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CENTRAL EXCISE AND CUSTOMS

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I INTRODUCTION

THIS SURVEY comprises of leading cases decided by the Supreme Court relating to central excise and customs and reported in the year 2010. Unlike the decisions in the recent past, 2010 has witnessed a major shift in the judicial policy in dealing with issues of non-compliance in the procedural matters of both central excise and customs law. Regarding the cases relating to the substantive rights of the parties under the central excise law, the court has taken a firm stand against revenue loss and a few cases which are discussed below provide ample proof of the same. While coming to the cases under customs law, the trend has been to employ the technique of strict construction of the statutory provisions on issues of aberrations of law and procedure.

II CENTRAL EXCISE

Marketability

In *Nicholas Piramal India Ltd.* v. *Commnr. of Central Excise, Mumbai*,[1] the main dispute was whether intermediate products captively consumed and not actually sold shall be liable to excise duty if they satisfy the test of both manufacture and marketability. It was held that in order to attract the levy of excise duty, the goods should not only be manufactured, but should also be articles or products that are known to the market and must be capable of being brought and sold. Intermediate products, even if captively consumed and not actually sold, may be liable to levy of excise duty if they satisfy the test of both manufacture and marketability. Therefore, the question of marketability, being a question of fact, had to be determined in this case. The fact that the appellants had chosen not to sell the product in question did not mean that the same was not capable of being marketed. Further, shelf-life of a product would not be a relevant factor to test the marketability of a product unless it is shown that the product has absolutely no shelf-life or the shelf-life of the

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1 2010 (182) ECR 166 (SC).

product is such that it is not capable of being brought or sold during that shelf-life.

In *Bata India Ltd*. v. *Commissioner of Central Excise*,[2] the issue related to marketability of the intermediate product and the burden of proving the same on the assessee in terms of section 2(d) of the Central Excise Act, 1944. In this case, the assessee had manufactured double textured, rubberised fabric, which was used as upper material in the manufacture of foot wears. The contention of the revenue was that the said goods were marketable and attracted duty. The tribunal upheld the demand and penalty imposed by the lower adjudicating authority. The main issue was whether textured fabric assembly produced in the assessee's factory and captively consumed could be termed as 'goods'. It was held that the impugned product was used as an intermediate product used as a component for the final product and the burden to show that the impugned product was marketed or capable of being bought or sold in the market so as to attract duty was entirely on the revenue. The assessee had produced sufficient materials to establish that the material used by the assessee was not marketable and had no commercial identity. It was further held that *vide* notification no. 143/94-C.E. dated 7th December 1994, impugned goods stood exempted if captively used for the manufacture of exempted footwear. Hence it was held that marketability was an essential ingredient to hold that a product was dutiable or exigible, and the onus to prove the same lay on the revenue.

In *Commissioner of Central Excise, Ahmedabad* v. *Solid and Correct Engineering Works*,[3] assessee was engaged in the manufacturing of asphalt batch mix, drum mix/hot mix plant by assembling and installing the duty paid parts and components. The respondent contended that although setting up of the plant tantamount to manufacture of a plant, the same did not necessarily amount to manufacture of 'exigible goods'. Hence, the marketability and excisability under section 2(d) of the Central Excise Act, 1944 read with section 3(36) of the General Clauses Act, 1897 and section 3 of the Transfer of Property Act, 1882 was in issue. It was held that the attachment of the plant with the help of nuts and bolts to a foundation not more than one feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation did not qualify for being described as 'attached to the earth' as defined in section 3 of the Transfer of Property Act. The setting up of the plant itself was not intended to be permanent as the impugned plant could be moved after the road construction or repair project and, therefore, the plant in question could not be termed as immovable property as defined under section 3(26) of the General Clauses Act and exigible to excise duty.

2 (2010) 5 SCC 490.
3 (2010) 5 SCC 122.

SSI exemption

In *Commissioner Central Excise, Delhi* v. *Ace Auto Comp. Ltd.*,[4] the claim of benefit of notification nos. 1/93-CE and 16/97-CE was discussed. The issue was regarding the affixation of brand name of another person on goods with intent to show connection between the products. It was held that in order to avail of the benefit of the exemption notification, the assessee must establish that his product was not associated with some other person. If it was shown that the assessee had affixed the brand name of another person on his goods with the intention of indicating a connection between the asessee's goods and the goods of another person, using such name or mark, the assessee would not be entitled to the benefit of exemption notification. If the assessee was able to satisfy the adjudicating authority that there was no such intention, or that the user of the brand name was entirely fortuitous, it would be entitled to the benefit of the exemption. In the instant case, the brand name "TATA" did not belong to the assessee. It was also evident that by using the said brand name, the assessee had not only intended to indicate a connection between the goods manufactured by them and the Tata company, but also the quality of their product as that of a product of Tata company, as they were supplying their goods to the said company. Thus, the bar created in clause 4 read with explanation IX of the notifications clearly attracted the present case, disentitling the assessee from the benefit of the exemption notifications.

In *Parle Bisleri Pvt. Ltd.* v. *Commr. of Customs and Central Ex., Ahmedabad*,[5] the issue was concerning the question whether the 'code names' used to denote soft drink flavours manufactured by the appellant could in fact be termed as 'brand names' and if so, whether they belonged to another entity. The yardstick in this regard is explanation VIII, which is in *pari materia* in both notification nos. 175/86 and No. 1/93, reads:

> *Explanation VIII*- "Brand name" or "trade name" shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

The argument of the appellant was that this explanation referred only to 'brand names' and could not be used to determine whether code names, as used by the appellant in the present case, falls within the said category. The mere difference in nomenclature could not take away the import of the

4 2010 (13) SCALE 387.
5 JT 2010 (13) SC 518.

explanation from its applicability to the present case. The appellant in this case manufactured flavours which fell within the ambit of the 'code names' and it was on record that these codes were key to identifying the flavours which were commercially transferable. Furthermore, it was clear that the code names on the flavours indicated a connection in the course of trade between the specified goods and such person using such name or mark. The flavours in question, which were earlier manufactured by M/s PEL Ltd. and supplied to the franchise holders, were subsequently allowed to be made by the appellant. The franchise holders were in effect buying the very same flavours from the appellant and placing orders by referring to the same code name, as evident from the respective purchase orders. The users of the flavours, *i.e.* M/s PEL Ltd., M/s PIL Ltd. and specified bottlers were all interconnected since the latter group comprises of franchisees of PEL and thus there was more than an iota of evidence to prove the connection in the course of trade between the flavours and the entity using the flavours through code names. Furthermore, the ownership of the code names by M/s PEL Ltd. was clearly evidenced from the fact that these flavours were developed, researched and concocted by M/s. PEL Ltd in its research labs. That M/s. PEL Ltd. had given the brand names to the flavours and allowed them to be manufactured by the appellant, their holding company could not hide the fact that M/s PEL Ltd were, in fact, the owner of the code/brand names. This conclusion was fortified by the fact that it was M/s PEL Ltd who transferred the right of the codes when they were sold to M/s. Coca Cola Co. in November, 1993. Since the appellant was not the owner of the said brand names in question, the tribunal was justified in holding that the appellant was not entitled to the benefit of notification nos. 175/86 and 1/93 for the products with code names G-44T, L- 33A, T-IIPC, T-IIP, R-66M and K-55T which belonged to M/s PEL Ltd.

Valuation

In *Parle Bisleri Pvt. Ltd.* v. *Commr. of Customs and Central Ex., Ahmedabad*,[6] the issue was whether the value of production/clearances of the three companies, namely the appellant, M/s PEL Ltd. and M/s PIL Ltd., can be clubbed for the purposes of ascertaining the eligibility to exemption under notification no.1/93 C.E. dated 28.02.93. On the primary issue of whether the clearances of the said companies could be clubbed together, and the companies themselves could be treated as one manufacturer, the tribunal found that the effective financial control and management emanated from a common core and, therefore, the companies could well be said to be interdependent and even interrelated.

What the court was emphasising in the decision by the tribunal was not only the fact that the circular 6/92 had no effect upon commencement of notification no. 1/93, but also the fact that the distinct legal nature of

6 *Ibid.*

companies could not be used as eyewash to portray its independent nature. Where the companies were indeed interdependent and possibly even related through financial control and management, the value of clearances had to be clubbed together in the interests of justice. The operation of circular 6/92 admittedly protected entities like the appellant prior to the commencement of notification no. 1/93, but certainly not after the same. In this case, the court was presented with a preponderance of evidence to suggest that the companies were related not only in terms of financial control, but also through management personnel. The two basic features which *prima facie* showed interdependence were pervasive financial control and management control. The two tests were applied to the facts of this case. As a whole, it was decided that the value of production/clearances of the three companies, namely the appellant, M/s PEL Ltd. and M/s PIL Ltd., could be clubbed for the purposes of ascertaining the eligibility to exemption under notification no. 1/93 C.E.

In another case,[7] exception under section 4 of the Central Excise Act, 1944 was invoked. The commissioner held that the freight charges arising between factory of the respondent and depot of the related person were to be included in sale price as place of removal of goods was depot of the related person. However, tribunal held that the cost of transportation from the place of removal to the place of delivery should be excluded from the price to arrive at the assessable value in terms of section 4(2). Hence, in the appeal, it was held that the assessee sold its goods to a related person, it was prudent to understand that price in such a sale would be deliberately understated so as to evade taxation within the scheme of the Act. It was to dissuade such sales that the legislature had decided to redeem price of goods at the time of their sale by related persons to wholesale market. Therefore, the provision of section 4(1)(a)(iii) was applied as it stood at the relevant time and finding of the appellate tribunal was held not sustainable. On the issue as to whether imposition of penalty was justified, it was held that penalty under section 11AC of the Act was a punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of means mentioned therein. Hence, in order to attract penalty provision under section 11AC, criminal intent or *mens rea* was a necessary constituent. In reply to show cause notice, the stand taken by the respondent was that it had been paying duty and there was no *malafide* intention on its part to evade payment of duty. Since no punishment could be imposed unless *mens rea* was proved, the imposition of penalty of equal amount of duty under order-in-original could not be sustained.

In *Aurangabad Electricals (P) Ltd*. v. *The Commissioner of Central Excise and Customs,*[8] there was an allegation against the appellants as to

7 *Commnr. of Central Excise, Chandigarh* v. *Pepsi Foods Ltd*., 2010 (13) SCALE 274.
8 2010 (260) ELT 24 (SC).

undervaluation of their goods. The tribunal and adjudication commissioner had decided against the appellants as they did not produce any material/data as to the actual expenses incurred on account of freight, loading, unloading charges, profit margin, *etc*. The appellants contended that they were unable to produce a certificate of their chartered accountant in respect of valuation due to unavoidable and unforeseen circumstances and expressed their willingness to place it before the tribunal after the appeal was heard and the judgment was reserved. It was held by the Supreme Court that technicalities should not defeat rendering of complete justice to a litigant and the matter was remanded to the tribunal with the direction to verify and consider whether the certificate which was already placed on record by the appellant would assist them in support of their defence.

In *National Leather Cloth Manufacturing Co.* v. *Union of India*,[9] fabric manufactured by the assessee was sold by it to the wholesalers only in polythene bags. At the customers' request, the assessee did further packing by bundling three rolls in a hessian cloth. The issue was whether the cost of packing of fabric in hessian cloth was includible in the assessable value of the fabric manufactured by the assessee or not. It was held that additional packing in the nature of secondary packing was done for the purpose of convenience of the up-country customers in the transportation of the goods manufactured by the assessee. Therefore, the cost of secondary packing in hessian cloth could not be included in the value of the goods in terms of section 4(4)(d)(i) of the Central Excise Act, 1994 for the purpose of assessment of excise duty.

Manufacture: In another case,[10] the substantial question of law was whether conversion of 'straight grade bitumen' to 'blown grade bitumen' amounts to manufacture or not. It was held that the process of converting straight grade bitumen into blown grade bitumen through oxidation, known as blowing process, did not amount to manufacture.

Interest: In a case,[11] the excise difference arose between the price on the date of removal and the enhanced price at which the goods stood ultimately sold was discussed. The issue was whether interest was to be paid on the differential duty or not. It was held that when differential duty was payable under section 11A(2B) of the Central Excise Act, interest was levied for loss of revenue on any count and section 11AB of the Act makes clear that interest becomes leviable on enhanced duty on the corrected value of the goods on the date of removal.

CENVAT/MODVAT

In *Mewar Polytex Ltd*. v. *Union of India*,[12] section 57A of the then Central Excise Rules, 1944 was challenged. The assistant commissioner had disallowed

9 2010 (256) ELT 321 (SC).
10 *Commnr. of Central Excise, Mumbai* v. *Tikitar Industries*, 2010 (4) SCALE 487.
11 *Commissioner of Central Excise* v. *International Auto Limited* (2010) 2 SCC 672.
12 JT 2010 (13) SC 734.

MODVAT credit; confirmed recovery and imposed penalty under rule 173Q(1)(bb) of the said rules as confirmed by the tribunal. The High Court also held that the assessee had resorted to subterfuge and impermissible technicalities in attaining its desired end to claim MODVAT credit and dismissed the appeal filed by the appellant. Hence, the main issue involved in the appeal was whether assessee was entitled to claim MODVAT credit or not. It was noted that the assessee had used indigenous duty-paid inputs and finished products were exported without payment of excise duty and subsequently, MODVAT credit was claimed on such inputs. The provision of rule 57A made it clear that an entitlement to MODVAT credit would arise only if excise duty was the incident upon final product. The final product was referred to as the finished goods that were exported under the advance licensing scheme without any payment of duty. Therefore, any attempt of the assessee to justify its availing of MODVAT credit was seriously undermined by the provisions in rule 57A. Based on the fundamental rule that no claim can be made which is not given under law, the Supreme Court held that the assessee was not entitled to MODVAT credit on finished goods where duty was not incident upon final product.

In *Madras Cements Ltd*. v. *Commissioner of Central Excise*,[13] the issue was regarding the denial of modvat/cenvat credit on certain capital goods under rule 57Q of the erstwhile Central Excise Rules, 1944. The adjudicating authority disallowed the modvat/cenvat credit, which was upheld by the commissioner (appeals). The assessee neither specified at any stage of the proceeding before the lower courts that the tariff heading under which their machinery/equipment of which the impugned capital goods were claimed to be accessories were classifiable, nor could they even disclose the identity of such machinery and equipment to the authorities. Hence, the main issue was whether the assessee was eligible for modvat/cenvat credit on the impugned goods or not. It was held that in order to avail modvat/cenvat credit, an assessee had to satisfy the assessing authorities that the capital goods in the form of component, spares and accessories had been utilised during the process of manufacture of the finished product. In the instant case, however, the appellant was not able to identify the machinery for which the impugned goods had been used and in the absence of such identification, it was not possible for the assessing authorities to come to a decision as to whether modvat/cenvat credit would be given. Therefore, the appellant was held not eligible for modvat/cenvat.

In *Ramala Sahkari Chini Mills Ltd., U.P.* v. *Commissioner of Central Excise*,[14] the issue was regarding the interpretation of rule 2(g) of CENVAT Credit Rules, 2002. In the facts of the case, the appellant had availed CENVAT credit on welding electrodes used in maintenance of machines under the head

13 2010 (5) SCALE 387.
14 2010 (182) ECR 171 (SC).

input credit. The appellate tribunal held that the welding electrodes were not eligible for credit as 'inputs' under CENVAT Credit Rules. Hence, the dispute was whether welding electrodes would come within the ambit of 'inputs' as defined in rule 2(g) of the CENVAT Credit Rules, 2002 or not. It was held that welding electrodes were used for repair and maintenance of machinery for welding purposes and also upon analysing various decisions of the court, it appeared that by employing phrase *and includes*, the legislature did not intend to impart a restricted meaning to the definition of 'inputs'. Since the issue involved the interpretation of the term 'inputs', the matter was referred for reconsideration by a larger bench.

In *Commissioner of Central Excise, Chandigarh* v. *Kwality Ice Cream Co.*,[15] the computation of aassessable value on the basis of the principle of 'related person' was in dispute. M/s. Kwality Ice Cream Company on the one hand and Brooke Bond Lipton India Ltd. on the other hand which later merged with Hindustan Lever Ltd. (BBLIL/HLL) were to be treated as related persons in the matter of computing assessable value of ice cream manufactured by M/s. Kwality Ice Cream Ltd. and as to whether duty should be demanded from M/s. Kwality Ice Cream on the basis of the price at which Brooke Bond Lipton India Ltd. sold the said product from its depot. It was held by the Supreme Court that what was of importance was certain interdependence and reciprocity beyond the relationship of either a distributor or manufacturer so as to consider as to whether the parties were "related persons". In the instant case, essentially the relationship between M/s. Kwality Ice Cream and BBLIL/HLL was one sided and there was nothing to show that each one of them had interest, direct or indirect, in the business of each other. Accordingly, M/s. Kwality Ice Cream and BBLIL were not "related persons". The transaction between them was of the nature of principal to principal and the price was the sole consideration for the sale of goods. Therefore, it was held that the assessable value could not be computed on the basis of price at which BBLIL sold the product from its depot.

In *Commissioner of Central Excise, Jaipur* v. *Rajasthan Spinning and Weaving Mills Ltd.*,[16] the issue was regarding the admissibility of modvat/cenvat credit on capital goods under rule 57Q of the erstwhile Central Excise Rules, 1944. The question as to whether steel plates and M.S. Channels used in the fabrication of chimney for diesel generating set fell within the ambit of 'capital goods' as contemplated in rule 57Q so as to avail modvat/cenvat credit was discussed in detail. It was observed by the court that the pollution control laws have made it mandatory that all plants which emitted effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases. Therefore, any equipment used for that purpose had to be treated as an accessory in terms of serial no. 5 of the goods described in column (2) of the

15 2010 (182) ECR 157 (SC).
16 JT 2010 (7) SC 64.

table below rule 57. Hence, it was held that the steel plates and M.S. Channels used in the fabrication of chimney for diesel generating set would fall within the ambit of 'capital goods' as contemplated in rule 57Q so as to avail modvat/ cenvat credit.

Duty exemption

In *Commissioner of Central Excise* v. *Hari Chand Shri Gopal*,[17] the issue was regarding the benefit of exemption from remission of excise duty on specified intermediate goods, though there was non-compliance of procedural conditions of chapter X of the erstwhile Central Excise Rules, 1944. The tribunal held that the benefit of exemption notification could not be denied if intended use of goods was established, though there was non-compliance of procedural conditions of Chapter X. It was noticed that assessee could not be absolved from legal obligation to comply with statutory requirements for manufacture of excisable goods at the supplier end. However, the assessee laid great emphasis on maintenance of some statutory registers and filing of periodical returns at recipient unit to take shelter under the doctrine of substantial compliance for remission of duty. Thus, similarity of columns and details furnished could not be considered as a substitute for not maintaining RG-16 register or other registers for remission of duty under chapter X. Moreover, at supplier end, no registration under rule 174 of erstwhile Central Excise Rules was obtained and no records were kept. Therefore, non-compliance of conditions enumerated under various rules in chapter X and non-furnishing of various statutory forms prescribed under that chapter were fatal to the plea of substantial compliance and intended use. No person shall be exempted from payment of duties on vague grounds unless such benefit was expressly conferred upon him under the relevant statutory provisions.

In *Indian Oil Corporation Ltd*. v *Commissioner of Central Excise, Vadodara*,[18] the issue was whether the benefit of concessional rate of duty under notification nos. 5/98-CE and 5/99-CE given to kerosene, which was ordinarily used as illuminant in oil burning lamps, could be extended to "superior kerosene" sold and used for industrial purposes. It was held that the benefit of concessional rate of duty was available only on that category of kerosene, cleared by the assessee to the PDS, which was ordinarily used as an illuminant in oil burning lamps. It was further held that an assessee could not claim the benefit of concessional rate of excise duty when it was specifically provided for one particular purpose other than that of assessee. Hence, the benefit of concessional rate of duty under notification nos. 5/98-CE and 5/99-CE could not be extended to "superior kerosene" classified under chapter sub-heading 2710.90 of the Central Excise Tariff Act, 1985.

17 2010 (260) ELT 3 (SC).
18 2010 (181) ECR 101 (SC).

In another case,[19] the rate of duty of CD-ROM containing images of drawings and designs of engineering goods classifiable under tariff heading 49.06 of Customs Tariff Act, 1985 was in dispute. The appellant claimed benefit of nil rate of duty under the category of the term 'software' falling under the heading of 85.24 of Customs Tariff Act, 1985. It was held that there could be no doubt that such engineering drawings and designs did not provide instructions for computer hardware to perform. However, the said drawings and designs could be said to be by-products and outputs of computer software, which generate designs and drawings. Therefore, such engineering drawings or designs data in a CD could not be placed in the category of the term software. Hence, the appellant was not entitled to the benefit of nil rate of duty under heading 85.24 of Customs Tariff Act, 1985.

In *Commissioner of Central Excise, Ahmedabad* v. *Solid and Correct Engineering Works*,[20] it was further held by the tribunal that the manufacturing units were entitled to the benefit of exemption as the size of the stickers giving the brand name of the manufacturing units was bigger than that of the marketing company. Hence, with regard to the issue as to whether the assessee was entitled to the benefit of notification no. 1/93-Central Excise, dated 28th February 1993, it was held that the reasoning given by the tribunal based on the size of the sticker was not legally sustainable. Hence, the assessee was held entitled to the benefit of the notification.

Demand/limitation

In *Commissioner of Central Excise, Aurangabad* v. *Bajaj Auto Ltd., Waluj, Aurangabad,*[21] the tribunal, while considering whether extended period of limitation could be invoked, only observed that since both the assessees were situated under the jurisdiction of the same division, the revenue was expected to be aware of the transactions, hence extended period of limitation was not invocable. The court held that section 11A(1) of the Act can be invoked only when there was a conscious act of either fraud, collusion, wilful misstatement, suppression of fact, or contravention of the provisions of the Act. The tribunal did not state whether there existed any such circumstances, which would not allow the revenue to invoke extended period of limitation. Hence, the matter was remanded for reconsideration by the tribunal.

Contempt of court

In *Indirect Tax Practitioners Association* v. *R.K. Jain*,[22] the main issue was whether contents of the editorial would constitute criminal contempt within the meaning of section 2(c) of the Contempt of Courts Act, 1971 read with articles 129 and 142 of the Constitution of India. During the pendency of

19 *L.M.L. Ltd.* v. *Commissioner of Customs,* JT 2010 (10) SC 286.
20 (2010) 5 SCC 122.
21 2010 (182) ECR 7 (SC).
22 (2010) 8 SCC 281.

the said contempt case, the respondent had written detailed letters to the finance minister, Government of India highlighting specific cases of irregularities, malfunctioning and corruption in the central excise, customs and service tax appellate tribunal (CESTAT). When no action was taken in this regard, the respondent wrote an editorial in which he condemned the administrative and judicial reforms initiated by the new president of CESTAT and, at the same time, highlighted the irregularities in the appointment. Hence, the issue was whether the respondent had violated the undertaking filed in the Supreme Court in the contempt petition. It was observed by the court that the sole purpose of writing said letters was to enable the concerned authorities to take corrective measures but nothing appears to have been done by them to stem the rot. No material had been placed before the court to show that the finance minister or the revenue secretary, Government of India had taken any remedial action in the context of the issues raised by the respondent. Therefore, it was held not possible to hold the respondent guilty of violating the undertaking given to the court.

As to the issue whether the editorial was intended to scandalise the functioning of CESTAT or the same amounted to interference in the administration of justice, it was held that such criticism could not be castigated as an attempt to scandalise or lower the authority of the court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism was ill-motivated or construed as a deliberate attempt to run down the institution or an individual judge was targeted for extraneous reasons. It was noted that what the respondent projected was nothing but the true state of the functioning of the CESTAT on administrative side and, to some extent, on the judicial side. By doing so, he had merely discharged the constitutional duty of a citizen enshrined in article 51A(h) of the Constitution.

It was categorically stated by the court that substituted section 13 of the Contempt of Courts Act, 1971 represents an important legislative recognition of one of the fundamentals of our value system, *i.e.* truth. The amended section enables the court to permit justification by truth as a valid defence in any contempt proceeding if it is satisfied that such defence is in public interest and the request for invoking the defence is *bona fide*. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements.

Classification

In *Commissioner of Trade Tax, U.P.* v. *S/S. Parikh Gramodyog Sansthan*,[23] the issue was the classification of voltage stabilizer for the

23 2010 (7) UJ 3719 (SC).

assessment years 1994-95 and 1995-96. The dispute was whether the same fell under electrical goods under entry no. 16 of the schedule to the U.P. Trade Tax Act, 1948 or electronic goods under entry no. 74(f) of the notification no. 1223. It was found that an automatic voltage stabilizer involves the operation of a number of electronic components. Moreover, it was categorically stated that an electrical device could be an electronic device, but an electronic device could not be an electrical device. Hence, it was held that voltage stabilizer was an electronic goods for the purpose of taxation under the U.P. Trade Tax Act. In another case,[24] classification of *Bitumenised Hessian based roof felt* was in question. Applying the *ratio* in *C.C.E., Navi Mumbai* v. *Amar Bitumen & Allied Products Pvt. Ltd.,* it was held that the said roof felt is classifiable under chapter heading 59.09 of the Central Excise Tariff Act, 1975. Hence, the assessee was entitled to exemption from payment of excise duty under notification nos. 53/65 and 92/ 94 C.E.

In *Commissioner of Central Excise, Goa* v. *Funskool (India) Ltd.*,[25] the issue was regarding the classification of snake and ladder and monopoly scrabble/upwords and other 34 items. Following the *ratio* of the *Pleasantime Products* v. *Commissioner of Central Excise*,[26] it was held that the said three items, *viz*. snake and ladder, monopoly and scrabble/upwords stand were classifiable under chapter heading 95.04 of Central Excise Tariff Act, 1985, which refers to "articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment." Hence, the matter was remitted back to the tribunal with the request to examine as to whether each of the remaining 31 items would stand covered by CSH 9504.90 or by CSH 9503.00 of the Central Excise Tariff Act, 1985.

Appeal

In *Commissioner of C. Ex.* v. *Oswal Petrochemicals Ltd.*,[27] an application was filed for rectification of mistake under section 35C(2) of Central Excise Act, 1944. However, customs, excise and gold (control) appellate tribunal held that the contents of file no. 6 were not brought to the notice of the respondent by way of show cause; hence the main issue was whether the issue regarding non-compliance of the provisions of rule 194 of the erstwhile Central Excise Rules, 1944 read with statutory form could be raised at the said stage by the appellant. It was held that the plea for rectification of mistake could be considered only if there was mistake apparent on face of record. However, the issue of non-compliance of provisions of rule 194 read with statutory form was not raised in the application for rectification of mistake and was never considered.

24 *Commnr. of Central Excise, Mumbai* v. *Tikitar Industries*, 2010 (4) SCALE 487.
25 (2010) 1 SCC 275.
26 2009 (244) ELT 0003 (SC).
27 2010 (180) ECR 1 (SC).

In another case,[28] the issue was regarding application of the doctrine of merger when two appeals are filed against the same order. In the facts of the case, the adjudicating authority disallowed two deductions claimed by the assessee while allowing the remaining six. Both assessee and revenue filed appeals against the order of adjudication. The dispute was whether the doctrine of merger had no application to a case like the present one where the content and the subject matter of challenge in the two proceedings, namely the appeal filed by the assessee and that filed by the revenue, were totally different. The original order of the adjudicating authority was limited to disallowance of two out of eight deductions claimed by the assessee. The tribunal in that appeal was concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. The admissibility of the said deductions could have been raised only by the revenue who had lost its case *qua* those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads, which were not the subject matter of scrutiny before the tribunal. That being so, the proceedings instituted by the commissioner of the central excise pursuant to the order passed by the central board of excise and customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal.

It was, therefore, held that the tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may partly be in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate court or the authority. The dismissal on merits or otherwise of any such appeal against only a part of the order will not foreclose the right of the party who is aggrieved of the other part of this order. Hence, it was categorically stated that if the doctrine of merger were to be applied in a pedantic or wooden manner, it would lead to anomalous results in as much as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness irrespective of the fact that the appeal was earlier disposed off by the court or authority had not examined the correctness of that

28 *Commissioner of Central Excise, Delhi* v. *Pearl Drinks Ltd*., JT 2010 (6) SC 531.

part of the order. Doctrine of merger is not a doctrine of universal or unlimited application and it depends on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. Accordingly, the order passed by the tribunal dismissing the appeal by the revenue on the doctrine of merger was held erroneous and unsustainable. Hence, the matter was remanded back to the tribunal for a fresh disposal in accordance with law.

III CUSTOMS

Classification

In *C.C.E.C and St, Vishakhapatnam* v. *Jocil Ltd*.,[29] the primary issue for consideration was one of classification under tariff items of the Customs Tariff Act, 1975. The specific issue was to whether cargo imported was classifiable as *non-edible industrial grade crude palm stearin* falling under chapter 15 11 90 90 or as '*RBD palm stearin'* falling under tariff item no. 38 23 11 12 of the Customs Tariff Act, 1975.

The six-digit first schedule to the Customs Tariff Act, 1975 was substituted by the eight-digit first schedule *vide* the Customs Tariff (Amendment) Ordinance, 2003. Therefore, the new schedule would operate over and above the CBEC circular dated 03.12.2002 and the latter would not be applicable since the new schedule was not operational at the time of issuance of the circular. The goods, which were imported between August, 2003 and November, 2004, should, therefore, be classified under the eight digit tariff schedule.

As noted earlier, CBEC circular dated 03.12.2002 had been issued prior to the coming into force of the amended tariff schedule and consequently, did not have the latter as its reference point. The goods, which were imported between August, 2003 and November, 2004, would undoubtedly be classified under the eight-digit tariff schedule and on account of the aforementioned reasons, the subject matter in question would be classifiable under chapter 38 of the same. The said circular needs to be thus harmonised with the eight-digit first schedule introduced *vide* the Customs Tariff (Amendment) Ordinance, 2003. The subject matter in question was specifically identified in chapter sub-heading no. 38 23 11 as "Palm Stearin", and further differentiated as "Crude" and "RBD" in sub-heading nos. 38 23 11 11 and 38 23 11 12, respectively. The explanatory notes were categorical in affirming the accepted practice that rule 3(b) of the general rules of interpretation shall be used only if classification under rule 3(a) fails. In this instance, it was stated by the court that the issue of essential character of the subject matter in question might be resorted to only if identification under rule 3(a) is impossible. Further, the court observed:[30]

29 (2011) 1 SCC 681.
30 *Id.*, para 15-17.

> Referring to the essential characteristics of the subject matter would not only be applying contorted logic in arriving at the correct classification but would also amount to ignoring the express identification offered in Chapter 38 of the First Schedule of the Customs Tariff Act, 1975. It is also important to note that the interpretive powers of this Court are significantly curtailed by the presence of a specific enumeration in Chapter 38 of the Tariff Schedule. This Court, while deciding an issue of classification, can only adjudicate along the lines of settled norms and precedents drawn from statutory interpretation and judicial precedents.

Hence, it was held that the goods, which were imported between August, 2003 and November, 2004, would undoubtedly be classified under the eight digit tariff schedule and on account of the aforementioned reasons, the subject matter in question would be classifiable under chapter 38.

In *Xerox India Ltd*. v. *Commissioner of Customs*,[31] the issue was the classification of the multi-functional machines. While deciding the dispute as to whether the impugned imported multi-functional machines fall under chapter heading 8479.89 (residual heading) or under chapter heading 8471.60 of the Customs Tariff Act, 1985, it was held that the printing function emerges as the principal function as the impugned goods had about 85 per cent of the its total parts and components along with manufacturing cost allocated to printing. Therefore, it was found to have met the three-fold requirement of note 5(B) of chapter 84, as it was to be used principally in Automatic Data Processing Machines (ADPM) and connectable to the Central Processing Unit and it was able to accept data in a form (codes or signals) which could be used by the system. It was also held that based on the nature of function, multi-functional machines would serve as input and output devices of an ADPM (computer) and thus serve as unit of an ADPM, which on a reading of note 5 (C) of the chapter 84 would classify them as falling under chapter heading 8471.60 of the Customs Tariff Act, 1985. Hence, the imported multi-functional machines were held classifiable under chapter heading 8471.60 of the Customs Tariff act, 1985.

In another case,[32] the issue was regarding the PXI controller/other controllers imported by the assessee. The tribunal held that the imported items could not be categorised as measuring instruments under chapter 90 of the Customs Valuation Act, 1975, as PXI controller *per se* was not a measuring instrument and it could be used only in conjunction with an independent measuring instrument with suitable interface. In the appeal, it was held that on the basis of technical material (including the importer's own catalogue and

31 2010 (182) ECR 1 (SC).

32 *Commissioner of Customs, Bangalore* v. *N.I. Systems (India) P. Ltd*., JT 2010 (7) SC 195.

webcast) that controllers (including embedded controllers) were not merely PCs/ADPMs, but had a specialised structure and specific functions to perform and were classifiable under chapter 90 of the Customs Valuation Act, 1975. In appeal, it was argued that the industrial process controllers and I.O. modules, which were part of functional unit and function of which was to be judged as a whole were classifiable under chapter 90 of the Act a whole. It was further argued that the said machine should be seen as a system. As a functional unit, the imported machine should perform a function other than data processing or it should perform a function in addition to data processing. In this connection, the court opined that the industrial process controllers and I.O. modules, which were part of a functional unit, the function of which was to be judged as a whole and were, therefore, classifiable in chapter 90. The sentence in note 5(E) of the chapter 90 dealing with incorporating or working in conjunction with an ADPM merely indicated that overall package, which was presented before the department, had an ADP machine in it. In other words, what was imported was a system containing an ADPM. This would completely obliterate specific function test and concept of functional unit. Hence, it was held that the imported goods were rightly classified by the department under chapter 90.

Exemption

In *Commissioner of Customs (Preventive), Mumbai* v. M. *Ambalal and Co.*,[33] the tribunal allowed exemption to the respondent by setting aside the original order passed by the adjudicating authority, wherein it had directed the respondent to pay a sum by way of duty under provisions of the Customs Act, 1962.

The brief facts of the case as follows: In a search and seizure by the officers of customs department conducted in the office premises of the respondent firm on the basis of specific information, a large quantity of rough diamonds was recovered. The partner of the respondent firm, Maganbhai Patel was neither able to offer any satisfactory explanation nor produce any documents in relation to import of the said diamonds. The diamonds were seized by the officers in the reasonable belief that they were liable for confiscation under the provisions of the Act. After investigation, a show cause notice was issued to the respondent and others wherein confiscation of the seized diamonds was proposed. After adjudication, the adjudicating authority passed an order confiscating the seized diamonds under section 111(d) of the Act. However, an option was given to the respondent to redeem the seized goods on payment of redemption fine. The respondent was also asked to pay the appropriate duty on the said confiscated diamonds which were allowed to be released on payment of redemption fine. In addition, penalty was also imposed on the respondent under section 112 of the Act. The

33 2010 (13) SCALE 266.

respondent thereafter filed a writ petition before the Bombay High Court and the same was withdrawn to avail the benefit under *kar vivad samadhan* scheme, 1998. The respondent thereafter requested the appellants for release of diamonds by placing reliance on the notification no. 247/76-cus. dated 02.08.1976. This request was turned down by the department and the respondent was informed that the seized diamonds would be released only after payment of duty in the light of the original order dated 03.12.1992. The respondent then preferred a writ petition before the Bombay High Court. The said writ petition was dismissed by the High Court wherein it was specifically observed 'that the petitioner imported diamonds of foreign origin without a valid licence.'

The question before the apex court was whether the goods that were smuggled into the country could be read within the meaning of the expression 'imported goods' for the purpose of benefit of the exemption notification. It was observed that 'smuggled goods' will not come within the definition of 'imported goods' for the purpose of the exemption notification for the reason that the Act defines both the expressions differently: imported and smuggled. It was further held that if the two were to be treated as the same, there would be no need to have two different definitions. The court stated:[34]

> In order to understand the true meaning of the term 'imported goods' in the exemption notification, the entire scheme of the Act requires to be taken note of. As noted above, 'imported goods' for the purpose of this Act is explained by a conjoint reading of section 2(25), section 11, section 111 and section 112. Reading these sections together, it can be found that one of the primary purposes for prohibition of import referred to the latter is the prevention of smuggling. Further, in the light of the objects of the Act and the basic skeletal framework that has been enumerated above, it is clear that one of the principal functions of the Act is to curb the ills of smuggling on the economy. In the light of these findings, it would be antithetic to consider that 'smuggled goods' could be read within the definition of 'imported goods' for the purpose of the Act. In the same light, it would be contrary to the purpose of exemption notifications to accord the benefit meant for imported goods on smuggled goods.

Further, it was held that the rule regarding exemptions was that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. The synthesis of views was quite clear that general rule was strict interpretation while special rule in case of beneficial and promotional exemption was liberal interpretation. Nonetheless in the light of the facts of

34 *Id*., para 14.

the present case, it was stated that the notification 247/76-cus. dated 02.08.1976 exempted certain articles when imported into India from payment of duty under the Act. The import must be valid and in accordance with the provisions of the Act. In the present case, it was the finding of the High Court that the respondent firm had imported diamonds of foreign origin without a valid licence and that finding became final; hence, the benefit of exemption could not be extended to the respondents.

Valuation

In *Commissioner of Customs (GEN), Mumbai* v. *Abdulla Koyloth*,[35] valuation of imported goods found to have been misdeclared was in issue. It was held by the court that once the nature of goods had been mis-declared, the value declared on the imported goods became unacceptable. As against the contention of the revenue that the respondent had made mis-declarations in the bill of entry in relation to quantity, country of origin and value of the goods and the transaction value had to be rejected in terms of section 14(1) of the Customs Act, 1962 read with rule 4(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, the tribunal held that that, in the absence of any evidence to the contrary, the value declared by the appellant should be accepted as transaction value. Hence, the main issue before the court was whether the assessable value as declared by the importer was to be accepted and the order of the tribunal was to be sustained in the facts and circumstances of the case. It was held that the tribunal failed to apply the procedure envisaged in section 14(1) of the Customs Act, 1962 read with rule 4(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, for determining the value of the imported goods. If the certificates of origin of the goods had been found to be false the value declared in the invoices could not be accepted as genuine. Hence, the matter was remitted back to the tribunal for a fresh decision on valuation.

In *Chaudhary Ship Breakers* v. *Commissioner of Customs, Ahmedabad*,[36] levy of additional customs duty under section 14 of the Customs Act, 1962 read with rules 3 and 4(1) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was in dispute. In the facts of the case, the tribunal confirmed levy of additional customs duty by virtue of final assessment order passed by the deputy commissioner (customs). Hence, the issue as to whether the transaction value of the vessel was to be the price mentioned in the original MOA or reduced price indicated in *addendum*. Greater emphasis was to be laid on genuineness or otherwise of *addendum* and not on the *factum* of absence of provision in original agreement for reduction of price for reasons stated in *addendum*. According to section 14(1) of the Act, assessment of the customs duty under the Customs Tariff Act, 1985

35 2010 (182) ECR 15 (SC).
36 2010 (181) ECR 197 (SC).

was to be made on the value of goods imported and unless the value of goods was fixed under sub-section (2) of section 14, the value had to be determined under sub-section (1) of said section. The *factum* of actual payment price in terms of *addendum* could not be ignored while determining the value of vessel under section 14. The tribunal had not examined genuineness of *addendum*, and had proceeded to reject the appeal of the appellant on the short ground that there was no provision for price variation in original MOA. However, commissioner (appeals) examined the cogency of reasons for price reduction though he was not convinced to accept the same. Hence, the matter was remitted to the tribunal for a fresh decision.

In *Pernod Ricard India (P.) Ltd*. v. *Commissioner of Customs, ICD Tughlakabad*,[37] the applicability of rule 6 of Customs Valuation (Determination of Prices of Imported Goods) Rules, 1988 was in dispute. In the facts of the case, the tribunal remanded the matter to the adjudicating authority for a fresh consideration on the question of applicability of rule 6. The order of the tribunal was challenged before the High Court and the challenge was dismissed. Subsequently, the tribunal, in another round of appeal, again reopened the issue of applicability of rule 6. Hence, the main issue was whether the tribunal was justified or not in re-examining the question of applicability of the rule 6. It was held that in the instant case, the doctrine of merger would be attracted and the appellant is estopped from raising the issue of applicability of rule 6. Once a statutory right of appeal was invoked, dismissal of appeal by the Supreme Court, whether by a speaking or non-speaking order, the doctrine of merger applied. It was further held that the logic underlying the doctrine of merger was that there cannot be more than one decree or operative order governing the same subject-matter at a given point of time. Further, the issue with regard to the applicability of rule 6 had attained finality and, therefore, the tribunal erred in reopening and examining afresh the question as to the applicability of rule 6.

Import

In *Anirudh Singh Katoch* v. *Union of India*,[38] the issue related to the import of firearms into India under the EXIM policy. The justification of the act of commissioner of customs in detaining the two duly licensed firearms which the appellant had brought on transfer of his residence into India was also discussed in this appeal. It was held that the EXIM policy clearly contemplated that the import of sporting, hunting or target-shooting shotguns, including combination shotgun-rifles was not permitted except against a license by renowned shooters for their own use and that too on the recommendation of the Government of India. Thus, it stands clearly established

37 JT 2010 (7) SC 602.
38 2010 (5) SCALE 7.

that the import of firearms which was governed by the EXIM policy was prohibited except to the extent stated. Hence the import of firearms was held to be permissible only against an import license issued by the DGFT to renowned shooters/rifle clubs for their own use on recommendation of the Department of Youth Affairs and Sports. In this case, the appellant was denied import license because he was not covered by this category under the terms of the circulars dated January 5, 1988 and June 7, 1995. The contention of the appellant that he was entitled to bring in more than one firearm because of transfer of residence by relying upon the Baggage Rules, 1998 was held to be misconceived. The only inference that could be drawn from these rules was that the duty free import of firearms was not permissible. It was categorically stated that by virtue of circulars, the appellant was permitted to import one firearm but the court did not intend to consider effect of EXIM policy on these circulars. Consequently, the appeal was dismissed.

Appeal

In *Sanghvi Reconditioners Pvt. Ltd*. v. *Union of India*,[39] the issue was the maintainability of an application for amendment seeking to urge an additional ground before the High Court against the order of the settlement commission. In this case, certain incriminating documents were seized from the appellant revealing that the appellant had clandestinely availed the benefit of duty exemption under notification no. 211/83-cus. dated 23rd July 1983, as amended, on the import of multiple consignments of engineering cargo as "Ship Spares". The appellant claimed the same exemption before the settlement commission but before the High Court an unsuccessful attempt was made to lay more emphasis on exemption from payment of customs duty in terms of sections 54 and 69 of the Customs Act, 1962. In this regard, the court opined that the ground sought to be raised was in fact contradictory to the earlier stand and since a fresh ground could not be entertained, an additional ground was raised by the appellant regarding applicability of sections 54 and 69 at the belated stage. The issue as to whether the High Court committed any illegality in declining to entertain the additional ground raised by the appellant, it was held that the additional ground raised before the High Court was an afterthought and adjudication thereon involved investigation into facts and, therefore, the decision of the High Court in not entertaining the additional ground did not suffer from any infirmity. Thus, there being a complete shift in the stand of the appellant before the High Court when sale of the imported components by them to a third party stood proved on the basis of overwhelming documentary evidence on record, disentitling them to the benefit of the exemption notification. The applicant could not be permitted to resile from his pleadings in the application at any stage of proceedings before the settlement

39 AIR 2010 SC 1089.

commission or set up a new case before the higher fora. Proved by the documentary evidence that the order of the settlement commission did not suffer from any error, legal or factual, it was held that the High Court was fully justified in declining to entertain the additional ground.

IV CONCLUSION

The present survey of cases decided by the Supreme Court in areas of central excise and customs shows that the dynamics of judicial interpretation have not been so visible in the area of indirect taxes. Nonetheless, the Supreme Court has laid down principles in certain important areas such as marketability, valuation and duty exemption. Another notable decision of the court is the pronouncement of *Indirect Tax Practitioners Association* v. *R.K. Jain*,[40] wherein the judiciary has taken a firm stand against the instances of corruption by the authorities of CESTAT. As against the past practice, minor discrepancies in the nature of procedural irregularities are dealt with leniency. As regards the cases under customs law, the court has tried to maintain certainty in the application of law and procedure to the given situation. This can be seen further in cases dealing with issues of classification, valuation and import/export, *etc*. A holistic view of the cases would give an impression that the rule of strict construction of fiscal statutes has been followed in maintaining balance between the country's economic growth and the freedom of trade.

40 *Supra* note 22.