtue of a notification issued under sub section (1) of section 5A of the CE Act, must establish his case;
b) to avail of the exemption benefits under a notification the assessee must strictly comply with the conditions of the notification;
c) benefit of exemption notification can be claimed only from the date of filing of undertaking before the concerned authority;
d) the provisions of the notification has to be interpreted strictly in terms of the wordings; and

e) where the language of the notification is very clear and unambiguous benefit cannot be granted merely on the ground of sympathy.

Penalty

Imposition of penalty is always founded on the factual matrix of the dispute. It is an ancillary event associated with the assessment. When the departmental authorities clamp penalty mechanically, the courts have to be alert, discreet, just and balanced. In *North West Switchgear* v. *Commissioner of Central Excise, New Delhi*[29] a penalty of Rs. 10000 was imposed under rule 173-Q of the Central Excise Rules. While the challenge to the classification was rejected, the court set aside the imposition of penalty.

In *Duncans Agro Industries, Calcutta* v. *The Commissioner of Central Excise, New Delhi*,[30] the question of imposing penalty under rule 9 (2) of Central Excise Rules, was in question. The rule provides for penalty to those who do clandestine acts vis-a-vis assessment. But clandestine or suppressive acts are a condition precedent for invocation of the provision and the authorities are burdened with the onus to prove the same. Setting aside the penalty imposed and allowing the appeal on the point of classification also, the court held that in the above case there was not even an allegation much less finding by the department that there has been any clandestine removal of goods without assessment. As such the penalty was held as one liable to be set aside. The matter had already been settled in the Kar Vivad Samadhan Scheme , 1998. So the question of determination of the duty payable or levy of penalty did not arise. It was held that, the tribunal clearly erred in upholding the levy of penalty. Accordingly, the appeal filed by the assessee was accepted and the penalty levied was ordered to be deleted.

Exigibility to excise duty

Exigibility to excise duty is considered in the context of the totality of the manufacturing process. In trade and business where money is generated the long arm of tax reaches. Even a bye-product which is a waste if it finds a market will be subjected to taxation. In *C.T. Cotton Yarn Limited* v. *Commissioner of Central Excise, Indore*,[31] cotton waste obtained as an intermediate product in the manufacture of cotton yarn was sold in domestic tariff area. It was held that to be exigible to duty its emergence should involve a process of manufacture. The product involved in this case is not a leftover after the end product is manufactured. Here the cotton waste is generated during the process of manufacture of yarn and is a marketable commodity which is regularly marketed. Therefore, one of the twin tests, namely, that the commodity which is produced is marketable and is regularly marketed as a product, is satisfied. It is established that merely because a commodity is

29 (2006) 3 SCC 86.
30 (2006) 7 SCC 642.
31 (2006) 7 SCC 794.

included in the schedule, it will not be exigible to duty unless a process of manufacture is involved when that product emerges. Here, heading 52.02 had been brought into the schedule by the Finance Act, 1995.

Extended period of limitation

Section 11-A of the Central Excise Act, clothes the authority with drastic powers to initiate action against the assessee. In *Commissioner of Central Excise, Chandigarh* v. *Jab Laminates (P) Ltd*.[32] the government considered the applicability of the extended period of limitation under the proviso to section 11 (i) of the Act. Dismissing the appeal filed by the Revenue, the court held as undisputable the question as regards classification of the decorative laminated sheets falling under chapter 39 of the Central Excise Tariff Act and not under chapter heading 48. This position had been holding the field. The court held it unbelievable that the respondent prior to 8.1.1993, had been paying duty at the rate of 35 per cent ad-valorem and that the benefit of notification no. 135 / 89 dated 12.5.1989 had been accorded to it without any verification and only on the basis of the statements made by the respondent.

At no point of time, the Revenue doubted the correctness or otherwise of the manufacturing process or the ingredients disclosed by the respondent . The stand of the respondent had been that the industry as such had adopted the same manufacturing process and had been extended the benefit of the exemption notification . This was not called in question also. Therefore, there was no reason as to why it should be singled out. The impugned notice was issued only on 9.12.1997 relying on or on the basis of the decision in *Bakelite Hylam Ltd.* case.[32a] The instant case was not one where the respondent had not disclosed the activities of manufacturing product carried out by it by declaration or otherwise. It responded to each and every query of the appellants, as and when called upon to do so. The authorities of the appellant must have verified the said disclosures. At least they were expected to do so. The disclosure made by the respondent was acceptable to them. Its *bona fides* were never questioned. The applicability of the extended period of limitations is, therefore, required to be considered in the aforementioned context. The proviso, it is trite, provides for an exception. It is not the rule. A case, therefore, has to be made out for attracting the proviso to section II – A (1).

III CUSTOMS LAWS

The earth is shrinking. The entire globe is, today, a single theatre of human action. Different parts of the world are connected to one another through human activity. Men and materials, more than at any time in human history, meet and mingle easily. Still, the nations keep intact their identities through effective operation of sovereign power. Screening of trade and

32 (2006) 7 SCC 431.
32a (1997) 10 SCC 350.

business activities through the microscope of customs laws is the most patent and powerful method of asserting the sovereign power of the state. Law of customs is one of the earliest branches of laws to emerge in the modern times. In India the Customs Act, 1962 is the principal law relating to customs. There are other legislations like Customs Tariff Act, rules, notifications and the like. The issues drawing judicial attention at the highest level are questions of law pertaining to classification, penalty, exemption, valuation, extended period of limitation etc. The general thinking is that very few litigating instances come before the high courts and the Supreme Court. The Supreme Court administers solutions to issues arising out of special leave petitions whereas high court's involvement is limited to substantial questions of law. The entire gamut of the operation of customs laws is held at the departmental level and at the statutory authorities level, including the tribunals set up for the purpose of adjudicating the issues.

The courts on occasions decide issues relating to exemption, valuation, abatement, maritime lien, period of limitation, classification and issues relating to anti-dumping, penalty etc. In spite of responses from some quarters that the "law is developing a strong tilt towards revenue and the safety of the citizen is no longer an important concern", the decisions of the courts during the period do not give any such impression to an impartial, impersonal and objective assessment of the judgments.

Exemption

In *Tata Tele Services Ltd*. v. *Commissioner of Customs*,[33] the Supreme Court considered the entitlement of the appellant to exemption under section 25 of the Customs Act. The appellant and certain others imported telephone LSP 340. The gadget admittedly utilized cellular technology and was mobile, though, within a limited range. The importers claimed exemption under notification no. 21 / 2002 Cus. dated 1.3.2002, which granted partial exemption to cellular telephones classified under tariff item 8525. 20 of the Customs Tariff Act. However, CBEC circular no. 57 / 2003 stated that the term "cellular phone" in the said notification covered only handheld mobile phones and not fixed phones working on cellular technology. On the basis of that circular, the Revenue rejected the importers' claim to exemption and classified telephone LSP 340 rather under tariff item 8525 20 19. The importers then approached different fora. The Delhi bench of CESTAT decided in favour of the Revenue but the Bombay bench held that CBEC could not provide conditions to the notification. Moreover, the Andhra Pradesh High Court quashed the CBEC circular itself. Cross appeals were, therefore, filed before the Supreme Court. CBEC had, in the impugned circular, predetermined the issue of common parlance that was a matter of evidence and should have been left to the department to establish before the adjudicating authorities. The circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide. It was not open to CBEC to whittle down

33 (2006) 1 SCC 746 .

the exemption notification in such a manner. Since the exemption notification merely reproduced the language of entry 8525 20 17, the limitation sought to be imposed by CBEC would tantamount also to reading the limitation into the classification itself. Since the issue would be ultimately a question of evidence, the onus was on the department to prove by appropriate evidence that the goods, were classifiable under entry 8525 20 19, the residuary entry. In the present case, the onus had not been discharged by the Revenue. Since the technology used in LSP 340 and the handheld mobile phone was admittedly the same, there was no warrant to limit either the tariff entry or the exemption notification to handheld cellular phones. Neither the range nor the size would make any difference, the court held.

In *Nanya Imports and Exports Enterprises* v. *Commissioner of Customs, Chennai*[34] while considering the claim for exemption the court interpreted the provisions regarding the classification to decide whether insoles, midsoles and sheets can be treated as rolled sheets .The appellant firm was engaged in the business of leather footwear materials and accessories. It used to import regularly "PU – coated leather fabrics" which were used in the leather footwear industry as "insoles and midsoles".

In this case the apex court considered the question whether the expression, "insoles, midsoles and sheets thereof" used in exemption notification No.20 of 1999 – Cus issued under the Customs Act, 1962 could be interpreted to mean that the sheets rolled up for the convenience of loading and transportation would disentitle the assessee from the benefit of the notification. The Revenue denied the benefit of exemption under the relevant notification, on the ground that the subject goods were not "sheets" but "films" or "running sheets" and therefore, not entitled to the exemption. But the contention of the assessee that the goods had been imported in the form of long sheets and rolled up as specified by the ISI standards for loading and safe transportation, has not been rebutted by the Revenue.

While allowing this appeal, the apex Court held that the burden was on the Revenue to prove that the subject goods were not "sheets". It was for the Revenue to prove whether the item in question is taxable in the manner.
claimed by it.[35] In this case the court took a decision in favour of the assessee with respect to the benefit under the exemption notification by interpreting the provisions thereof liberally in favour of the assessee.

The High Court of Kerala in *Maulana Hospital* v. *Union of India*,[36] had to consider the question of exemption from payment of customs duty under section 25 of the Act for high tech cost intensive equipments to hospitals rendering free health care to certain percentage of patients. Under section 25 of the Act, the government is empowered to issue notifications providing such exemption. As per notification no.64/88 – Cus dated 1.3.1988 all hospitals

34 (2006) 4 SCC 765.
35 Reliance for this view was placed on *Union of India* v. *Garware Nylons Ltd.*, (1996) 10 SCC 413 and *Hindustan Ferodo Ltd.* v. *CCE*, (1997) 2 SCC 677.
36 (2006) 1 KLT, 681.

certified by the Ministry of Health and Family Welfare subject to their satisfying certain conditions are eligible to get such exemption from payment of customs duty for the import of high tech cost intensive equipments to hospitals. These conditions are:

1. It should provide medical, surgical or diagnostic treatment to all patients without distinction of caste, creed, race, religion or language.
2. It should extent free treatment to 40 per cent of the outpatients.
3. It should render free treatment to all in-patients belonging to the families with an income of less than Rs.500/- per month and also keep at least 10 per cent of the beds reserved for such patients and
4. It should extend treatment at reasonable charges to the patients not covered by conditions 2 and 3 mentioned above.

The dispute in this case concerned only with respect to conditions 2 and 3. The petitioner, a multi specialty referral hospital imported a whole body CT scanner, availing duty exemption on the strength of a customs duty exemption certificate issued by the director general of health services by virtue of the above said notification. But on a finding that the documents produced by the hospital, to support its claim that it is providing free treatment to 40 per cent of the outpatients and 10 per cent of the in-patients were tampered with, he withdrew the earlier exemption certificate issued to the petitioner, after giving an opportunity to the petitioner to explain its case. The petitioner submitted that if the number of patients treated in medical camps was also reckoned, the stipulation that free medical treatment should be extended to 40 per cent of the out patients, would be satisfied.

Rejecting this contention of the petitioner, it was held by the high court that the treatment given to the persons attending the medical camps, could not be reckoned as treatment granted to the outpatients in terms of the above said notification. The court accepted the contention of the respondents that the medical camps are, by and large, held for screening general public to detect possibility of certain diseases among them. They comprise both healthy as well as unhealthy population. Large number of people who attend such camps cannot be even called out-patients and they cannot be said to be the persons who would otherwise have approached the hospital.

The court held that intention of allowing such duty free import of high tech cost-intensive equipments is for providing secondary and tertiary health care and making them accessible to patients who do not have access/ affordability to such treatment. The writ petition was, accordingly, dismissed with an observation that other statutory remedy could be invoked by the petitioner against the decision of the customs authorities.

Valuation

The question of valuation involved in *Tata Tele Services Ltd*. was regarding whether mobile telephones and software imported along with it were includible in the value of the phone and whether it would attract section 14 of the Act. The court , finding that the CESTAT had not considered the issue in the proper perspective remitted the matter to CESTAT for further consideration of the same.

In *Khadija* v. *District Collector*,[37] the question to be decided by the Kerala High Cout was whether the amount of penalty could be recovered under section 142 (1) (C) (i) of the Customs Act and rule 28 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules,1995 read with the Kerala Revenue Recovery Act after the demise of the offender / defaulter from his personal properties left behind by him to the legal heirs. The petitioner had inherited certain property of the deceased offender who was found guilty of offence under section 111 (d) of the Customs Act and was liable to pay penalty for the same. It was argued on behalf of the petitioner that (a) the liability being quasi-criminal it was the personal liability of the offender; and the legal heirs were not liable under their personal law; (b) the proceedings initiated by the state revenue recovery authorities under the Kerala Revenue Recovery Act were not in accordance with the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995; and (c) the properties of the deceased had already been vested in the legal heirs under Shariath law free from encumbrances and no action had been taken against the real offender / defaulter or against his property for the last so many years and therefore, there was no justification in initiating the proceedings against the properties inherited by him. The court, however, found that, the offence committed by the deceased was an economic offence, that is, smuggling, within the meaning of section 2(39) of the Customs Act. Sections 111 and 112 of the Act deals with confiscation of improperly imported goods and the imposition of penalty, respectively. Steps were also initiated, to recover the penalty amount invoking the provisions of section 142 (1)(c)(i) of the Act. The court , therefore, refused to interfere with the proceedings initiated by the respondents for recovery of the amount by attachment and sale of the properties left behind by the deceased/defaulter on the ground that:[38]

> [W]hen the sum is payable by any person and the same is sought to be recovered from his property as if it were land revenue, the mere fact that defaulter is no more, the proceedings will not abate and the properties, inherited by the legal heirs could be proceeded with since recovery proceedings are not directed against the legal heirs but against the properties left behind by the defaulter.

The court, thus, rejected all the contentions raised on behalf of the petitioner after distinguishing the penalty *in rem* from penalty *in personam*. The court elucidated that provision regarding confiscation of goods under the

37 (2006) 2 KLT 654.

Act is a penalty *in rem* enforceable against the goods, while the personal penalties under section112 and other provisions of the Act are penalties *in personam enforceable against the persons concerned*.

While dismissing the writ petition, the court also observed that penalty imposed in this case fell within the realm of civil obligation in the sense that even if the offender was no more it could be recovered from his properties since it is an economic offence, which is against national interest.

Abatement

Abatement in common legal parlance means extinction of the cause of action. Section 22 of the Customs Act provides for the claim of abatement available to the party who is subjected to the jurisdiction of the customs laws. The question of abatement was considered in the context of import of goods in *Udyani Ship Brakers Ltd.* v. *Commissioner of Customs and Central Excise, Rajkot*.[39] In this case, the apex court held that to claim the benefit of abatement the party claiming has to satisfy the assessing authority that a case had been made out under section 22 of the Customs Act for abatement of duty on damaged or deteriorated goods. It was also held that under section 22 of the Act the application can be made only by the importer and not by a person who purchased the imported goods in domestic trade from the importer.

The court considered the meaning of the term 'import', to avail the benefit of section 22 by the appellant. M/s. Priya Blue Industries Pvt. Ltd., had imported a vessel MV VLOO ARUN under open general licence for the purpose of breaking. Thereafter, the importer sold the ship to the appellant for various reasons. The appellant thereafter approached the customs authorities for getting benefit under section 22 for abatement of duty on damaged or deteriorated goods. The assessing authority did not accept the price of the ship declared by the appellant in the bill of entry and appraised the value of the vessel at the price at which it had been purchased by the importer in the course of international trade. To come to a right conclusion, the Supreme Court looked at the definition of the terms "import" and "India" under clauses (23) and (27) of section 2 of the Act which is as follows:

> "2. (23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India."
> The term "India" for the purpose of CA has been defined in clause (27) of S. 2 of the Act as under :
>
> "2 (27) "India" includes the territorial waters of India "

The court held that it was evident from the fact of the case that the act of "import" in this case was over as soon as the letter of credit was opened by the importer in favour of the foreign seller and remitted the sum of Rs.

38 *Id*. at 659.
39 (2006) 3 SCC 345.

24,78,27,175/- to him in terms of the letter of credit opened with the bank. Under sub-section (1) of section 14 of the Act, the imported goods are required to be assessed at the price ordinarily charged for them in the course of international trade. The sale price of the aforesaid vessel during the course of international trade which has actually been paid was Rs. 24,78,27,175/-.

Therefore, the reduced price as shown by the appellant could not be accepted for determining the value under sub-section (1) of section 14 of the Act. The reduced price charged to the appellant was not during the course of international trade but was during domestic trade. Hence the court rightly decided that the appellant i.e. the buyer who had purchased the vessel in the course of domestic trade was not entitled to seek any abatement of duty under section 22 of the Act

Maritime lien

In *O.Konnavalov* v *Commander Coast Guard Region and others,*[40] the court was called upon to decide the issue of maritime lien against the backdrop of the larger principle of fundamental rights under article 21 of the Constitution. The issues which fell for decision of the court involved the following :

- Whether maritime lien of wages will sustain over the confiscated vessel, for the violation of section.115 of the Customs Act. ?
- Is the confiscated property subject to claims and charges ?
- Does the power under section 115 not include power to destroy and deny such charges and claims, if they are otherwise legal, valid and legitimate, according to municipal law or foreign or international law?
- Is confiscation possible only against persons having a proprietary or ownership right in the ship or goods ?
- Should the benefit of exception under section115 (2) should be extended to the crew?

The creditworthy approach of the apex court in this case, once again highlighted the significance of article 21 of the Constitution, while dealing with the power of confiscation and forfeiture under section 115 of the Act. It was held that in the context of maritime law, the exercise of power under sections 115 and 126 of the Act, is subject to the satisfaction of claims and charges created and recognized by law in all civilized countries.

In this case the vessel named *Kobe Queen I* also known as *Gloria Kopp* registered in Panama, with its crew members belonging to Ukraine, was spotted by the officers of the customs department in the Indian territorial waters. The cargo(steel) which was being carried by the ship was treated as smuggled goods for reasons of non-compliance with section 30 of the Act and the ship and cargo were confiscated under sections 115 and 126.

40 (2006) 4 SCC 620.

The Supreme Court considered the scope of "maritime lien" in respect of sub-section (2) of section 115, which provides for relief against confiscation, if it is established by the owner or the person in charge of the conveyance that it has been used for the prohibited purpose without his knowledge or connivance. It was categorically stated by the court that seamen who have a right to wages, which right is enforceable against the ship can legitimately lay claim to the payment of such wages out of the proceeds of the ship obtained by its sale. The seamen can claim their wages only from and out of the sale proceeds of the vessel. While taking a pragmatic approach, the apex court not only referred to the judicial opinions but also the authoritative text books to observe that a maritime lien such as seamen's wages is a right to a part of property in the *res* and a privileged claim upon a ship, aircraft or other maritime property and remains attached to the property travelling with it through changes of ownership.

An important argument that was raised by the appellant was that the right to wages of seamen as wages of any employee is integral to article 21 of the Constitution, which talks about the right to life and liberty of every individual.

Accepting this argument of the appellant and relying on its earlier decisions in *Rustom Cavasjee Cooper* v. *Union of India*[40a] and *Maneka Gandhi* v. *Union of India*[41] the apex court took a dynamic and constructive approach and held that the crewmen of the ship, if their wages are not paid, have a right to wages out of the proceeds of the sale of the ship. It is settled law that the action of the state has to be based on reasonableness and it cannot deprive any person of the basic human rights afforded under the Constitution, more so under article 21. The principles enshrined in article 21 are equally applicable to a foreigner as they are to a citizen, as India has become a signatory to various international conventions honouring the social, political, civil and economic rights of human beings. This view mirrors the humanitarian approach of the apex court.

Limitation

In *Aban Lyod Chiles Offshore Ltd.* v. *Commissioner of Customs, Maharashtra*[42] the court considered section 28 of the Customs Act which is in *pari materia* with section 11-A of the Central Excise Act, 1944. Deciding in favour of the appellants the court negated the contention of the Revenue by holding that deficiency in notice amounts to denial of opportunity to meet the situation. The penalty proposed by the department was waived by the court. The appellant companies had entered into separate contracts with ONGC in the year 1987. They were engaged in exploration and exploitation of offshore oil, gas and other related services as contractor for ONGC. The appellants carried drilling operations with its oil rigs at a place outside the territorial waters of India, on the continental shelf. The extensive machinery in the rigs

40a (1978) 1 SCC 248.
41 (1970) 1 SCC 248.
42 (2006) 6 SCC 482 .

often required repair and replacement. It was the practice in the customs house to treat the replacement of parts or machinery on the rigs as shop stores and not to levy duty on them in terms of the provisions of the Customs Act.

In 1994, the department issued three show cause notices to the appellants stating that there were unauthorized loading, unloading, storage or removal of imported, indigenous items and scrap from the base concerned. The notices contained annexures stating the details of such goods and the proposal to recover the escaped customs duty and to levy penalty. By two further notices, the department sought to confiscate the ship stores of two of the appellants and to levy customs duty and penalty. The appellants filed their replies. Rejecting the contentions raised by the appellants in reply to the first three notices, the commissioner of customs confirmed the demands and imposed penalties on the three parties concerned. By another order, the commissioner ordered confiscation of the goods of two of the parties and also levied custom duty and penalty. The appellants then filed five appeals before CEGAT which in turn disposed of the said appeals by a common order. Two of the said appellants filed appeals before the Supreme Court against that part of the order which had gone against them. The Revenue did not file any appeal against the part of the order which had gone against it.

Before the Supreme Court, the appellants offered to pay the duty for the last six months immediately prior to the issuance of the show cause notice, and limited their challenge only to the invocation of the proviso to section 28 (1) of the Act to extend the period of limitation. The appellants contended that — the said provision was not applicable to the facts and circumstances of the case; the department was at all relevant times aware of the activities carried on by the appellants; there was no allegation in the show cause notice that the appellants had evaded the payment of duty either in collusion with the officers of customs department or were guilty of making wilful misstatement or for wilful suppression of facts; there was no conscious or deliberate attempt to withhold any information though there was inaction or failure on their part. The appellants also pleaded that section 11-A of the Central Excise Act was in *pari materia* with section 28 of the Customs Act. On the other hand, the department contended that although not expressly stated therein the show cause notice read as a whole clearly pointed out that the appellants were guilty of wilful suppression of facts.

The court held that although it was contended that section 28 of the Customs Act is in *pari materia* with section 11 A of the Central Excise Act there is material difference between the two provisions. The word 'fraud' and the words "with intent to evade payment of duty" occurring in the proviso to section 11A of the Central Excise Act are missing in section 28 (1) of the Customs Act and the proviso in particular. The proviso to section 28 (1) can be invoked where there is suppression of facts. So far as "misstatament or suppression of facts" are concerned, they are qualified by the word 'wilful' preceding the words "misstatement or suppression of facts" which clearly spells out that there has to be an intention on the part of the assessee to evade the duty. CEGAT has held that ONGC had intimated the department of its operations from the base concerned. That the department would in any case have been aware of the general nature of the activities at the base concerned from the fact that the goods which were imported as ship stores were escorted by the preventive officers of the customs. That commissioner himself in his order had recorded that the department was aware of that fact and that the fault lay with ONGC and the department. Therefore, the appellants who were working on behalf of the ONGC and as per directions could not be accused of wilful suppression of facts. As all those facts were already in the knowledge of the department, the department was not entitled to invoke the proviso to section 28 (1) of the Customs Act and avail of the extended limitation period.

Therefore, it was held that the appellants would be liable to pay the duty for a period of six months prior to the date of issuance of the show cause notice and not for the earlier period. The demand for the earlier period was held to be beyond the period of limitation. Accordingly, the demand of duty and levy of penalty stood quashed.

Classification

In *Commissioner of Customs, Mumbai* v. *Toyo Engineering India Ltd.*[43] the apex court considered the issue of classification under the Customs Tariff Act, 1975. The court interpreted the provisions vis-à-vis the factual matters and came to the conclusion that construction equipment imported and used in initial setting up of a fertilizer plant could not be denied the benefit of exemption and held that the words "industrial plant" in heading 98.01 includes fertilizer plant. Therefore, all the "auxiliary equipments" required for initial setting up of the unit could be imported under the project import scheme. It was not disputed that construction equipments imported by the respondent were used in the initial setting up of the plant. What is required under heading 98.01, Tariff Act is that the machinery imported should be required "for the initial setting up of a unit, or the substantial expansion of an existing unit". That heading specifically mentions and includes "auxiliary equipment". The "auxiliary equipment" has not been defined under the Tariff Act. As per dictionary meaning, it is an equipment which aids or helps. Any equipment which aids or helps in setting up of an industrial plant would fall and be covered under heading 98.01 of the Tariff Act. The mere possibility of its being used subsequently for other projects would not debar the respondent from availing the facility of project import scheme.

The respondent assessee is engaged in the setting up of industrial units such as fertilizer plant. M/s Indian Farmers Fertilizers Cooperative Ltd. entered into a contract with their parent company M/s Toyo Engineering Corporation, Japan for designing, engineering, fabricating and commissioning an ammonia storage package unit and a cogeneration plant. The parent company in turn entered into an agreement with the respondent to carry out all the works, services, erection and commissioning of the project on turnkey basis. The respondent filed an application on 17.3.1986 with the contract registration cell

43 (2006) 7 SCC 592.

for grant of the benefit under the project import scheme read with notification no. 72 / 85 - Cus. dated 17.3.1985 in respect of goods sought to be imported. The respondent imported various special construction equipments, available at their overseas project at Kuwait, and filed eleven bills of entry in March 1986 for the clearance of goods, which were cleared on payment of duty under protest. The assistant collector under adjudication order no. S / 5 – misc. 376 / 86 – CC dated 18.8.1987 rejected the request of the respondent for registration under the project import regulations on grounds that the imported goods were the property of the respondent and even after execution and completion of the work, these goods would remain the property of the respondent and the ownership of the imported goods could be used for other works elsewhere after the completion of the present project, and therefore the imported goods would not qualify for classification under heading 98.01 of the Tariff Act.

Aggrieved, the respondent filed an appeal before the appellate authority which was rejected. It was held that as per heading 98.01 of the Tariff Act, the items of machinery or component parts should go into the initial setting up of the unit and should not merely be used as an aid for the setting up of the unit or its substantial expansion. As the respondent could utilize the machinery elsewhere in the setting up of other plants, the impugned goods could not be classified under heading 98.01 of the Tariff Act. The respondent being aggrieved filed an appeal before the tribunal which was accepted by the impugned order. The tribunal held that the grounds on which both the lower authorities have denied the facility of project import to the respondent were not sustainable in law. After a detailed discussion the tribunal set aside each of the findings recorded by the appellate authority and held that the respondent would be eligible to the benefit asked for. The reasons stated by the tribunal were good enough for the Supreme Court to hold that there was no merit in the appeal.

Customs and anti-dumping

In the global scenario of big business and competition for global markets the issue of anti-dumping gained more than economic significance. Imposition of anti-dumping duty has come to occupy the agenda of administration of customs laws as is evidenced by the decision of the Supreme Court in *Sneh Enterprises* v. *Commissioner of Customs*.[44] The court allowed the appeal by holding that the assessee could not be mulcted with anti-dumping duty as the same is not leviable under the Customs Act, 1962. The absence of rules and regulations has left a chasm in the fabric of tax laws as is revealed through this decision.

Sealed maintenance free lead acid batteries manufactured in Taiwan for being used in uninterrupted power supply (UPS) were imported by the appellant at Mumbai on 16.04.2002. The goods were trans-shipped from Mumbai to Delhi. However, the appellant filed the bill of entry at Delhi on

44 (2006) 7 SCC 714.

22.5.2002. The goods were cleared by the customs authorities without imposing any anti-dumping duty. But subsequently, after issuing a show-cause notice and relying on notification no. 55 / 2002 – Cus. Dated 22.5.202, the department directed payment of anti-dumping duty. The appellant contended that the said notification was not retrospective in operation and therefore, not applicable in the present case. The department rejected that contention. Upholding that decision CESTAT held that anti-dumping duty was imposable on importation of goods. That import was completed only when the goods were to cross the customs barrier. Therefore, anti-dumping duty was payable by the appellant.

In appeal before Supreme Court, the appellant-assessee contended that section 9-A of the Custom Tariff Act, 1975 was an enabling provision and the notification thereunder having been issued on 22.5.2002, the provisions of section 15-A of the Customs Act could not have been invoked in the instant case, particularly because section 9-A (8) was introduced only in the year 2004. On the other hand, the respondent department contended that the taxable event must be held to be on the day when the goods crossed the customs barrier and not on the day when the goods landed in India or entered its territorial waters. Allowing the appeal the Supreme Court held:[44a]

> Section 2 of the Customs Tariff Act, 1975 provides the rates at which the customs duty should be levied under the Customs Act, 1962. Imposition of anti-dumping duty, however, is not a part of the duty which can be levied under the Customs Act. Section 9-A was inserted in the Customs Tariff Act, in the year 1985. It contains a provision enabling the imposition of anti-dumping duty. Section 9-A (8) was introduced by the Finance (No. 2) Act, 2004. Prior thereto, the statute did not contemplate application of the provisions of the Customs Act and the Rules and regulations made thereunder. If the provision of law contained in section 15 (1) Customs Act, 1962 was incorporated by reference it was obligatory on the part of the Parliament to say so. Such a provision was brought for the first time in the year 2004. The doctrine of incorporation by reference is, therefore, not attracted.

The court referred to and distinguished *Nagpur Improvement Trust* v. *Vasantrao*;[45] *Kanak* v. *UP Avas vam Vikas Parishad*;[46] *Surana Steels Pvt Ltd.* v. *CIT*;[47] and also referred to *Kiran Spg. Mills* v. *Collector of Customs*[48] as also G.P. Singh's *Principles of Statutory Interpretation*.[49] Anti dumping duty would be payable in respect of the goods which have already entered the

44a *Id.* at 715.
45 (2002) 7 SCC 657.
46 (2002) 7 SCC 693.
47 (1999) 4 SCC 306.
48 (2000) 10 SCC 228.
49 At 294-95, 10th edn., (2006).

Indian territory and are warehoused.

The question as to when import of goods is complete would depend upon contract between the parties and / or statute governing the field. It is not a part of common law that the import of goods would be deemed to have been completed only when it passed the customs barrier. In the absence of a statute, the contract between the parties would not be superseded. Section 9-A (8) of the Customs Tariff Act was enacted to achieve a specific purpose. Its operation is limited from the date it came into force. It cannot be applied with retrospective effect. Unless there exists a statutory interdict, common law principles would apply which would mean that import would be complete when the goods enter the territories of the country. Taxable event in terms of the notification issued under section 9A of the Act is on importation of the goods and not when the same passes barrier on the day on which the Bill of Entry was filed by the appellant for the purpose of Customs Act. But such importation of goods, in terms of the provisions of the Customs Act, was meant only for computation of duty thereunder and not for any other purpose. In other words, a situation contemplated under one statute cannot, in the absence of any express or clear intendment, be made to apply or be given to while applying the provisions of another statute.

It is a trite law that while interpreting the statute, the courts not only may take into consideration the purpose for which the same had been enacted, but also the mischief it seeks to suppress. Evidently, with a view to suppress the mischief, if any, section 76 of the Finance (No.2) Act, 2004 was brought into the statute book. It cannot, therefore, by any stretch of imagination be held that Parliament intended to apply the provisions of section 15 of the Customs Act in section 9-A of the Customs Tariff Act, prior to 2004. While dealing with a taxing provision, the principle of strict interpretation should be applied. The court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible , the court ordinarily would interpret the provisions in favour of a tax payer and against the Revenue.

IV CONCLUSION

The survey of law made above in the realm of indirect taxes in central excise and customs is only an annotation of the notations of juristic standards laid down by the Supreme Court of India during 2006. The court has shown great acumen in applying the interpretational skills while negotiating with situations for judicial response thrown up on each occasion. The notifications issued by the department, coming as they are through the hands of mandarins of tax regime, can be clothed with words overreaching the provisions of law; and the orders passed by the authorities relying on notifications and general orders can defeat and deflect the intentions of legislature expressed through the provisions of law in the relevant Acts and rules. At the same time, the assessees who are often the past masters in the art of business cannot be permitted to have unjust enrichment by hobnobbing with the officials, hoodwinking the tribunals and misleading the courts at the cost of the receipts accountable by the Revenue. The Supreme Court of India and high courts have been commendably successful in leading the judicial process out of the thicket of litigations in the province of indirect taxation as in the case of all other jurisdictions. In dealing with the disputes the courts have displayed a propensity for "free scientific research" in ascertaining the applicability of the principles of law to the fact situations involving scientific propositions, technical and technological details, social security issues, economic and commercial considerations, global ramifications, national and international market factors and so on. No less is the literature of law emanated in the process by enriching the jurisprudence through references to the precedents, treatises, lexicons, dictionaries and other authorities. Rationalization of the tax structure has been a perennial problem in maintaining fiscal discipline in Indian economy. But the same remains an unattained goal with the tax jurisdiction presenting a bewildering scenario with hierarchies of departmental and quasi-judicial authorities with their own rules of proceedings and a plethora of forms of procedure. In the process, rationalization comes only through the portals of the Supreme Court and high courts, if at all rationalization is found, through the process of judicial titration conducted by the judges and assisted by expert legal professionals. The balance sheet of the survey in this context in indirect tax laws is that the Supreme Court at the apex position discharges the constitutional obligations in dispensing justice and thereby effects a great value addition to the concept of rule of law.