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INDIRECT TAXES LAW—I
(CENTRAL EXCISE & CUSTOMS)

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I INTRODUCTION

DURING THE year 2007, there was hardly any decision bringing significant change in the settled position of law. There was no substantial contribution from the judiciary by way of establishing new principles or scrapping existing provisions of law that are found to be unviable. The general evaluation of the cases decided during the year under survey recaps the common tendency of courts in maintaining revenue neutrality with minimum harm to private entrepreneurs.

In the basic scheme of taxation in India, the Central Government collects tax from income, excise and customs while state governments from sales tax, excise on liquor and tax on agricultural income. Excise duty is the major chunk of indirect taxes, which is paid by the people to the manufacturer, who then pays it to the government. This survey analyses the decisions pertaining to the nature of excise and customs duty, when and how duty is paid and finally about the issues relating to classification and valuation of goods and the jurisdiction of appellate authorities.

II CENTRAL EXCISE LAWS

Dutiability

An excise duty is a duty on production and according to economists, it is an indirect tax capable of being passed on to the consumer as part of the price, yet the mere passing of the duty is not its essential characteristic. Even if borne by the producer or manufacturer it does not cease to be a duty of excise. Liability to pay excise duty on manufactured goods does not depend upon end use of the goods.

In *Commissioner of Income Tax and Anr.* v. *Distillers Co. Ltd,*[1] the Supreme Court held that the levy of excise duty on alcohol must have a source in a statute legislated in terms of Entry 51, List II of the Seventh Schedule of the Constitution of India. In the facts of the case, respondents were in the business of arrack bottling, manufacture of industrial alcohol and

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1 (2007) 5 SCC 353.

their marketing, licensed under the provisions of the Karnataka Excise Act, 1965. Meanwhile a circular was issued by the commissioner of excise specifying arrack to be matured in wooden vats for minimum period of 15 days prior to being bottled. It was further provided that prior permission should be obtained for bottling immature arrack due to reasons beyond control with penalty thereon. On obtaining permission, respondent claimed deduction on such amount in income tax return, which was disallowed on the ground that the amount payable was penalty. Appeal against this order was allowed on the ground that the amount in question was neither penalty nor excise duty and therefore section 43 B of Income Tax Act, 1961 was not attracted. This ruling was affirmed by the high court also. In appeal the Supreme Court held that in the absence of period being specified, authority cannot levy tax on manufacture in terms of the circular or otherwise and the question of imposing any penalty for non-compliance with the statutory provisions did not arise. Circular issued laid down only the process of bottling to regulate the trade and not imposing additional duty and, therefore, not a tax on manufacture. The court further added that excise duty must have a direct relationship with manufacture, which is in the nature of tax and could be imposed only by a statute that answers the description of Article 265 of the Constitution.

In *Commissioner of Customs* v. *ACER India Pvt. Ltd*,[2] the court examined the dutiability of additional duty of excise on notebook computers as against desktop computers. The issue was whether notebook computers (laptop computers) are "CPU with monitor, mouse and keyboard imported together as a set" classifiable under Sl. No. 2 of the Table in Rule 2 of the Computers (Additional Duty) Rules, 2004. It was held that a notebook computer comes in an integrated and inseparable form and it is not a combination of CPU, monitor, mouse and keyboard. In common parlance a desktop or a microcomputer is different from a laptop. Purpose of levying additional duty of seven per cent *ad volorem* is absolutely clear and unambiguous as it is provided having regard to the average quantum of duty excise leviable under the first schedule to the Central Excise Tariff Act, 1985 on monitor, motherboard, key board, mouse and other parts and components used in the manufacture of the computers. Hence the court concluded that a notebook computer is not a combination of CPU, monitor, mouse and keyboard and thus cannot be termed as a set. A set may mean a complete apparatus but it should consist of more than one item, each complementing the work of another and retaining their individual identity all the time.

Education cess

The Rajasthan High Court in *Banswara Syntex Ltd.* v. *Union Of India*,[3] held that education cess could be levied on excisable goods as a duty of

2 2007 (12) SCALE 581.
3 2007 (216) ELT 16 (Raj.)

excise in terms of the statutory provisions from the date of levy. Education cess collected as surcharge along with excise duty assumes the same character as excise duty. Manner of collection and exemption applicable to parent levy of excise duty is applicable to education cess also. Amendment by way of notification no. 19/2004 C.E. (NT) dated 9.07.04 to the basic notification no.40/2001 dated 26.06.01 by including education cess in the enumerative definition of levies to be considered as duty of excise, is clarificatory in nature. Basic notification providing exemption by way of rebate of excise duty is applicable to education cess from the date of effect of its levy i.e., from 9.07.2004 onwards.

Exemption

In *Vijay Raj Kheriwal* v. *Union of Indi*a,[4] exemption to physically handicapped person under notification no. 3/2001 C.E. was in dispute before the Rajasthan High Court. It was ruled that when a person produced the certificate from the Ministry of Industries to the effect that he was suffering from mal-functioning or non-functioning of limb and had purchased a vehicle suitable to him, he was entitled to get exemption regarding payment of excise duty. Fact that his right leg was non-functional and not the left leg could not be a ground for denial of exemption, as the notification did not stipulate the presence of physical deformity in any particular form.

The Supreme Court in *Commissioner of C.Ex.* v. *Damnet Chemicals Pvt. Ltd,*[5] extended the benefit of exemption under Notification no. 120/84 C.E. to Lubricating oil – CRC. 226 on the reasoning that it is a preparation containing 70% or more of mineral oil apart from 20% petroleum oil. Since the product is predominantly blended with lubricating oil, a negligible percentage of rust preventives does not make the product a rust preventive one.

Export oriented unit

In *Vanasthali Textiles Industries* v. *Commissioner*[6] exemption under notification no. 8/97 C.E. was claimed by 100% EOU in respect of goods sold in Domestic Tariff Area (DTA) and manufactured wholly from raw materials produced in India. They also contended that some raw materials imported as sizing material should be treated as consumables as they did not form part of the final product. Those raw materials were either washed away or became waste and scrap. The court after examining the issue in detail held that the word consumables refers only to material which is utilized as an input in the manufacturing process but is not identifiable in the final product by virtue of the fact that it has not been consumed therein. On the premise, the matter was ultimately remanded to the tribunal to decide the claim of the appellants over raw materials as consumables.

4 2007(217) ELT 8 (Raj).
5 2007 (216) ELT 3 (SC).
6 2007 (218) ELT3 (SC).

The supreme court in *Virlon Textile Mills* v. *Commissioner*,[7] held that texturised polyester yarn and dyed polyester yarn manufactured and sold by a 100% EOU against foreign exchange in DTA with the permission of competent authority under para 9.10(b) of Export and Import Policy-1997-2002 was covered by the expression " allowed to be sold in India" occurring in proviso (ii) to section.3 (1) (as it then stood) of the Central Excise Act, 1944. The court further held that the tribunal erred in inferring from para 9.9(b) of the exim policy that the benefit of exemption under the said notification would be admissible only in respect of 50% of such DTA sales against foreign exchange. Hence, the court extended the benefit of exemption under notification no. 2/95 C.E. to EOU.

In *J.S. Gupta & Sons* v. *Union of India*,[8] CT III facility of procurement of raw material without payment of duty was extended to 100% EOU by the tribunal by order that commissioner or board did not have the power to suspend the facility. However, the board took a decision that the facility in question could be permitted only subject to extension of bond and production of 100% bank guarantee. The high Court disagreed with the decision taken by the board on the ground that it went against the decision of the tribunal

SSI exemption

After considering the scope of SSI exemption under notification no. 175/86 C.E. the Supreme Court, in *Commissioner of central Excise* v. *Khanna Industries*[9] held that such notifications were goods specific giving emphasis on specified goods. Persons must be eligible in respect of specified goods and any other interpretation would render the purpose of notification redundant. In the present case, the respondents were found guilty of surreptitiously using the brand name of another trader for brass sanitary bathroom fittings manufactured by them. In the light of the fact that respondents were affixing specified goods with brand name of another person who was not the actual manufacturer of goods, it was ruled that respondent's case would not invite application of notification no. 175/86 C.E. granting duty exemption to small-scale industries.

In another case,[10] the apex court examined the nature of Foreign Trade Policy 2004-2009 and held that 100% EOU was not an integral part of EOU scheme whereas DTA sales was an integral part. DTA sales constituted an exception or an incidental facility under para 6.1 of unamended FTP-2004-2009. In the present case 100% EOU imported rough marble blocks for producing marbles tiles/ slabs. But it was found that the final product was made out of poor quality indigenous rough marble blocks. It was held by the

7 (2007) 4 SCC 440.
8 2007 (212) ELT 22 (All).
9 2007 (207) ELT 17 (SC).
10 *Hindustan Granites* v. *Union of India*, 2007 (211) ELT 3 (SC).

court that unamended policy had no co-relation between inputs imported and finished product exported. To stop procurement of domestic rough marble blocks for achieving net foreign exchange savings (NFE), DTA sales had to be prohibited by Foreign Trade Policy circular dated 30-08-2005.[11] Object behind EOU scheme is consumption of imported raw material for manufacture of finished products, which are to be exported. If that facility leads to substitution of imported inputs by domestically procured inputs then facility has to be discontinued. Impugned amendment *vide* notification dated 31.08.2005 fulfils test of public interest and also test of reasonableness *qua* restriction imposed on 100% EOUs by way of limiting the right to import only to special import licence units. Hence, its validity was upheld. It was also added that the foreign trade policy, and handbook of procedure merely implements the policy. It does not prevent the central government from changing the policy. Nothing prevents central government in public interest to plug loophole by tinkering with existing policy.

In *Mohan Steels*[12] exemption under notification no. 202/88 C.E. (as amended) to wire rods and bars of iron and steel manufactured from old and used railway materials which were nothing but old MS scrap containing broken pieces of bars, angles, old machinery parts, old automobile parts, and oil engines etc. purchased by the assessee from *kabadis* who in turn purchased the same in auction from government departments, was in dispute. Revenue failed to show any evidence that inputs used by the assessee were clearly recognisable as being non-duty paid. Under such circumstances it was stated that the presumption raised under explanation to notification no. 202/88 C.E. in favour of assessee as to duty paid nature of goods is legitimate.

The Supreme Court in *Meghraj Biscuits Industries Ltd* v. *Commissioner,*[13] having found that the assessee used the trade name of another person in contravention of the bar in the notification no. 1/93 C.E., held that it would not become entitled to the benefit of exemption merely upon obtaining a registration certificate with retrospective effect under the provisions of the Trade Marks Act, 1999.

Manufacture

In another case[14] the Supreme Court examined the qualifying aspects as to activities amounting to manufacture. In this case, the assessee undertook the activity of converting aluminium ingots into aluminium billets during the intermediate stage by remelting and adding other alloys. Assessee was not only consuming such aluminum billets captively to manufacture aluminium irrigation pipes but also selling the same in open market. In view of the emergence of aluminium billets as a commercial commodity having

11 Sections 91 and 93 of Finance Act, 1994.
12 *Mohan Steels Ltd*.v. *Commissioner of Central Excise*, 2007 (207) ELT 21 (SC).
13 (2007) 3 SCC 780.
14 *Commissioner* v. *Mahavir Aluminium Ltd*, (2007) 5 SCC 260.

independent marketability, it was held that the said process of conversion of aluminium ingots into aluminium billets amounted to manufacture. The product therefore, attracted excise duty.[15]

Refund

In *Commissioner* v. *Birla Corpn Ltd.*,[16] claim of refund of duty paid under protest for the assessment period from March 1987 to March 1990 was considered. Assessee contended that duty was paid under protest in terms of rule 9-B of erstwhile Central Excise Rules, 1944 and in terms of pre-amended section 11B (3) of the Central Excise Act, 1944. Hence, refund was to be granted without asking for the proof of unjust enrichment. The court refused the plea and held that for all matters relating to refund of excess duty paid, the assessee had to satisfy the test of unjust enrichment and that the duty had not been passed on to the customers. However, the matter was remitted to assistant collector to decide whether the duty element had in fact been passed on to customers or not.

Recovery of dues

In *UTI Bank Ltd.* v. *Deputy Commissioner of Central Excise,*[17] it was held that in matters of recovery of dues, revenue has no priority over secured creditors i.e. banks. In the instant case the petitioner bank claimed legal right to priority in its favour under section 13(2) of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFACI). Revenue also claimed statutory first charge over the property. It was held that the petitioner bank which took possession of property under section 13 of the abovementioned Act was the secured creditor. There were no specific provisions in the Customs Act, 1962 or the Central Excise Act, 1944 for claiming first charge.[18] Secured Creditor i.e., the bank was entitled to get preference over the claim of revenue. It was further clarified that revenue could not resort to auction of impugned property for recovery of dues payable by the assessee. Revenue would otherwise be free to proceed if property was available after clearance of debt of the petitioner bank.

Redemption fine

There was no significant ruling on the aspect of redemption fine during the year either by the apex court or by the high courts. In one case,[19] there was an issue on the imposition of redemption fine on third parties, when the goods allegedly belonged to a person other than the appellant. On refusal of the high court to refer to the questions framed by the appellant in this regard,

15 Central Excise Act, 1944, ss. 2(f) and 3.
16 (2007) 3 SCC 68.
17 2007) 208 ECT 3(Mad).
18 Ss. 11 and 12 of Central Excise Act, 1944 and S. 142 of Customs Act, 1962.
19 *H.B. Fibres Ltd.*v.*Commissioner*, 2007 (213) ELT 3 (SC).

the Supreme Court directed the former to reconsider the questions framed by the parties to the dispute.

Valuation

The court discussed about the relevant factors determining the quantification of excise duty on bought-out items in *MIL India Ltd* v. *Commissioner*.[20] Assessee was manufacturing plant and equipment falling under sub-heading 8479.90 of Central Excise Tariff Act, 1985 under a composite contract with certain other parties. In addition to the equipments manufactured by it, assessee supplied various duty-paid bought-out items to facilitate the setting up of the plants at their sites. Duty on such bought-out items was initially demanded for one-year period but through a corrigendum the period was reduced to six months. When the liability to pay duty was disputed, it was held that in such circumstances, even if the bought out goods were dutiable, the assessee was entitled to take the benefit of MODVAT credit. In the peculiar circumstances of the case since the duty for the reduced period of six months could not be the same as for the larger period of one year, instead of remanding the matter, the demand was reduced from Rs 94,03,500 to Rs. 23,56,000.[21]

Income tax

The scope of interpretation of section 80 HHC (1) of Income Tax Act, 1961, providing for deduction of profit to export house derived from export of goods or merchandise while computing the total income was examined by the court in Commissioner *of IT, TVM* v. *Baby Marine Exports*.[22] It was held that section 80 was incorporated with the object of granting incentive to foreign exchange owners. It was held by the apex court that the object of the Act must always be kept in view while interpreting the provisions of a statute. The intention of the legislature must be the foundation of judicial interpretation. Hence, the court held that supporting manufacturers were also entitled to deduction of profit derived from the sale of goods under section 80 HHC (IA) since the requirement of realization of sale proceeds in foreign exchange was not applicable to supporting manufacturers.

Classification

The court examined the principles of classification in *Trutuf Safety Glass Industries* v. *Commissioner,*[23] and it was ruled that c*asus omissus*[24] cannot be supplied by the court except in case of clear necessity and when

20 (2007) 3 SCC 533.
21 Central Excise Act, 1944, Ss. 3, 4, 35-L, 35-G.
22 2007(211) ELT 12 (SC).
23 2007 (215) ELT 14(SC).
24 Meaning 'an omitted case'. A legal issue or situation not governed by statutory or administrative law or by the terms of a contract. The resolution of any legal dispute arising from such an issue or situation is governed by the case law or, if it is a case of first impression, by whatever guidance the court finds in the common law.

reason for it can be found in four corners of the statute itself. But at the same time, a *casus omissus* should be not be readily inferred and for that purpose all parts of a statute or section must be construed together. Besides, every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. Toughened safety glass including windscreen, door screen, side screen and back screen is covered under the heading glass and glassware in all forms under clause (2) of notification no. ST-II-7551 | X-9 (1) –76 dated 31.12.76.

In *HMT LTD.* v. *Commissioner of Central Excise*[25] while deciding the appropriate classification of milk processing machines like pasteurizer, chilling plant, milk/cream chillers, milk cream, ghee pumps, butter packing machine and parts of such machineries, the Supreme Court stated that in classification matters views of tribunal should not be interfered with unless it was patently wrong. As per note 2 to chapter 84 and HSN explanatory note to heading 84.34 of the Central Excise Tariff, 1985, classification of machines for processing milk depend on principle of heat exchange and once they are held to be excluded from coverage under heading 84.34, it cannot be again claimed by the appellants.

The Supreme Court also considered the interpretation of 'animal feed and feed supplements' as given in entry 5 of first schedule of Karnataka Value Added Tax, 2003 in *Sree Durga Distributors* v. *State of Karnataka.*[26] The issue was whether both cat feed and dog feed would fall under entry 5. It was held that punctuation mark in the subject items was an indication of the fact that legislature intended to classify these two as one class or category and not as two different classes. Since cat feed and dog feed are two separate items, they cannot fall under the same head 'animal feed and feed supplements' as given in entry 5.

Departmental clarifications

In *Union of India* v. *Arviva Industries (l) Ltd.*,[27] it was held that circular issued by the Central Board of Excise and Customs is binding on revenue and the department, and it cannot be permitted to argue otherwise. In the facts of the case it was ordered that the circular extending brand rate of draw back to exporters of impugned goods i.e. rerolled steel products and processed fabrics was binding on the department.

It was held in *Jay Mahakali Rolling Mills.* v. *Union of India,*[28] that rerolling products made from ship breaking scrap are exempted under notification no. 208/83 C.E. as amended by notification no. 101/87 C.E. as its retrospective effect is not specifically stated. CB.E.C circular F. no. 37/ 4/71/86 – TRU, dated 31.03.1987 was relied on and held that retrospective

25 2007 (214) ELT 10 (SC).
26 2007 (212) ELT 12 (SC).
27 2007 (209) ELT 5 (SC).
28 2007 (215) ELT 11 (SC).

law means a law which looks backward or contemplates the past, i.e., one which is made to affect acts or facts occurring or rights occurring before the law came into force. Retroactive statute means one, which creates new obligation on transactions or considerations or destroys or impairs vested rights. When *now* is used its effect or operation is prospective.

In *B.J. Akkara Col. (Retd.)* v. *Govt. Of India*,[29] the court observed that when the language used is clear and unambiguous and the intention is also clear, it is not permissible to add words to the circulars to satisfy what the assessee considers being just and reasonable. Also, if pursuant to the decision of the high court, a circular was withdrawn with respect to petitioners in the particular writ, the fact that decision of the court was accepted and implemented in their case, would not come in the way of the Supreme Court to considering similar petitions filed by others in public interest in respect of other corresponding circulars.

Appeal

The courts in a number of cases have examined the finality of orders due to non-filing of appeal and its effect on other cases. Once a case has been decided by the high court and implemented by the revenue department, on similar issue cropping up subsequently, those judgments would not bar the department from challenging subsequent decisions or writ petitions in the Supreme Court in view of the magnitude of financial implications being realized. It might be that earlier judgments were challenged due to negligible financial repercussions, appeal being barred by limitation, negligence, oversight of dealing officers, wrong legal advice, or non-comprehension of seriousness or magnitude of the issue involved. The principle of estoppel by judgment, legitimate expectation and fairness in action are inapplicable in such cases. However, the position should be viewed differently if petitioners showed that department adopted in a pick and choose method only to exclude them on account of ulterior motives.

In *P.J. Steels (P) Ltd.* v. *Central Excise and Customs,*[30] an *ex parte* dismissal of appeal was upheld on the ground that intimation of change of address to tribunal via courier was not permitted under the rules. Change of address may be intimated by means of miscellaneous application filed in the tribunal.

The issue in *Mohteshan Mohd. Ismail* v. *Special Director, Enforcement Directorate*[31] was regarding the maintainability of an appeal filed by the special director appointed under FERA, 1973. It was ruled that he could not by himself file an appeal to the high court against the order of foreign exchange appellate board. Appeal was filed in official capacity as an adjudicating authority and not as a delegate of the central government. When

29 2007 (207) ELT 3 (SC).
30 2007 (217) ELT 17 (All).
31 2007 (220) ELT 3 (SC).

the appellate board set aside an order under the provisions of FERA, the adjudicating authority has no power to file an appeal against such an order without impleading the central Government as a necessary party to it.

Writ jurisdiction

In *Rammiklal Shankar Lal Shah* v. *Union of India,*[32] writ was pending for more than 17 years and it was reiterated that writ jurisdiction could be invoked only when alternate remedies were exhausted by the petitioner. In *MIL India Ltd* v. *Commissioner*[33] the Supreme Court discussed the maintainability of the order of commissioner (appeals). In this case assessee was the manufacturer of plant and equipment falling under sub-heading 8479.90 of Central Excise Tariff Act, 1985. Under a composite contract with certain other parties, they supplied various duty-paid bought-out items to facilitate the setting up of the plants at their sites in addition to the equipments manufactured by it. Department raised demand of duty for a reduced period in respect of such bought-out items through a corrigendum and rejected the assessee's contention that no duty was payable on those items. Commissioner (appeals) held that the value of the bought-out items should be included in the value of the equipments and remanded the matter for quantification of duty liability keeping in view the reduction in the period in dispute. Then the assessee pointed out to the adjudicating authority that in the alternative they were entitled to MODVAT credit. In appeal to commissioner (appeals) against this order, he did not consider assessee's claim as to MODVAT credit and held that it did not mean that the conclusion reached by the commissioner (appeals) in the first round of litigation as to excisability or dutiability of the items in question had become final and that the order was not binding upon appellate tribunal. After the 2001 amendment to section 35A of Central Excise Act, 1944, the commissioner (appeals) continues to exercise the powers of adjudicating authority in the matters of assessment. Hence, appeal to appellate tribunal against the order of commissioner (appeals) passed in the second round was also held to be maintainable.

Rectification of mistakes

The distinction between review power of civil courts and the power to rectify mistakes in its order by the tribunal was the issue in question in *Commissioner of Sales Tax, UP* v. *Bharat Bone Mills.*[34] From the facts of the case the assessing authority proceeded to determine taxability based on the decisions that were prevailing. The officer in view of a subsequent decision sought rectification of the order. It was ruled that provision for rectification of mistakes cannot be equated with the power of a civil court

32 2007 (218) ELT 23 (Bom.). See also, *Commissioner* v. *Official Liquidator,* 2007 (219) ELT 53 (Mad).
33 *Supra* note 20.
34 2007(210) ELT 6 (SC).

to review its own order as envisaged under order XLVII rule 1 of the CPC, 1908.

In another case,[35] the declaration filed by the appellant under section 89 of the Kar Vivadh Samadhan Scheme (KVSS), 1998 was rejected by the designated authority on the ground that the appeal was filed by the appellant before the commissioner after expiry of the limitation period and delay whereupon was not condoned. Before the tribunal, appeal filed to the commissioner was held to be within time and matter was remanded for its fresh disposal. Accordingly, the commissioner (appeals) upheld the order-in-original. Meanwhile, after the tribunal passed the order holding that the appeal preferred was within time, the appellant approached the designated authority for reconsideration of the earlier order and to grant the benefit of KVSS. As the order-in-original had attained finality on dismissal of the appellant's appeal by the commissioner (appeals), the order was enforced and appellant deposited the entire duty and penalty. The appellant moved writ petition seeking direction to be issued to the respondents to accept the appellants declaration and to restrain the recovery of interest on the amount as per the final demand. The high court held that since the appeal was filed after the limitation period and delay was not condoned, the appellant was not entitled to the benefit of KVSS. Allowing the appeal the Supreme Court ruled that from the mere fact that an appeal was held to be not maintainable on any ground whatsoever, it did not follow that there was no appeal pending before the court. Hence, the order of designated authority denying the benefit of KVSS was set aside.

Sales tax law

In *Master Cables Pvt. Ltd* v. *State of Kerala,*[36] it was ruled that section 90(3) of Kar Vivadh Samadhan Scheme, 1998 was limited only to enactments of Parliament in view of article 246 of the Constitution and could not be extended to assessment under state sales tax. The court rejected the plea that '*any other law for the time being in force'* in section 90(3) of KVSS should be given a wide meaning so as to cover not only direct or indirect taxes as envisaged under section 87(h) and 87(j) but also state sales tax laws in view of article 286(3), 366(29A) and 366(29A) (d) of the Constitution. It was also added that legislature is presumed to enact law only within its domain of field of legislation. Application of laws to areas beyond legislative competence would amount to colourable legislation.

Cenvat

In *GNFC Ltd.* v. *Union of India*,[37] rule 57S (2) (c) of erstwhile Central Excise Rules, 1944 was held applicable to sale of old and unusable *modvated* capital goods as waste and scrap since they are dutiable. It was further

35 *Swan Mills Ltd*. v. *Union of India and Ors.,* (2007) 7 SCC 29.
36 2007 (219) ELT 41 (SC).
37 2007 (214) ELT 18 (Guj.).

clarified that not only wastes and scrap, arising in the process of manufacture, but also used ones when sold are also bound to duty.

The court examined the admissibility of the claim as to cenvat credit on capital goods in *Commissioner of Central Excise, Bhavnagar* v. *Saurashtra Chemicals Ltd.*[38] Impugned goods were received on 24.10.1998, but were not installed prior to April 2000. Rule 57Q(3) of erstwhile Central Excise Rules, 1944 which was in operation in the relevant financial year, was subsequently replaced by rule 57AC *w.e.f.* 1. 4. 2000. The assistant commissioner held that the respondent was entitled to CENVAT credit only to the extent of 50 per cent. On appeal, the commissioner allowed the same. The tribunal as well as high court dismissed the appeal of the revenue. The Supreme Court held that rule 57AC(2)(c) postulated that if the credit had not already been availed, the same should have been merely obtained but limited only to the extent of 50 per cent thereof. A beneficent statute may have to be construed liberally but where a statute does not admit more than one interpretation, literal interpretation must be resorted to. Hence, the Court concluded that the capital goods received after 1.4.2000 are governed by rule 57AC(2)(a) and (b) whereas if received prior thereto, the same would be governed by clause (c).

Penalty

The scope of rule 173Q of erstwhile Central Excise Rules, 1944 was discussed in *Commissioner of Central Excise* v. *U T Ltd*.[39] It was held by the High Court of Punjab and Haryana that the mere rejection of stand of the assessee on the aspect of penalty during adjudication was not a ground for holding that stand of the assessee was false for imposition of penalty. Element of *mens rea* is not excluded while imposing penalty under rule 173Q.

In *Commissioner* v.*Padmashri V.V. Patil,*[40] the quantum of penalty under Section 11AC of Central Excise Act, 1944 was examined and it was held that the said provision is penal in nature and applicable when non-payment or short-payment of duty is due to fraud, collusion, will ful mis-statement or suppression of facts with intent to evade duty. Discretion to impose lower penalty than equal amount is not provided. It was held that the language of the statute is clear and interest should be charged as notified by the government under section 11AB since non-payment or short payment was a proved fact in this case.

III CUSTOMS

Introduction

It was an ancient 'custom' that whenever a merchant entered a kingdom with his merchandise, he had to make a suitable offering of gifts to the king.

38 2007 (212) ELT 7 (SC).
39 2007 (207) ELT 27 (P&H).
40 2007 (215) ELT 23 (Bom.).

In course of time, the modern state formalised this custom into customs duty which the state collects on goods imported into or occasionally, exported out of its frontiers. Customs duties now from a significant source of revenue for all countries, more so in the case of developing countries like India. In India customs duties are levied on the goods at the rates specified in the schedules to the Customs Tariff Act, 1975. The taxable event is import into or export from India.

Appellate jurisdiction of high courts

In *Vijay Dasharath Patel* ,[41] the Supreme Court examined the scope of jurisdiction of the high court under section 130 of Customs Act, 1962. It was held that though the appellate jurisdiction is limited, what would be a substantial question of law would vary from case to case. In the present case, respondents were detained for carrying gold biscuits without any documents for legal importation. In their statements under section 108, they admitted the lacking of such documents. About a week later, they retracted their statements and claimed that they did have the requisite documents. Taking note of the confessional statements of the respondents and the fact that a substantial number of foreign marked gold bars had been found concealed in their shoes and body parts, the commissioner of customs held that the respondents had not discharged the burden of proof in terms of section 123 of the Act and ordered confiscation under section 111(d) and also imposed penalty. The appellate tribunal reversed the order on the ground that transportation of gold in shoes was a normal practice among the carriers in the bullion market irrespective of whether they had bills or vouchers. Such a finding was recorded despite the absence of any evidence on record to support the existence of such practice for transporting gold bars. Moreover, the tribunal took into consideration only the last statements of the respondents and not their earlier statements. In such circumstances, in the appeal against the decision of the tribunal, it was held that there was a substantial question of law for the consideration of the high court.[42]

In another case[43] the appeal by the department was dismissed on the ground of limitation. Also it was filed without a certified copy of the impugned order passed by the tribunal. The appellant department stated that request for certified copy of order was made to the registrar, CEGAT. However, it was evident from the facts that there was total inaction on the part of appellant for almost one year and during that period the respondents had repeatedly been making representations to the appellant for implementing the impugned order. AS the court found no justifiable reasons to condone the delay, the appeal was dismissed.

41 *Commissioner of Customs (Preventive)* v. *Vijay Dasharath Patel*, (2007) 4 SCC 118.

42 Also see, *Commissioner of Customs* v. *Peerless Consultancy Services (P) Ltd.,* (2007) 5 SCC 735.

43 *Commissioner of Customs* v. *Aditya Trading Co.,* 2007 (207) ELT 372 (Del).

In *Commissioner* v. *S.C. Gupta*,[44] it was held that the Customs Act does not exclude the applicability of sections 4 to 24 of the Limitation Act, 1963 and as such delay, if any can be condoned in proceedings contemplated under section 130A of the former Act.

Valuation

Most of the customs duties are *ad valorem*. Goods have therefore to be valued for purposes of assessment. Packaged goods have to be assessed on the basis of their maximum retail price (MRP) declared on the package, with reference to excise notification no. 13/2002 C.E. (N.T) insofar as charge of CVD is concerned. For the rest, unless the board has notified a tariff value, goods have to be valued as per relevant statutory provisions, which are section 14 of the Customs Act, 1962 and Customs Valuation (Determination of Price of Imported Goods) Rules, 1944 framed under section 14(1A) of Customs Act, and brought into force w.e.f. 16.8.1988. Commonly referred to as valuation rules, these rules follow the GATT and WTO provisions. Here the norm is that the transaction value or invoice value of goods subjected to assessment, provided it is genuine, is internationally competitive and the buyer or seller has no interest in the business of other party to the sale. There is no concept of mutuality of *interest* as such.

In *Commissioner of Customs* v. *South India Television (P) Ltd.*[45] the court examined the assessable value of goods imported and allegedly under invoiced. In view of the deeming provision in section 14 of the Customs Act, it was held that the department has to see the value or cost of the goods at the time of importation, i.e. at the time when the goods reached the customs barrier. Hence, the invoice price though not sacrosanct, can be rejected only for cogent reasons. Unless the department gathers evidence to show that there were imports of identical goods or similar goods at a higher price at around the same time, section. 14 (1-A) cannot be invoked and the price has to be upheld. Once the department discharges such burden of proof, the burden shifts to the importer to establish the validity of the invoice.[46] On these facts, it was held that the department had wrongly rejected the invoice as incorrect on mere suspicion of facts.

Provisions under rules 3, 4(1), 4 (2), 7, 7A, 8(2)(i), 10A etc. of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1998 were discussed to analyse the issue of valuation of goods in *Rabindra Chandra Paul* v. *Commissioner of Customs (Preventive)*.[47] In the present case, assessee imported refined *soyabean oil* (final product) from a foreign exporter who had processed crude *soyabean* oil (raw material) imported from a third country. There was no evidence to show that the price declared

44 2007 (207) ELT 377 (Bom.).
45 (2007) 6 SCC 373.
46 Rule 4 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1998.
47 (2007) 3 SCC 93.

was pegged at a lower level on account of circumstances mentioned in rule 4 (2). There was no finding that the foreign exporter and the assessee were related persons or that the former had not followed the accounting system of its own country. In such circumstances, rule 7-A was held to be not applicable. The court added that in case of doubt that the cost of the raw material has exceeded the cost of the final product, rule 7-A could be invoked. But before applying rule 7-A, the department ought to have called upon the assessee to furnish the value or cost of raw material plus all costs and profit at an average rate and to produce a certificate from the chartered accountant of the foreign seller indicating the turnover, profit and other details for computing the deductive value under rule 7.[48] The court further added that for valuation under rule 7 A, cost of raw material should be accepted along with value of processing charges.

The issue as to valuation of capital goods involving technology transfer was considered in *Commissioner of Customs* v. *Toyota Kirloskar Motor (P) Ltd.*[49] It was held that royalty and know-how fee payable implied amounts payable as a condition of import as distinct from the amounts payable in respect of matters governing manufacturing activities carried on with the imported capital goods. In the present case the assessee imported certain goods and parts thereof to establish an automobile manufacturing plant. Under an agreement, the foreign exporter concerned granted manufacturing licence to the importer assessee for the foreign exporters licensed products. Moreover, the foreign exporter undertook to furnish to the importer, at the latter's request, with certain technical know-how of a particular type but required the importer to pay royalty on such manufactured products in consideration of the licence to use such technical know-how. Foreign exporter further offered to furnish at its own discretion, know-how of a different type for which fee would be payable to the foreign exporter by the importer. Such royalty and technical know-how fee was held to have nexus with post-import activities and not with the importation of the capital goods. Hence, such royalty value was held to be not includible in the transaction value as per Rule 4 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

Exemption

The central government has the power to exempt, in public interest, specified goods from levy of customs duty by issue of notifications of an exceptional nature by special orders. Power to exempt includes power to modify or withdraw the exemption. Government can at any time withdraw, even a time bound exemption if 'public interest' so demands. But a notification being a piece of subordinate legislation is open to challenge on the ground of being arbitrary or unreasonable and if the Government cannot

48 Customs Act, 1962, ss. 14 and 156.
49 (2007) 5 SCC 371.

show the public interest involved in any curtailment, withdrawal or grant of the exemption, the concerned notification can be declared invalid.[50]

The Supreme Court in one of the cases[51] discussed the issue relating to the import of customs duty exemption certificates (CDECs) obtained by the appellant under notification no. 64/88-Cus. by Directorate General of Health Services (DGHS) on hospital equipment. As per the certificate, the appellant was covered under para 2 of the table annexed to the notification to avail of the exemption. Later, CDECs were cancelled by the DGHS on the ground that the appellant had failed to comply with the relevant conditions of the notification. Three years after the cancellation the appellant made representation seeking categorization under para 1 instead of para 2 of the table annexed to the said notification and the same was rejected by the DGHS. Appellant filed a writ petition challenging the cancellation or withdrawal of CDECs and denial of re-categorization. The high court upheld the order passed by the DGHS and also held that the appellant could not claim change in the categorization after having enjoyed the benefit under para 2 for a considerable period. In the Supreme Court it was held that the appellant was not entitled to the relief sought as he had given up his right to challenge the cancellation or withdrawal of CDECs for having violated the conditions laid down for grant of exemption. It was also added that the representation made after a lapse of three years could not be entertained and the question of change in category did not arise as the appellant's categorization under para 2 was already withdrawn. Change could be possible if categorization had been applied prior to issuance of communication by the DGHS.

Penalty

The dispute as to penalty for the goods declared as not conforming to the standards of the U.S. Federal Government was discussed in *Relax Safety Industries, Mumbai and Anr*. v. *The Commissioner of Customs (Import)*.[52] Goods were described as "moulded plastic parts" and "plastic fabricated cups" in the bill of entry and were cleared on payment of duty after adjudication. Later on finding that goods were grossly undervalued they were seized and show cause notice was also issued. Basic issue raised before the CEGAT was that once goods were subjected to adjudication, confiscation of the same goods were not impermissible. It was held that the fact that the earplugs did not conform to a particular standard would not render them unusable as such goods, or unsuitable for such use elsewhere. Goods were in fact earplugs and deliberately declared to be plastic moulded cups, so as to mislead the authorities for not treating the goods as consumer goods. Contention that the goods were life saving equipments and were freely

50 *Dai- Iulic karkaria Ltd*. v. *Union of India,* 2000 (119) ELT 516 (SC).
51 *Jaslok Hospital and Research Centre* vs. *Union of India*, 2007(12) SCALE 714.
52 (2007) 5 SCC 759.

importable was not substantiated by evidence as per the provisions of the import policy and hence confiscation was upheld.

In *U.K. Enterprises and Anr.* v. *Commnr. of Customs and Central Excise,*[53] the issue as to imposition of penalty for undervaluation of goods under section 114 A of the Customs Act, came to be discussed. The appellant imported integrated circuits from Hong Kong and undervalued the impugned goods. Differential duty was demanded by the revenue department and accepted by the appellant. It was held that under section 114A of Customs Act, liability to pay penalty can be equal to the amount of duty and could not exceed the payable duty. Since penalty was imposed against the express provisions of law, it was reduced accordingly.

Seizure

The High Court of Punjab and Haryana in *M K International* V. *Union of India*[54] held that freezing of bank account is permissible when supported by some statutory provision and procedure for effecting such seizure has to be fair and reasonable. No adjudication by any administrative, quasi judicial, judicial or any authority determining liability of petitioners either provisionally or finally was done. Neither was there any finding that the amount in his bank account represented sale proceeds of any smuggled goods or that the goods were liable to confiscation or that seizure of amount would be useful for or relevant under the provisions of the Customs Act.[55] Since the bank account could not be seized for an indefinite period, respondents were directed to release the bank account unless any other appropriate order justifying its seizure of was passed.

Confiscation and redemption fine

In *Commissioner of Customs* v. *South India Television (P) Ltd,*[56] the respondent had imported six consignments of ceramic capacitors and one consignment of diodes from Hong Kong. Price of the goods were declared in the bill of entry and overseas investigation declared that declared price did not represent the transaction value under rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. In the present petition the issue was whether the importer had under-invoiced the value of the goods to evade duty and it was held that the charge of under-invoicing has to be supported by the evidence in the form of prices of contemporaneous imports of like goods by the department. In the absence of any indication shown on behalf of the department to substantiate contemporaneous imports at higher price, confiscation and penalty were it was held, not justified.

The issue in *Commissioner of Customs* v. *Brooks International and Ors,*[57] was if the market value of goods under export is much less than the

53 2007(3) SCALE 477.
54 2007(209) ELT 15(P&H).
55 S. 110 of the Customs Act, 1962.
56 (2007) 6 SCC 373.
57 2007(8) SCALE 373.

amount of draw back claimed whether such goods could be confiscated for violation of provisions of the Customs Act or not. It was held that where the export value was not correctly stated and there was intentional over-invoicing by not mentioning true sale consideration of the goods, it would amount to violation of conditions for import or export of goods. The purpose may be money laundering or some other purpose, but it would certainly amount to illegal or unauthorized money transaction. Over-invoicing of the export goods would result in illegal or irregular transactions in foreign currency.

The effect of an order on confiscation and penalty passed in a debarment order made under a repealed Act was in considered in *T R Mehra* v. *Union of India.*[58] The order passed under the Imports and Exports (Control) Act, 1947 whether saved and applicable to goods not requiring licence under similar provisions in Foreign Trade (Development & Regulation) Act, 1992 was considered in this case. It was held that even if impugned order was saved, there were no provisions in the Foreign Trade (Development & Regulation) Act, for considering the issue as to whether import was illegal or liable for confiscation/prosecution or not. Hence, the import of polyester staple fibers was upheld and the order of confiscation and penalty was set aside.

It was ruled in *U.K. Enterprises and Anr.* v. *Commissioner of Customs and Central Excise,*[59] that for deciding the redemption fine, market price of the goods as on the date of imposition of fine could not be less than the purchase price thereof. It cannot be said that the market price of the goods was not known or determinable. Even if it is assumed that the appellants sold the goods at a loss, it could not be less than half of the purchase price and redemption fine shall be determined accordingly.

The scope of the complaint filed by the chief enforcement officer about an offence under section 56 of FERA, 1973 read with section 49 of PEMA, 1999 was considered in *D. K. Rastogi* v. *Union of India*.[60] Findings of the special enforcement director discharging show cause notices issued to the petitioner were premised on merits and on full appreciation of all factors. Such decision amounted to a categorical and unambiguous finding that no contravention of provision of law, took place. It was stated that appeal to appellate forum against the order of the special enforcement director could only be availed by the person aggrieved and not by the enforcement department. In the light of section 482 of the Criminal Procedure Code, 1973 it was again held that exoneration in adjudication of assessment proceedings should not automatically result in conclusion that criminal complaints were not maintainable. Court examining the issue should consider facts of each case. If exoneration was based on technicalities or absence of

58 2007 (217) ELT 26.
59 2007 (3) SCALE 477.
60 2007 (217) ELT 26 (Del).

certain features, which were otherwise available in criminal proceedings, the latter should be allowed to proceed. Court also should consider other circumstances such as whether an appeal was maintainable before a superior or appellate body and if it was pending, the standard of proof in either proceedings, etc.

Settlement commission

The settlement commission has the power to grant immunity from prosecution and immunity, full or partial, from infliction of fine, penalty and interest, provided the assessee makes a true and full declaration of his duty liability.

In *Alpesh Navin Chandra Shah* v. *State of Maharashtra*[61], it was ruled that admittance of a case and imposition or condonation of fine or penalty was the prerogative of settlement commission. It was also held that though application praying for immunity from fine or penalty and prosecution were matters pertaining to jurisdiction of settlement commission, revocation of detention order issued in respect of a detenue under COFEPOSA, 1974 being a different issue was not governed by section 127 F (2) of the Customs Act, 1962.

The court also discussed the scope of preventive detention under COFEPOSA, and the powers of settlement commission. Matters of settlement commission and COFEPOSA are altogether different, and orders of respective authorities should not and cannot be influencing or binding on each other. Settlement commission's order only deals with true and full disclosure of disputed duty and acceptance of entire duty. Outcome of settlement commission's order should not have any bearing on detention order. Court also added that, purpose of passing detention order is to prevent detenue from continuing his prejudicial activity and not to punish him.[62]

The case of the petitioner in *Mahendra Petrochemicals* v.*Union of India,*[63] was settled before the settlement commission. Plea on credit of CVD was brought after passing of order by the settlement commission and hence it was rejected. It was not required to determine benefits or liability item wise under various heads strictly or on technical grounds. Once the duty liability was settled, writ petition could not have been entertained in the facts and circumstances of the case.[64]

Compounding of offences

In addition to the departmental adjudication, prosecution in a court of law, with the sanction of the commissioner is often resorted to in serious cases of customs contraventions including mis-declaration of value and fraudulent exports. Some cases are subsequently compounded also.

61 2007 (210) ELT 13 (SC).
62 *Ibid.*
63 2007 (218) ELT 29 (Guj).
64 S. 127C of Customs Act, 1962

The court examined the scope of Custom (Compounding of Offences) Rules, 2005 in *Rajesh Kumar Sharma* v. *Union of India*.[65] Compounding authority imposed a compounding amount of Rs. 10,00,000. In such circumstances the words '*whichever is higher'* in rule 5 becomes crucial and the interpretation sought by the petitioner that the words 'upto ' applies to both 20% of market value of goods, or Rs. 10 lakhs was not accepted by the court as it would render expression "*whichever is higher*" redundant. Corresponding amount as fixed was held to be within the permissible limit of section 135 (1) (a) of Customs Act, 1962.

Stay

The respondents in *Union of India (UOI) and Anr.* v. *Adani Exports Ltd. Anr,*[66] were held guilty of false description and narration of goods imported, over invoicing and misuse of foreign exchange. Penalty was imposed. In appeal to the tribunal along with an application for dispensation of deposit of penalty, it was held that neither any *prima facie* case was made out nor any financial stringency was established to warrant dispensation of pre deposit. Against this a writ petition was filed in the high court wherein it was held that the order directing deposit and also that of adjudication was unsustainable, overlooking the fact that the appeals were pending before the tribunal. Subsequently, a consequential order was passed on the basis of the high court's order. On appeal by the revenue before the Supreme Court, it was held that while dealing with the order relating to pre-deposit, the high court was not justified in going into the merits and expressing its views and thereafter, remitting the matter to the tribunal. Relevant aspects *viz*. *prima facie* case, balance of convenience and irreparable loss are to be necessarily proved for granting stay. Even when the tribunal decided to grant full or partial stay it has to impose such conditions as necessary to safeguard the interest of the revenue, an imperative under section 129E of the Customs Act. The impugned order passed by the high court and the consequential order by the tribunal were set aside.

In *Indu Nissan Oxo Chemicals Ind. Ltd* v. *Union of India,*[67] the appellant pleaded that as the company became a sick unit, the demand of pre-deposit would deprive them of the statutory right of appeal. Revenue contended that even if there was financial hardship that could not be a ground to dispense with the predeposit and, moreover, in appellants' case, balance of convenience was not in favour of them. It was upheld by the Court and ruled that there could be no rule of universal application and the order has to be passed keeping in view the factual scenario involved. Mere assertion about undue hardship would not be sufficient. Undue hardship is caused when the hardship is not warranted by the circumstances. It must be shown that the

65 2007 (209) ELT 3 (SC) .
66 2007 (13) SCALE 4.
67 2007 (14) SCALE 150.

particular burden is out of proportion to the nature of the requirement itself, and the benefit, which the applicant would derive from the compliance with it.

In another case,[68] the issue as to interpretation of section 129E of the Customs Act, was discussed by the apex court. The appeal by the appellant against the assessment of custom duty was dismissed for failure to pre-deposit the amount as directed by the tribunal. Writ application filed by the Appellants questioning the correctness of the order was dismissed by the high court. Appellant contended that the high court committed a manifest error by not taking into consideration ingredients of section 129E of the Customs Act. It was held that the matter required reconstruction at the hands of the Tribunal as it failed to take into consideration the limitation of its jurisdiction. The Supreme Court finally added that section 129E emanates from the custody of goods and the high court went wrong in deciding the case on merits instead of considering the question as to whether direction to deposit the amount would cause undue hardship or not.

Classification

India is an active member of the world customs organisation and has adopted various international customs conventions and procedures, including the harmonised classification system and the GATT based valuation system. Onus to establish tariff classification of goods is on the department. Classification is to be determined by reading together the wording of the relevant section notes, chapter notes and headings or sub-headings in the Customs Tariff Act, 1975. If doubt remains, resort should be made to the rules of interpretation in the import schedule, which should then be applied sequentially.

For determining classification, function and end use of the article is also relevant.[69]

In *Commissioner of Customs* v. *C-Net Communication (I) Pvt. Ltd*[70] , the issue was regarding classification of signal decoder normally used by cable operators for distributing satellite signals collected by dish antenna. After examining the relevant documents, it was held that decoder is neither a built in part, nor an essential component for the operation of television. It is also not treated as part of the television in the common usage and practice. Thus, it was held that a decoder cannot be held as part of the television, though it can be a "reception apparatus for television".

The issue before the court in *Commissioner of Customs, Chennai* v. *Hewlett Packard India Sales (P) Ltd*[71] , was *w*hether operating systems

68 *Bhavya Apparels Private Limited* v. *Union of India,* JT 2007 (11) SC 253.
69 *India Tool Manufacturers* v. *Assistant Collector,* 1994 (74) ELT 12 (SC).
70 JT 2007 (11) SC 329.
71 JT 2007 (10) SC 521.

(software) which controls the working of the computer and which is preloaded in the laptop (notebook) is classifiable as a separate entity under the customs tariff heading 85.24 at "nil" rate of duty or as an integral part of the laptop under customs tariff heading 84.71 at the appropriate rate of duty. Also, there was an issue as to whether value of hard discs should be included in the value of the "Notebooks" for the purpose of assessment under heading 84.71. It was held that when a laptop is imported with in-built preloaded operating system recorded on HDD the said item forms an integral part of the laptop (computer system). Classification of goods as an integrated single unit under Customs Tariff Heading 84.71 by the department was accordingly upheld. Further, it was held that value of the laptop should be taken into account considering it as a unit.

Demand

In *Commissioner of Customs* v. *Phoenix International Ltd*[72], M/s. PIL manufactured export quality synthetic shoes on their own account whereas those sold in the domestic market by M/s PIND was also 'manufactured by Ms. PIL for M/s PIND.' Therefore, subterfuge was created to show that two independent companies had imported separate parts of the footwear in order to bypass para 156(A) of the EXIM Policy 1992-97. The respondents were held likely to be assessed under customs tariff heading 64.04 and, accordingly, liable to pay customs duty at 50 per cent + CVD at 15 per cent *ad valorem*[73]. It was also held that the respondents were not entitled to the benefit of concessional rate of duty under notification no. 45/94-Cus dated 1.3.94. The court further clarified that when there is an allegation of subterfuge, the court has to examine the circumstances surrounding the import to ascertain whether the importer had entered into fictitious arrangement to evade customs duty or not.

Refund

The issue as to refund of duty paid in excess by the assessee was discussed in the case of *ONGC Ltd*.[74] In the facts of the case, despite the claim of exemption sought by the assessee, the department started assessment proceedings and duty was imposed. When the matter came up before the apex court, it upheld the appellant's contention and exemption was granted. However, during the pendency of proceedings, the authority collected the duty. Hence, the present application was filed for claiming refund of amount deposited along with interest thereon. Considering that that the appellant was a public sector undertaking and the respondent was the central government and applying the principle of equity as well as the principle of restitution, it was held that the appellant was entitled to interest

72 JT 2007 (7) SC 189.
73 Rule 8 of the Customs Valuation Rules, 2000.
74 *O.N.G.C. Ltd.* v. *Commissioner of Customsi,* 2007 (9) SCALE 529.

on the amount deposited. Having regard to the fact that amount paid by the appellant was already refunded, the respondent was directed to pay the interest to the appellant @ 6% P.A.

Remand

In *Vijay Dasharath Patel*[75] the tribunal reversed the finding of the commissioner of customs that the import of foreign marked gold biscuits was illegal. The high court also dismissed the appeal on the ground that no substantial question of law was involved. However, the Supreme Court after examining the issues in the light of the facts of the case held that the proper forum to decide the issue of illegal import afresh on merits was the tribunal and hence the matter was remanded to the tribunal.

IV CONCLUSION

The year under survey has not seen any major developments in the law of indirect tax by way of judicial pronouncements. But a cursory look at the various judgments cited here affirms the fact that the higher courts have always been vigilant in not disturbing the legislative fame work of the indirect tax regime constituting the major part of revenue of our country. Analysing separately, it gives an impression that the apex court has taken a more lenient view about the procedural non-compliances in the area of excise laws when compared to the customs law. In the light of the fact that economic laws should be applied more vigorously and strictly, the violation of the customs law and foreign exchange provisions has been decided on the basis of an exact application of the law regulating trans-boarder transactions. Though high court decisions were mostly based on the strict application of law and rules made thereof, the Supreme Court, as it ought to be, has intervened in the areas of non- exercise of appellate powers by high courts as is evident in a number of cases. In general it can be said that the judiciary has taken up the ardent task of strengthening the very objective of indirect tax legislation through the pronouncement of a catena of key judgments.

75 *Commissioner of Customs* v. *Vijay Dasharath Patel,* (2007) 4 SCC 118.