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CENTRAL EXCISE AND CUSTOMS

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I INTRODUCTION

CUSTOM AND excise duty as commodity taxes contribute substantially to the sources of revenue under the current regime of tax system in India. While the former duty is essentially levied upon the commodities/goods either imported or exported out of India, the latter is the tax levied upon the goods/produces manufactured or produced in India for consumption in the country. Unlike the other branches of law, typically, the fiscal statutes laying down the said duties, bring along with itself a labyrinth of issues owing to the existence of principal Act, their amendments, rules made there under, several tariff schedules, tariff headings *etc.* Owing to such complexities, and the administrative adjudications through assessment officials and administrative forum, disparity between the taxing authority and the tax payer may come for the final call before the apex court. The present survey explores these final calls made by the apex court through judgments in the year 2012 on the issues of manufacture, valuation, classification, exemption, import, appeal *etc.,* pertaining to the excise and custom duties respectively.

II CENTRAL EXCISE

Manufacture

In *Commissioner of Central Excise, Bangalore-II* v. *Osnar Chemical Pvt. Ltd.*,[1] the question before the apex court was whether addition and mixing of polymers and additives to the base bitumen resulted in manufacture of a new marketable commodity and as such was eligible to excise duty or not. In the instant case, the respondent was engaged in the supply of Polymer Modified Bitumen (PMB) and Crumbled Rubber Modified Bitumen (CRMB), a different kind of modifier. The respondent assessee had entered into a contract with one M/s. Afcons Infrastructure Ltd. for supply of PMB at their work site, the base bitumen and certain additives were to be supplied by Afcons to the assessee directly at the site where the assessee, in its mobile polymer modification plant, was required to heat the bitumen at a

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1 2012 (189) ECR 0158 (SC).

temperature of 160 degree centigrade with the help of burners. 1% polymer and 0.2% additives were added under constant agitation, for improving its quality by increasing its softening point and penetration. The process of agitation was to be continued for 12 to 18 hours till the mixture becomes homogenous and the required properties were met. The said bitumen in its hot agitated condition was mixed with stone aggregates which were then used for road construction. The resultant product was considered to be a superior quality binder with enhanced softening point, penetration, ductility, viscosity and elastic recovery. While the assessee was paying duty on PMB processed at their factory, no duty was paid for the conversion work carried out at the site. Accordingly, show cause notice demanding duty for the same was issued by the commissioner. While the adjudicating authority confirmed the demand, the appellate tribunal reversed the decision by concluding that the product cannot be bought and sold as it has to be kept at a particular temperature constantly. In appeal, the revenue contended that the end products, *viz.,* PMB and CRMB are different from bitumen, in as much as polymers and additives are the raw materials consumed in the process of manufacture of the said final products and are therefore, covered by the definition of the term "manufacture" in section 2(f) of the Act.[2] *Per contra*, the assessee submitted that the process of mixing an insignificant dose of polymer with duty paid bitumen only enhanced the quality of bitumen and did not amount to manufacture. It was further submitted that that even if it is assumed that the said even if the said process amounted to manufacture, still PMB cannot be subjected to excise as it was not commercially marketable. It was argued that for levy of excise duty, the twin conditions of "manufacture" and "marketability" have to be satisfied cumulatively.[3]

The apex court came to the conclusion that the process of mixing polymers and additives with bitumen did not amount to manufacture but only improved the quality. Bitumen remained bitumen and there was no change in the characteristic or identity of the products. The court observed that:[4]

> …"manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different Article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognised as a new and distinct article that manufacture can be said to have taken place.

In *CCE, Mumbai III* v. *Tikitar Industries*,[5] the respondent wanted to classify the product manufactured by them, namely, "Bitulux Insulation Board" known as "Tikki Exjo Filler" under tariff heading 4407.10 with 'nil' rate of duty. The respondent contended that "Tikki Exjo Filler" was obtained by the process of

2 *Id*., para 5.
3 *Id.*, para 6.
4 *Id.*, para 19.
5 2012 (192) ECR 0001 (SC)

bituminization of the insulation board which also falls under the same tariff heading and there was no manufacture involved. The adjudicating authority held that the process amounted to manufacture and the respondent was to pay duty at 10% under 4407.10, against which the respondent had filed appeal. Meanwhile, a few more notices came to be issued on this ground. The first appellate authority accepted the stand of the respondent and held that duty leviable was nil rate of duty. Since the revenue has not questioned the correctness of the first appellate authority, the court ruled that the revenue would not be entitled to any relief and hence the appeal filed by the revenue was dismissed.

Valuation

In *CCE, Mumbai* v. *Fiat India (P) Ltd.*,[6] the apex court held that when the goods are sold at a price which is less than the cost of manufacture, the price cannot be held as 'normal price' for purposes of valuation under section 4 of the Central Excise Act, 1944. Even under the new section 4, such a price cannot be taken as the 'transaction value'. In the instant case, the respondent declared wholesale sale price of their Fiat Uno cars during the period commencing from 27.05.1996 to 04.03.2001. As the declared price was found to be less than the cost of production, the central excise authorities felt such a price could not be considered as 'normal price' under the old section 4 of the Act for purpose of quantification of value in terms of section 4(1)(a) of the Act. Since further enquiry was found necessary, the assistant commissioner by his order dated 03.01.1997 directed for provisional assessment at a price which would include cost of production, selling expenses (including transport, landing charges wherever necessary from 28.09.96) and profit margin on the ground that the cars were not ordinarily sold in the wholesale trade as the cost of production was much higher than the wholesale price but was sold at a loss. The officers of the preventive and intelligence branch of Kurla Central Excise Division conducted investigation in 1997-98 and found that the respondent were importing all the kits in SKD/CKD condition for manufacturing the cars and cost of production of a single car was Rs. 3,98,585 for manufacture from SKD condition and Rs. 380883 for manufacture from CKD condition against the declared assessable value of Rs 185400. After completion of the investigation, Commissioner Central Excise Mumbai-II appointed cost accountant under section 14A to conduct special audit to ascertain the correctness of the declared price. The cost accountant calculated the average price of the Fiat Uno cars by adding material cost (imported, local, painting and others) and notional profit @5% of the total cost for the period from April 1998 to December, 1998 *vide* his report dated 31/3/99 which came to Rs. 5,04,982 per car. In the meantime, show cause notices were issued for the period June 1996 to February 2000 demanding differential duty on the assessable value calculated on the basis of manufacturing cost plus manufacturing profit minus modvat. The adjudicating authority confirmed the demand on the ground that the declared prices cannot be considered as 'normal price' under section 4 but they are artificially arrived at in order to capture the market. Having found that the declared price as not 'normal price' it was held that 'normal price' was not ascertainable and hence he decided the price in terms of section 4(1) (b) read with valuation rules. By

6 2012 (193) ECR 157 (SC).

referring to the judgment in *Bombay Tyre International Ltd*.[7], the adjudicating authority said that all costs incurred to make goods saleable/marketable should be taken into account for determining the assessable value. The adjudicating authority found the basis adopted by the cost accountant acceptable but adopted the average cost price worked out by the superintendent at Rs. 4,53,739 and confirmed the demand. On appeal, the appellate tribunal reversed the above decision by relying on *CCE, New Delhi* v. *Guru Nanak Refrigeartion Corporation.*[8] Aggrieved by the same, revenue in appeal submitted that the respondent was not fulfilling the conditions in section 4(1)(a) and hence the valuation has to be done in accordance with section 4(1)(b) read with 1975 valuation rules. On the other hand, the responded justified the declared price and submitted that the judgment in *Guru Nanak Refrigeration* fully covered the issue. It was further contended that 'normal price' is the selling price at which that particular assessee has sold the goods to all the buyers in the ordinary course of business. The term 'consideration' is used in this section in the same sense as in section 2(d) of the Indian Contract Act and would mean monetary consideration and nothing else. It was also contended that the assessable value has to be gathered from the normal price and not from cost of manufacture which is irrelevant when normal price is available. Hence, there was no need to resort to section 4(1) (b) or the valuation rules, 1975. Another plea was that with effect from 01.07.2000, Section 4 has been substituted with a new section 4 and for the period subsequent to 01.07.2000, the new provisions will apply, that is, adopting the concept of 'transaction value'. It was reiterated that the declared price was based on the competitive price in the market at arm's length and the price is the sole consideration. Relying on the decision in *Elgi Eqipment P Ltd* v. *CCE, Coimbatore*[9] the word 'ordinary sale' would mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. The apex court noted that since large part of the demand pertains to the period after 1975, issue requires to be decided in terms of section 4 with effect from 01.10.75. It observed that the legislature created a legal fiction to equate the value of the goods to the price which is actually obtained by the assessee, when such goods are sold in the market or the nearest equivalent thereof, a deeming provision creates a legal fiction.[10] Therefore, though the price at which the assessee sells the excisable goods to a buyer or the nearest ascertainable price may not reflect the actual value of the goods for the purpose of valuation of excise duty, by the deeming fiction created in section 4(1), such selling price or nearest ascertainable price in the market, as the case may be, is considered to be the value of goods. While further examining this issue, the court looked into the purport of the terms, 'value', 'normal price', 'ordinarily sold', 'sole consideration' used in this section. After referring to various judgments on these issues, the court finally concluded that the declared price cannot be held to be 'normal price'. In the words of the court:[11]

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7 AIR 1984 SC 420.

8 2003 (153) ELT 249 (SC).

9 2007 (215) ELT 348 (SC).

10 *J.K. Cotton Spinning and Weaving Mills Ltd* v. *UOI* (1987) Supp (1) SCC 350.

11 *Supra* note 6, para 43.

> Normal price, therefore, is the amount paid by the buyer for the purchase of the goods. In the present case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over five years and the consideration being only to penetrate the market and compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. The existence of extra commercial consideration while fixing the price would not be the 'normal price' as observed by this court in Xerographic Ltd's case.

The court also ruled that if there is anything to doubt the normal price, recourse to clause (b) of section 4(1) was permissible. Similarly, in respect of the position after 01.07.00 when the new section 4 has been enacted, the court said that if the ingredients of section 4 are not satisfied, value can be arrived at in terms of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

In *CCE., Faridabad* v. Food *and Healthcare Specialties,*[12] the apex court held that when one gets the goods manufactured from another, the nature of transaction is to be looked into to see whether they are at arm's length in order to determine the value for assessment purposes. The facts in this appeal are the respondent was engaged in the blending and packing of "Glocon D" for M/s. Heinz India P Ltd (Heinz, for short) under an agreement dated 01.03.00. As per this agreement, Heinz was to supply raw material, packing material and the technical know-how to the respondent for the blending and packing of the said product. From March, 2000 to September, 2000, the respondent paid excise duty on the basis of wholesale price of the product at the depots of Heinz. However, from October, 2000, it was modified and value was computed on the aggregate cost of raw material, packing material and their job work charges and started paying duty on the same. During investigation, the excise authorities found that the said product was also being processed at the Aligarh factory of Heinz and the duty on these clearances was being paid at the assessable value/depot sale price of Heinz. Consequently three notices were issued for the period October 2000 to December 2000; January 2001 to June 2001 and July 2001 to February 2002 proposing determination of assessable value on the basis of sale price fixed by Heinz at its depots and recovery of the duty accordingly, besides penalty under rule 173Q of the Central Excise Rules, 1944. While the adjudicating authority confirmed the demand, on appeal, the appellate tribunal allowed the appeal. On the basis of the observation of the adjudicating authority that the status of the respondent was no better than that of hired labourer, the tribunal held Heinz was the manufacturer and duty is leviable only on the manufacturer. In other words, the tribunal did not examine the agreement but went by the observation of the adjudicating authority. After hearing the submissions on behalf of the appellant and respondent, the court noted that the main question for consideration is whether the respondent was merely a processor of "Glucon D", independent of Heinz or it was related to Heinz. In dealing with this, the purport of some of the earlier judgments was also examined. On behalf of the appellant, it was contended that the relationship between the respondent and Heinz was one of principal and agent and not of principal

12 2012 (190) ECR 0099 (SC).

to principal. Apart from referring to several clauses in the agreement, it was pointed out that Heinz had control over the respondent, the processed product was kept in the same premises from where Heinz was operating and further that Heinz had taken exemption from registration under the Central Excise (No.2) Rules, 2001. After referring to section 4 of the Central Excise Act, 1944 as effective from 1.7.2000, the court stated that if the assessee and buyer are 'related', valuation has to be done under section 4(1) (b) read with the valuation rules of 2000. It also said that conceptually, there is no significant change in the definition of "related person" in the new and repealed section 4. The submissions from the contesting parties make it necessary to study the relationship between the two. However, since the tribunal had not addressed this aspect of the matter in detail, the court remitted the matter to tribunal for the purpose of determining the relationship between the two. It also said that if the tribunal finds that the respondent and Heinz are related, it shall remit the matter to the adjudicating authority for fresh determination of the value. On the other hand, if the tribunal concludes that they are not related, the present order of tribunal will stand affirmed.

Classification

In *CCE, New Delhi* v. *Connaught Plaza Restaurant (P) Ltd., New Delhi*,[13] the apex court held that in the absence of a statutory definition in precise terms; words, entries and items, taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. Thus, the court ruled that in the absence of statutory definition, common parlance test[14] may be applied in classifying a product.[15] It was further held that definition under one statute cannot be applied mechanically to another statute having a different object, purpose and scheme. The court observed that: [16]

> ….the object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of Excise Duty, thereby causing a loss of revenue.

The above rulings came to be delivered in the context of deciding the classification of 'soft serve' served at the restaurants/outlets commonly and popularly

13 2013 (195) ECR 0001 (SC).

14 In *Oswal Agro Mills Ltd.* v. *Collector of Central Excise,* 1993 (3) SCC 716, it was observed that the application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression ofactual human thoughts."

15 *Supra* note 13, para 31.

16 *Supra* note 13, para 43.

known as McDonalds, under heading 21.05, of the schedule to the Central Excise Tariff Act, 1985, as claimed by the revenue or under heading 04.04 or 2108.91, as claimed by the assessee. During the period from April 1997 to March, 2000, three notices were issued and one was decided classifying the goods under heading 04.04, while in respect of the remaining two notices, the product was classified under tariff heading 21.05 by the adjudicating authority. The assessee succeeded in the first appeal, against which the revenue filed appeal before the CESTAT. The appellate tribunal upheld the classification under tariff heading 2108.91, after perusal of the technical literature, ISI specification and provisions made in the Prevention of Food Adulteration Act, 1955. The tribunal was of the considered opinion that the product cannot be classified as ice-cream merely on the ground that the consumer understood the same as ice-cream.[17] Thus, the tribunal based its conclusion on the technical meaning and specifications of the product "ice-cream", stipulated in the Prevention of Food Adulteration Act, 1955 and rejected the common parlance test, *viz.,* the consumers' understanding of the product. Aggrieved by the order of the tribunal, revenue went into appeal before the apex court.

The court observed that for purpose of classification of 'soft serve', it would be first relevant to construe the true scope of the relevant headings. Since none of the terms in heading 04.04 and 21.05 have been defined and no technical or scientific meanings have been given in the chapter notes, it is necessary to find whether the subject goods would come under the purview of any classification descriptions employed in the Tariff Act. In this context, the court posed the question whether in the absence of a statutory definition, the term 'ice-cream' is to be construed in the light of scientific and technical meaning or to apply the common parlance test. Referring to a number of judgments on this issue, it was held that in the absence of a statutory definition, the words, entries and terms in taxing statute must be construed in terms of their commercial or trade understanding or according to their popular meaning. Rigid interpretation in terms of scientific or technical meanings must be avoided in such circumstances. The plea of classification based on milk fat content was rejected. The court also negated the argument that the product is marketed all over the world as 'soft serve', saying that the manner by which the product is marketed by a manufacturer does not play a decisive role in affecting the commercial understanding of the product. Referring to the evolution of ice-cream in various works, it was found that different forms with different characteristics are found in different parts of the world and there is no clear or unanimous view regarding the true meaning of 'ice-cream'. The terms of the statute must be adapted to developments of contemporary times rather than being held entirely inapplicable. The court made a distinction of the judgment in *Akbar Badruddin Jiwani* v. *Collector*,[18] relied by the assessee wherein the court had taken a different view in resorting to technical or scientific meaning.

In *Salora International Ltd* v. *CCE, New Delhi,*[19] the question before the apex court was whether goods manufactured by assessee were liable to be taxed as 'Parts

17 *Supra* note 13, para 5.
18 1990(47) ELT 161(SC).
19 2012 (193) ECR 0303 (SC).

of Television Receivers' falling under Tariff Entry 8529 of Central Excise Tariff contained in first schedule to Central Excise Tariff Act, 1985 or as 'Television Receivers' under Tariff Entry 8528. In the case at hand, the appellant, manufacturing all the parts of a television receiver, claimed classification of the goods as, 'parts' of TV sets under tariff heading 8529, whereas, the revenue wanted them to be classified as TV sets under tariff entry 8528. The contention of revenue was that the appellant chose to dis-assemble the television sets as parts before transporting them in order to avail the lower duty payable on parts. It was found that the appellant was manufacturing various components of the TV sets at its factory in Delhi. Thereafter, the said components were assembled in the same factory for the purpose of testing each component and for checking the working of each television set. Thereafter, the TV sets are disassembled and then transported as parts to various satellite units of the appellant at different places. The argument of the assessee appellant that the goods manufactured have to be considered only as 'parts' as they could not receive a picture, a basic requirement to consider them as 'Television Receiver' and that it would amount to double-taxation, since the satellite units where the subject goods finally assembled into Television Receivers are in fact paying duty under the tariff entry 8528 did not find favour with the court. The court observed that in the light of the provisions in section XVI of the Tariff, it has to be examined whether the appellant manufactured only 'parts'. Noting from the records that the appellant not only manufactured all the parts of the television receivers and make complete TV sets, but they were also operated in the manufacturing unit and thoroughly checked before they were dis-assembled and along with relevant packing material and individual serial numbers, sent to the satellite units. Once the manufacturing process is over, it was not the concern as to what happens subsequently. The court also found that the parts manufactured are matched and numbered within the factory itself, and also assembled together to receive pictures for the purpose of testing and quality control. As a consequence, the goods assembled at the satellite units would be identifiably the same as those assembled together by the appellant in its factory for testing, as all such parts are already numbered and matched. It was further ruled that the terminology of rule 2(a) of the rules for the interpretation of the tariff is wide enough to cover the goods transported by the appellant; the goods will have to be treated as possessing the essential character of the television receivers.[20] The court also ruled that once the classification is decided, no relief can be granted on the ground of double-taxation, particularly since it was open to the satellite units to avail the input credit.[21]

In *Commissioner of Central Excise, Bhopal* v. *Minwool Rock Fibres Ltd*,[22] the apex court dismissed the appeal filed by the revenue, which wanted slagwool and rockwool to be classified under tariff entry 6803, because it specifically covered the subject goods. The apex court held that they would fall under the tariff entry 6807.10 in view of the undisputed fact that they contained more than 25% of blast furnace slag. The court observed that the sub-heading 6807.10 introduced in the

20 *Id.,* para 30.
21 *Id.,* para 31.
22 2012 (278) ELT 581 (SC).

budget of 1997 appeared to have been a conscious entry introduced by the legislature. As per the tariff entry 6807.10, goods manufactured by use of more than 25% by weight of red mud, press mud, or blast furnace slag or one or more these materials thereof would fall under this entry. Since in the subject goods, there was no dispute that it contained more than 25% by weight of blast furnace slag, order classifying them under 6807.10 was upheld. The court noted that in a classification dispute, an entry which is beneficial to the assessee must be applied. It further said that the departmental circulars are not binding on the assesee or quasi-judicial authorities or courts. The court also noted that the issue had attained finality since the revenue had not questioned the judgment of the tribunal in *Commissioner of Central Excise, Raipur* v. *Punj Star Insulation Fibre Co,*[23] which classified the product under tariff entry 6807.10.

In *Vintron Electronics P Ltd.* v. *Commissioner of CCE*, Delhi,[24] the apex court was dealing with the classification of add-on cards and mother boards. It was noticed that the rate of duty on automatic data processing machine 8471.00 and add-on cards 8473.00 was fluctuating, sometimes, the rate of duty on one being higher than the rate of duty on the other and sometimes, the reverse. While the appellant filed a declaration claiming classification under tariff entry 8473.00, he changed the stand when the rate of duty under 8471.00 was lower compared to rate of duty on the goods under tariff heading 8473.00. Against the department's classification under tariff 8473.00, the appellant assessee filed appeal which was rejected by the tribunal. Noting that the order passed by the tribunal was cryptic, and by referring to the judgment in *Standard Radiators Pvt. Ltd* v. *CCE*,[25] the court emphasized the need for discussing the facts in detail, as the tribunal is the last fact finding authority. Further, relying on another judgment in *CCE, Delhi* v. *Carrier Aircon Ltd*.,[26] the court stated that for classification under the Central Excise Act, it is essential that the character and uses of the commodity and its parts are considered in detail and examined thoroughly, before arriving at a conclusion. Accordingly, the matter was remanded with directions for fresh consideration after taking into account the nature and character of the products in question and their functions with regard to automatic data processing machine and other machines.

In *Commissioner of Central Excise* v. *Wockhardt Life Sciences Ltd*.[27] the apex court ruled that there is no fixed test for arriving at the classification of the goods, though, 'common parlance test' or 'commercial usage test' are most common. The classification of 'Povidone Iodine Cleansing Solution USP' and 'Wokadine Surgical Scrub' both having identical composition, with the difference being that the former is a generic name while the latter is a branded product came up for decision in the appeal filed by the revenue. The revenue contended that these are detergents on the basis of the composition, meriting classification under heading 3402.90. It was further contended that the product contained surface active agents which are

23 2004(170) E.L.T. 43 (Tri.-LB).
24 2012 (279) ELT 161 (SC).
25 (2002) 10 SCC 740.
26 (2006) 5 SCC 596.
27 2012 (277) ELT 299 (SC).

primarily used as a medicated cleaning agent for removal of dirt, bacteria, fungi *etc.* It was used as an antiseptic agent for washing hands of surgeons and is also applied on the skin of the patients before operation. The said product was not a medicament in terms of 2(i) of the tariff as it neither has "prophylactic" nor "therapeutic" usage and hence, they cannot be classified under 3003 of the Tariff Act. By referring to the above, the court observed that the products, comprising two or more constituents which have been compounded together either for therapeutic or prophylactic uses would fall within the meaning of the expression 'medicaments'. Further, after ascertaining properties of these products as found in different pharmacopoeia and the meaning of the terms, "therapeutic" and "prophylactic" from the dictionaries, it found that these expressions means a medicament intended to prevent disease. Since medicaments are products which can be used for therapeutic or prophylactic and since the appellant's contention that these are primarily used for external treatment of the human-beings for the prevention of diseases remained uncontroverted, the tribunal was justified in classifying them under 3003 as 'medicaments'. In determining the classification, 'common parlance test' or 'commercial usage test' are commonly used. It was observed that the combined factor which must be taken note of for the purpose the classification are the composition, the product literature, the label, the character of the product and the use to which the product is put. The court also distinguished the earlier judgments on facts.

Cenvat/Modvat

In *Flex Engineering Ltd.* v. *Commissioner of Central Excise, U.P*,[28] the question before the apex court was whether goods used for testing machines are inputs used in relation to the manufacture of final product and eligible for Cenvat/ Modvat credit or not, erstwhile, rule 57A of the Central Excise Rules, 1944. In the instant case, the appellant was engaged in manufacturing various types of packaging machines to suit individual customer's requirements. For purposes of testing the machines, duty paid flexible laminated plastic films in roll form were used. The benefit of Modvat credit was denied on the ground that the said material was used for testing the final product which cannot be treated as inputs as stipulated in the rule 57A of the Central Excise Rules, 1944. The appellant failed before the authorities including the appellate tribunal. The appellant's request to the tribunal to make a reference to the high court also failed. The high court directed the tribunal to make a reference for deciding the question of law, namely, whether the duty paid plastic films/poly paper used for testing machines for commercial/technical opinion as to their marketability/excisability would be eligible to be taken a credit under rule 57A read with relevant notification and whether such use of material in testing in view of the purposes mentioned above, could be said to be used in the manufacture of or use in relation to the manufacture of the final products. The high court answered the question in the negative holding that the test is carried out after the manufacture and hence could not be called as goods used in or in relation to the manufacture of the final product. On further appeal, the apex court reversed the decision observing

28 2012 (276) ELT 153 (SC).

that testing is an integral part of manufacture. The apex court over ruled the same observing that the process of manufacture is complete only when the product is marketable. In so ordering, reference was made to *Union of India* v. *Sonic Electrochem (P) Ltd*[29] wherein it was ruled that manufacture is intrinsically integrated with marketability. Reference was also made to *CCEx, Calcutta II* v. *M/s. Eastend Paper Industries Ltd.,*[30] for the proposition that anything required to make the goods marketable must form part of manufacture. Accordingly, it was held that all the goods used till the time of manufacture continues will be considered as inputs and thus entitled to Modvat credit. It is to be noted that these appeals related to the period August 1992 to June 1996 and the above ruling was in the context of the erstwhile rule 57A of the Central Excise Rules, 1944. However, the term 'input' is more exhaustive in the present Cenvat Credit Rules, 2004.

In *Commissioner of Central Excise, Vadodara* v. *Gujarat Narmada Valley Fertiliser Co Ltd*[31] the question whether input credit can be taken on Low Sulphur Heavy Stock (LSHS) used as fuel for generating stem, which in turn is used to generate electricity used in the manufacture of exempted goods, that is, fertilizer was referred to a larger bench by the division bench of the apex court. In the instant case, two notices, one for the period 31.03.2003 to September, 2003 and another for the period October, 2003 to August, 2004 were issued holding that the appellant was not entitled to take Cenvat credit on LSHS as it is used for generating steam which in turn is used for generation of electricity which again is used in the manufacture of fertilizers, a product exempt from duty. The assessee replied to both the show cause notices and after giving the assessee an opportunity of hearing, the commissioner adjudicated the first show cause notice by passing an order adverse to the assessee on 24th June 2004. The second show cause notice was similarly adjudicated and an adverse order passed on 30th August 2004. By these orders, the commissioner confirmed the demand of Cenvat credit wrongly claimed by the assessee. The commissioner also directed the assessee to pay interest on the demanded amount and also imposed personal penalty under rule 13 of the rules. Aggrieved by the same, two appeals were preferred before the tribunal whose larger bench allowed the appeals saying that appeal against an earlier order on a similar issue in *Gujarat Narmada Fertiliser Co Ltd* v. *CCEx, Vadodara*[32] was dismissed by the Gujarat High Court stating that no substantial question of law was involved. However, in the meanwhile, on appeal against the larger bench decision, the apex court had decided the issue in favour of the revenue. In rendering this judgment, rule 6 of the Cenvat Credit rules 2002 came to be interpreted. It held that rule 6(1) is applicable to all inputs, including fuel, and hence cenvat credit will not be permissible on the quantity of fuel used in exempted goods. Rule 6(2) referred to other inputs (other than fuel) used in or in relation to the manufacture of final products. A plea was made by the respondent that in *Maruti Suzuki Ltd* v.*CCEx, Delhi III*,[33] a restrictive meaning was given to the term 'input' which was doubted

29 (2002) 7 SCC 435.
30 (1989) 4 SCC 244.
31 2012 (286) ELT 481 (SC).
32 2004 (176) ELT 200 (Tri-Mumb).
33 (2009) 9 SCC 193.

in *Ramala Sahkari Chini Mills Ltd, Uttar Pradesh* v. *Commissioner, Central Excise, Meerut-I*[34] and the issue has been referred to a larger bench. It was further submitted that if it is held in these appeals that LSHS is not an input, then the assessee would be adversely affected. It was, therefore, submitted that these appeals may also be referred to a larger bench or the court may await the decision of the larger bench of the apex court, thus the matter was referred to larger bench.

Exemption

In *Indian Oil Corporation Ltd* v. *Commissioner of Central Excise, Vadodara*,[35] the apex court followed the judgment of the Constitution bench in *CCE, New Delhi* v. *Hari Chand Shri Gopal*[36] and rejected the plea of substantial compliance or intended use. The apex court held that the conditions prescribed in the exemption notification have to be satisfied to get the benefit of exemption. In the instant case, the Indian Oil Corporation supplied reduced crude oil to Ahmedabad Electricity Co. Ltd. on the strength of CT2 certificate issued by the latter. The registration certificate obtained by the Ahmedabad Electricity Co. had expired on 31.12.1995 and was renewed on 26.06.1996. Accordingly, duty was demanded for the supplies made during the intervening period when there was no registration. The duty demand was confirmed even at the tribunal level. The apex court dismissed the appeal by ruling that the exemption under notification No. 75/84-CE dated the 01.03.84 prescribed twin conditions of proving to the satisfaction of an officer not below the rank of assistant collector of central excise that such goods have been used for the intended purpose and where the use is elsewhere than in the factory of production, the procedure set out in chapter X of the Central Excise Rules, 1944 is followed. Rule 192 of chapter X provides for the procedure in this regard. The court observed that for availing the exemption used in a specified industrial process, a person must obtain a registration certificate from the collector and that "the concession shall, unless renewed by the collector, cease on the expiry of the registration certificate". As the validity of the registration certificate has expired, one of the conditions prescribed in the exemption notification is not satisfied.

It is to be noted that the chapter X and rule 192 are no longer in the statute book since the erstwhile Central Excise Rules, 1944 have been replaced by Central Excise Rules, 2002. The Central Excise (Removal of Goods at Concessional rate of Duty for Manufacture of Excisable Goods) Rules, 2001 can be said to be analogous to the erstwhile rule 192 of the Central Excise Rules, 1944.

In *Bonanzo Engg & Chemicals P Ltd* v. *Commissioner of Central Excise*,[37] the apex court held that merely because duty is paid, may be, by mistake on exempted goods, they do not become liable to duty. In computing the value of clearances for deciding the exemption limit under the erstwhile SSI exemption notification, notification 175/86-C.C dated 1/3/1986, the value of clearances on the exempted goods, though cleared on payment of duty has to be excluded, as pro*vide*d in the notification. In the instant case, the appellant was a manufacturer of goods falling

34 (2010) 14 SCC 744.
35 2012 (276) ELT 145 (SC).
36 2010 (182) ECR 143 (SC).
37 2012 (277) ELT 145 (SC).

under chapters 32 and 84. The goods manufactured by the appellant under chapter 84 was eligible for exemption by virtue of another notification, namely, notification no. 111/88-C.E., dated 1/3/1988. The appellant filed a declaration before the adjudicating authority, *inter alia,* informing him that he would be claiming exemption from payment of excise duty for a sum of Rs. 20 lakhs under chapter heading 32 and upto Rs. 10 lakhs under chapter heading 84. However, proceedings were initiated for demanding duty denying the exemption under Notification 175/86, since, as per the said notification, exemption was available upto an aggregate value not exceeding Rs. 30 lakhs only. The appellant failed before the departmental authorities and hence appealed to the appellate tribunal. The tribunal also rejected the appeal stating that the appellants have not availed the exemption under notification 111/88 in respect of the goods falling under chapter heading 84.37, nor had they claimed refund. Accordingly, the appellant cannot claim that the goods were exempted from payment of duty. The tribunal held that the value of clearances under heading 84.37 on payment of duty has to be clubbed for computing the value of clearances for exemption under notification 175/86.

The apex court ruled that merely because the appellant may be, by mistake pays duty on the goods which are exempted from such payment, does not mean that the goods would become goods liable for duty. On the same analogy, failure to claim refund would not stand in the way of claiming the benefit of the notification 175/86. The court went on to recall the principles of interpreting exemption notification as laid down in *Union of India* v. *Wood Papers Ltd.*[38] and *Associated Cement Companies Ltd* v. *State of Bihar*[39] before allowing the appeal directing the adjudicating authority to apply the notification 175/86 without taking into account the excess duty paid under the other notification.

In *Sriniwas Cable Components* v. *State of M.P*,[40] the often referred principles in interpretation of exemption notifications has been reiterated by stating that the eligibility to exemption must be construed strictly and if found eligible, then a liberal approach could be followed. This question arose in the context of the appellant claiming exemption under a notification issued by the state of Madhya Pradesh. The notification gave the exemption from payment of tax to a dealer availing the facility of the notification in respect of products, by-products and the waste products, if they are manufactured by an assessee along with the principal products. In this case, the appellant was a manufacturer of plastic products, and wanted to avail the exemption in respect of DVD boxes (electronic goods), television sets and sanitary napkins, after diversification. The court ruled that the products manufactured after diversification cannot be termed as additional principal products and hence not entitled for the exemption.

In *CCE, Surat* v. *Favourite Industries*,[41] the apex court reiterated the binding principle laid down in *CCE, New Delhi* v. *Hari Chand Shri Gopal*[42] that an exemption

38 (1990) 4 SCC 256.
39 (2004) 7 SCC 642.
40 2012 (279) ELT 166 (SC).
41 2012 (191) ECR 0411 (SC).
42 (2011) 1 SCC 236.

notification had to be interpreted in light of words employed by it and not on any other basis. A person who claimed exemption or concession must establish clearly that he was covered by provision concerned and, in case of doubt or ambiguity, benefit of it must go to state. Whereas eligibility criteria laid down in an exemption notification were required to be construed strictly, once it was found that applicant satisfied same, then exemption notification should be construed liberally. In the instant case, the respondent being an Export Oriented Unit (EOU) procured raw materials from another EOU and cleared the finished fabrics in domestic tariff area (DTA) as provided under the EXIM Policy for the period 1997-2002. The respondent availed the benefit of exemption under notification 8/97-CE dated 01.03.97. The revenue found that the respondent was wrong in availing the benefit of this notification; whereas, at best, they could only avail the benefit of exemption under notification No. 2/95-CE dated 04.01.95. While the adjudicating authority confirmed the demand, the appellate tribunal allowed the appeal by setting aside the order confirming the duty. Before the apex court, the revenue contended that as per notification 8/97-CE dated 1.3.1997, the respondent must purchase the raw material manufactured in an industrial unit in a domestic tariff area and if such raw material is used for production or manufacture of goods and sold in the DTA as provided in the EXIM Policy, then only, it could take the benefit of notification 8/97. It was further urged that the raw material having been purchased from a 100 percent EOU, should be considered as deemed import and hence the respondent was not eligible for the notification 8/97. Further, if the benefit is allowed, the respondent would receive total or undue advantage in payment of duty at concessional rate which was made out of imported raw materials/goods. The court placed reliance on the proposition of law that an exemption notification should be construed directly but it is also well-settled that interpretation of an exemption notification would depend upon the nature and extent thereof. The terminologies used in the notification would have an important role to play. Where the exemption notification ex facie applies, there is no reason as to why the purport thereof would be limited by giving a strict construction thereto.[43] The court referring to a number of decisions on interpretation of exemption notifications, and in particular to its own observation in *Commissioner of Customs (Preventive), Mumbai* v. *M. Ambalal and Co.*[44] that 'the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation' upheld the decision of the tribunal.

Alternate remedy

In *Union of India* v. *Guwahati Carbon Ltd,*[45] the apex court held that the excise law is a complete code in order to seek redress in excise matters and hence it may not be appropriate for the writ court to entertain a petition under article 226 of the Constitution. The remedy of appeal provided under the Central Excise Act must be availed without invoking the writ jurisdiction of the high court. In the instant case, the CESTAT had ordered to recalculate duty under the Central Excise Act after

43 *Commissioner of Customs (Preventive), Gujarat* v. *Reliance Petroleum Ltd.* (2008) 7 SCC 220.

44 (2011) 2 SCC 74.

45 (2012) 11 SCC 651.

excluding freight and insurance charges. The respondent filed a writ which was admitted by a single judge of the Calcutta High Court, who subsequently disposed of the same on the ground of alternate remedy being available in the Act. On appeal, the division bench allowed the appeal holding that the high court has vast powers under article 226 of the Constitution of India to decide any issue that arises under the provisions of the Act. On appeal, the apex court found that the order of the division bench was not sustainable in view of the precedent judgments cited in, *Titaghur Paper Mills Co Ltd* v. *State of Orissa*[46] and *Whirlpool Corporation* v. *Registrar of Trade Marks*.[47] In the former judgment, the court ruled that where a right of liberty is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. In the second judgment, the principles for intervention under the said article are given, that is, when the writ is filed for enforcement of any of the fundamental rights, or where there has been a violation of principles of natural justice or proceedings being wholly without jurisdiction or the vires of an Act are challenged. Accordingly, the appeal was allowed.

Miscellaneous

Doctrine of merger

In *Raja Mechanical Company (P) Ltd.* v. *CCE, Delhi-I*,[48] the assessee was a manufacturer of dutiable excisable goods and availed MODVAT credit by filing a declaration dated 30.06.95 under rule 57T(1) declaring the receipt of goods along with the application for delay, before the assessing authority. However, the said declaration was not filed within the time prescribed under the 'Central Excise Act, 1944 and the rules framed thereunder. Accordingly, the adjudicating authority had issued a show cause notice to the assessee, *inter alia*, directing it to show cause as to why the MODVAT credit availed by it, should not be disallowed and recovered under rule 57G of the Central Excise Rules, 1944 read with section 11A of the Act and, further directed it to show cause as to why penalty under rule 173Q of the rules should not be imposed. In its reply dated 16.11.95 and 26.06.97 to the show cause notice, In reply, the assessee submitted that it had received the said goods in the factory only on 30.09.95, however, had wrongly mentioned the date of receipt of said goods as 18.06.95 in its declaration filed under rule 57T due to inadvertence, which was actually the date of invoice issued by the supplier. The assessee further submitted that it had also filed the application for condonation of delay in filing the declaration. Subsequent to it, the adjudicating authority had confirmed the show cause notice and disallowed the benefit of the MODVAT credit *vide* his order dated 17.10.97 and, thereby, had directed the recovery of MODVAT credit. Being aggrieved by the orders so passed by the adjudicating authority, the assessee preferred an appeal before the same authority which had passed the orders in original. Only after a year's time, the assessee realized that the appeal that was filed by him was not before the appropriate authority but before an authority which had passed the order in original. Thereafter, the assessee filed an appeal before the first appellate

46 (1983) 2 SCC 433.
47 (1998) 8 SCC 1.
48 2012 (191) ECR 0281 (SC).

authority, namely, the Commissioner of Appeals, but by that time there was a delay in filing the appeal. Along with the appeal, the assessee had also filed an application under section 5 of the Limitation Act, 1963 explaining the delay in filing the appeal. The first appellate authority rejected the same holding that it has no power to condone the delay beyond the prescribed period. Aggrieved by the same, the assessee went before the second appellate authority *i.e.*, tribunal which confirmed the orders passed by the first appellate authority. Thereafter, the assessee had filed an application for rectification of the judgment and orders passed by the tribunal on the ground that the tribunal ought to have considered the assessee's appeal not only on the ground of limitation but also on merits of the case. The tribunal, rejected the application filed for rectification, against which reference application was moved before the high court with a request to direct the tribunal to state the case and the question of law for its consideration and decision which was dismissed by the high court, it is against this order that the assessee moved to the apex court. It was argued on part of the assessee that the "doctrine of merger" theory would apply in the sense that though the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal ought to have considered the appeal filed by the assessee not only on the ground of limitation but also on merits of the case. The apex court reiterated the position that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order would not merge with the orders passed by the first appellate authority and hence the order by the high court was proper.

Appointment on compassionate grounds

In *Chief Commissioner, Central Excise and Customs, Lucknow* v. *Prabhat Singh*,[49] the claim for appointment on compassionate grounds was rejected due to non-availability of vacancy on creation of a new cadre of tax assistant and the respondent did not possess the requisite qualification for the said post. Further the Department of Personnel & Training had fixed a quota of 5% for appointments on compassionate grounds out of vacancies to be filled by direct recruitment, and such appointment to be made within 3 years from the death of the concerned employee. Whereas, in this case the claim for appointment was received in 2005 while the employee had died in 1996. The respondent had moved CAT and as directed by the CAT, the appellant had re-examined the issue but decided against the respondent. The respondent then moved to the Allahabad High Court which directed the appellant to consider the case of the respondent for employment in the post of tax assistant or any other post to be filled by direct recruitment in the department where his father was working or any other department of the Government of India. By special leave to appeal the matter reached the apex court which after noting down the facts observed that by the time the respondent first approached in 2005, he had no surviving right in view of the order 05.05.03 prescribing the time limit of 3 years. It further observed that after about 16 years there can be no surviving claim for compassionate appointment. A caution was also administered to the courts and tribunals not to fall prey to any sympathy syndrome.

49 2013 (287) ELT 393 (SC).

III CUSTOMS

Import

In *Hotel Ashoka (Indian Tour. Dev. Cor. Ltd.)* v. *Assistant Commissioner of Commercial Taxes*,[50] it was held that the state of Karnataka had no right to levy sales tax on transactions which took place in duty free shops situated inside the international airport, which was beyond the customs frontiers of India. Briefly stated, the appellant sold cigarettes, liquor and other items in the duty free shops inside the international airport to the passengers going abroad and arriving from a foreign country. On import, these goods were warehoused under section 59 of the Customs Act, 1962 and transferred to duty free shops for sales. When the goods were kept in customs bond, they cannot be said to have crossed the customs frontiers. Since they were sold at the duty free shops before import, no tax can be imposed by any State when the transaction of sale or purchase takes place in the course of import of goods into or export of the goods out of the territory of India. By virtue of section 5(1) of the Central Sales Tax Act, 1956, the transaction would be deemed to take place in the course of import. The submission of the respondent that 'in the course of import' would mean 'the transaction ought to have taken place beyond the territories of India and not within the geographical territory of India' was rejected by saying that though the transaction might take place within India but technically, looking to the provisions in section 2(11) of the Customs Act, 1962 and article 286 of the Constitution of India, the said transaction would be said to have taken place outside India.

In *Commissioner of Customs* v. *Magus Metals P Ltd.*,[51] the custom authorities seized 96.74 mts. of copper concentrate imported by the respondent on account of their alleged hazardous qualities. The appellate tribunal having ordered release treating them as copper concentrate, this appeal was moved. Attention of the court was drawn to the provisions of customs manual[52] providing for provisional release in order to expedite clearances, the court ordered release of the goods subject to compliance with the provisions of chapter 15 of the customs manual, 2011.

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50 AIR 2012 SC 982.

51 2012(286)ELT650(SC).

52 The guidelines for expeditious clearance/provisional release was brought to the notice of the court which under para 2.2(c) provides: But for certain exceptional categories, in any dispute case pending investigation wherever importer or exporter is willing, he should be allowed provisional clearance of the goods by furnishing a bond for full value of the goods supported by adequate bank guarantee as may be determined by the proper officer. The value of bank guarantee shall not exceed twice the amount of duty. The provisional clearance should be allowed as a rule and not as an exception. Provisional release may not be restored to in the cases mentioned below but here too option for storage in warehouses under s. 49 of the Customs Act, 1962 should be provided to the importers (goods can be allowed entry into the country only after the laid down quality standards etc. are satisfied): (i) Goods prohibited for import/export; (ii) Imports for complying with the specifications/conditions/ requirements of various Orders/Acts (*e.g.* Livestock Importation Act, 1898, Prevention of Food Adulteration Act, 1954, *etc*.); and (iii) Where gross fraudulent practices are noticed and release of the goods may seriously jeopardize further investigations as also interests of the revenue.

Exemption

In *Commissioner of Customs (Import), Mumbai* v *Konkan Synthetic Fibres*,[53] the question before the court was whether the imported high speed draw warping machine with drawing unit is eligible for the exemption under customs notification 17/01on 01.03.01. The exemption entry reads as high speed warping machine with yarn tensioning, pneumatic suction devices and accessories. The exemption was denied holding that the imported goods cannot be covered under the above entry, in spite of the opinion of the textile commissioner who opined that the goods are covered by the said entry. However, since the appellate tribunal extended the benefit, the revenue had filed this appeal. In deciding the issue, the court stated that it is a settled proposition in a fiscal or taxation law that while ascertaining the scope or expressions used in a particular entry, the opinion of the expert in the field of trade, who deals in those goods, should not be ignored, rather it should be given due importance. The court placed its reliance on *Collector of Customs* v. *Swastic Woollens (P) Ltd.*[54] where in it was held that when no statutory definition is provided in respect of an item in the Customs Act or the Central Excises Act, the trade understanding, meaning thereby the understanding in the opinion of those who deal with the goods in question is the safest guide. The court also placed its reliance on the judgments on interpretation of beneficial notifications where in it was observed that the beneficial notification providing the levy of duty at a concessional rate should be given a liberal interpretation, for the same, *Commissioner of Customs (Preventive), Mumbai* v. *M. Ambalal and Company*,[55] *Commissioner of Sales Tax* v. *Industrial Coal Enterprise,*[56] was referred.

Custom house agent licence

In *Sunil Kohli* v *Union of India*,[57] the apex court ruled that those who have passed the examination held under Custom House Agents Licensing Regulations, 1984 need not qualify again under the regulations framed in 2004. This ruling came to be issued on the appeal filed by the appellant who had earlier qualified in the examination held in terms of regulation 9 of the 1984 regulations. Commissioner of Customs, New Delhi issued the public notice dated 20.6.2003 inviting application for grant of temporary CHA (Custom House Agents) licence in terms of clause 8 of these regulations. However, by a letter dated 08.12.03, the government of India, Ministry of Finance asked all the Chief Commissioners of Customs to keep the process of recruitment of custom house agents in abeyance. New regulations, called the customs house agents Licensing Regulations, 2004 were notified on 23.02.04. The commissioner issued a circular dated 21.05.04 for conducting examinations under clause 8 of the 2004 regulations. The Central Board of Excise and Customs also issued clarifications on doubts raised from the field formations, in their letter dated 10.06.04. In respect of the query whether persons who have qualified under regulation 9 of the 1984 regulations be exempted from appearing for the examination

53 (2012) 6 SCC 339.
54 1988 Supp SCC 796.
55 (2011) 2 SCC 74.
56 (1999) 2 SCC 607.
57 2012(285) ELT 481(SC).

under regulation 8 of the 2004 regulations and licence granted to them, it was clarified that they have to meet the qualifications and pass the examinations under regulation 8 of the 2004 regulations. Some of the applicants represented to the chairman requesting to issue a clarification to the effect that they are not required to appear for the examination again. Failing to get a reply, a writ was filed and a single judge of the Delhi High Court allowed the same. It was held that failure of the authorities to process the applications received in pursuance of the public notice dated 20/6/2003 cannot be a ground to deprive the appellant the right to get licences. In view of the same and in view of the prefatory statement contained in the 2004 regulations, the rights of those who have qualified under the earlier regulations are saved and they are entitled to get the licence subject to fulfillment of other conditions. However, on appeal, the division bench reversed the order of the single judge stating *inter alia* that those who could not have been granted licence on account of vacancies as existed till 2004 regulations would be governed by the new regulations. The apex court however did not agree with the order of the division bench, particularly in introducing the concept of vacancies. After fully analyzing the provisions in both the old and new regulations, the court observed that the procedure for grant of licence is similar except that the new regulations do not envisage grant of temporary licence. The court further said that the opening paragraph of the 2004 regulations and proviso to clause 8(1) thereof make it clear that those who already passed the examination are not required to appear in any further examination. It held that the board's circular dated 10.06.04 and the decision to dump the applications received pursuant to the notice dated 20.06.03 as contrary to the language of proviso to clause 8 of the 2004 regulations. The court further ruled that the regulations framed by the board under section 146(2) of the Customs Act are in the nature of delegated legislation. The language employed in this section nor those in the Act permitted the board to make the regulations with retrospective effect.

CESTAT member: right to appear after demitting office

In *N. K. Bajpai* v. *Union of India*,[58] the question before the apex court was whether section 129(6) of the Customs Act, 1962, stipulating that on demitting office as member of the Customs Excise and Service Tax Appellate Tribunal (hereinafter "CESTAT") a person shall not be entitled to appear before the CESTAT, was *ultra vires* the Constitution of India. It was contended on part of the appellants that the section 129(6) of the Customs Act imposes a complete restriction upon the appellants and is therefore unconstitutional. While examining the merit of the contention, the apex court held that there is no challenge to the legislative competence of the legislature which enacted and inserted section 129(6) of the act, and once there is no challenge to the legislative competence and the provision remains as a valid piece of legislation on the statute book, then the only question left for the court to examine is whether this provision is so unreasonable that it inflicts an absolute restriction upon carrying on of the profession by the appellants. The court held the restrictions to be valid on two counts, one, it is not an absolute restriction and is merely a partial restriction to the extent that the persons who have held the

58 AIR 2012 SC 1310.

office of the President, Vice-President or other members of the tribunal cannot appear, act or plead before that tribunal. The court observed:[59]

> In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardize the interests of any hardworking and upright advocate. The right of such advocate to practice in the High Courts, District Courts and other Tribunals established by the State or the Central Government other than the CESTAT remains unaffected. Thus, the field of practice is wide open, in which there is no prohibition upon the practice by a person covered under the provisions of Section 129(6) of the Customs Act.

Second, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. The court held that such restriction would add further to public confidence in the administration of justice by the tribunal, in discharge of its functions. Thus, it cannot be held that the restriction has been introduced without any purpose or object. The court observed that one find a clear nexus between the mischief sought to be avoided and the object aimed to be achieved.

Classification

In *Keihin Penalfa Ltd* v. *Commissioner of Customs*[60], the dispute was related to the classification of electronic automatic regulator, either under 8543.89 or under 9032.89 of the customs tariff. Since in a notification dated 1.3.2002, the central government had classified the goods under chapter sub-heading 9032.89, the court ruled that from 1.3.2002 they will be classified as in the notification.

Duty entitlement passbook scheme

In *Commissioner of Customs* v. *Caryaire Equipment India Ltd*.,[61] the question whether "aluminium grills" made out of extruded aluminium section would fall under serial no. 7 of the product group engineering-product code: 61 and whether the exporter would be entitled for the Duty Entitlement Passbook Scheme (DEPB scheme) at 7% *ad valorem* available for the products falling under the above product group came up for consideration. While the commissioner had rejected the claim, the appellate tribunal allowed the appeal holding that 'aluminium grills' are nothing but extruded aluminium products. The revenue preferred an appeal against the order. The Entry 7 reads as "Extruded Aluminium products including pipes and tubes". After referring to the meaning of the term "extrusion" and noting the process of cold extrusion in the Text book McGrawHill Encyclopedia, and further referring to the manufactured forms of aluminium from the book, "The Complete Technology on Aluminium and Aluminium Products", the court concluded that "aluminium grills" in question being obtained out of the fabrication made out of extruded aluminium products are not the same as extruded aluminium products. Accordingly, the tribunal's decision was reversed. While on the subject, the court held that the

59 *Id*., para 20.
60 (2012) 3 SCC 318.
61 (2012) 4 SCC 645.

word "include" and the inclusive definition sometimes has a restrictive meaning and would be a word of limitation depending on the context of use.

Condonation of delay

In *Thakker Shipping P Ltd* v. *Commissioner of Customs (General)*,[62] the appellant's licence to act as custom house agent was initially suspended by the commissioner under regulation 23 of custom house agent licencing regulations, 2004 for alleged mis-declaration of value and attempt to clear an import consignment. The suspension of the licence was set aside by the appellate tribunal. However, the enquiry under the above regulation continued and on conclusion thereof, the commissioner of customs (General) dropped the proceedings. On a review of this order, the committee of chief commissioners ordered the commissioner to apply to the appellate tribunal for determination of the points raised in the review order. The commissioner made an application under section 129 D (4) of the Customs Act, 1962, along with an application to condone the delay in making the application. The tribunal rejected the application seeking condonation of delay following the ruling by the larger bench of the tribunal in *Commissioner of Central Excise* v. *Azo Dye Chem*.[63] Thus the question before the apex court was whether the tribunal is competent to invoke section 129A(5) of the Act where an application under section 129D(4) has not been made by the commissioner within the prescribed time limit and condone the delay in making such application, if it is satisfied that there was sufficient cause for not presenting it within that period. The appellant submitted that the Tribunal has no powers to condone the delay and relied on the judgment of a three-Judge Bench of the apex court in *Commissioner of Customs and Central Excise* v. *Hongo India Pvt. Ltd*.[64] After analyzing the provisions in sections 129A and 129D (4), the court observed that the expression "such application", *inter alia,* is referable to the application made by the commissioner to the tribunal in pursuance of an order under sub-section (1) of section 129D. The period prescribed in section 129D does not control the expression "such application". The application made under section 129D (4) pursuant to an order passed under sub-sections (1) or (2) does not cease to be "such application" merely because it has not been made within the prescribed time. It further noted that if "such application" is taken as to mean only the applications made within time, then the expressions "heard", "as if such an application were an appeal" and "so for as may be" occurring in section 129D(4) may be rendered ineffective. The court concluded that the tribunal has powers to invoke section 129A (5) where an application under section 129D (4) has not been made in time.

Detention

In *Baby Devassy Chully@Bobby* v. *Union of India,*[65] the captain of the vessel M.T.AL SHAHABA was arrested along with few others on the allegation of smuggling diesel oil of foreign origin. Based on his statement implicating the

62 (2012) 12 SCC 189.
63 (2000) 120 ELT 201 (Tri-Delhi).
64 (2009) 5 SCC 791.
65 2012 (194) ECR 1 (SC).

appellant herein, the appellant was arrested on 24.03.05. On 12.04.05, he was granted bail but he did not avail it. In the meanwhile on 03.05.05, the Joint Secretary to government of India passed the detention order against him under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act.) Being aggrieved by the said order, the appellant moved criminal writ petition which was dismissed by the Bombay High Court resulting in the present appeal. On the plea that on the date of issue of the detention order, the appellant was still in jail, having not availed the bail granted to him, and hence there was no compelling need to pass the detention order as held in *Rekha* v. *State of Tamilnadu*[66] the court ruled that it was aware of the right to liberty guaranteed by article 21 of the Constitution of India; however keeping in view the above and article 22(3)(b), it was necessary to find whether the detention order was sustainable in law or not. The court reiterated that the subjective satisfaction of the detaining authority is vital and found that in the impugned case, all the details are narrated for passing the order with a view to prevent the appellant from abetting in smuggling. As for the reliance on the judgment in *Binod Singh* v. *District Magistrate, Dhanbad, Bihar*,[67] the court held that in this case, there was an order granting bail to the appellant and he could walk out any time and indulge in prejudicial activities. The court rejected the plea on no reference being made to the confessional statement, and the reliance on *A.Sowkath Ali* v. *UOI*[68]. It reiterated that the sponsoring authority has to place all the documents before the detaining authority. A document which has no link with the issue cannot be construed as relevant. Before parting, the court reminded all the high courts that in a matter of this nature affecting the personal liberty of a citizen, the courts must endeavour to take an early decision.

In *Saeed Zakir Hussain Malik* v. *State of Maharashtra,*[69] the apex court held that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order, otherwise the subjective satisfaction gets vitiated and such unreasonable delay in executing the order creates a serious doubt regarding the genuineness of the detention authority. In the instant case, the detenu was allegedly involved, along with few others, in a racket in using fictitious IECs and forged documents for fraudulent exports under the duty drawback scheme leading to availing crores of rupees as drawback. The detenu was arrested on 21.10.05, but was released on bail on 11.11.05. The detention order under powers given under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) was issued by the principal secretary (Appeals and Security), government of Maharashtra on 14.11.06, while the detenu was actually detained on 01.02.08. Referring to article 22(5) of the Constitution of India and the judgments in *P.M. Hari Kumar* v. *UOI*,[70] *SMF Sultan Abdul Kader* v. *Jt. Secy to GOI*[71] and *A.Mohammed Farook* v. *Jt. Secy to GOI*,[72] the court ruled that

66 (2011) 5 SCC 244.
67 (1986) 4 SCC 416.
68 (2000) 7 SCC 148.
69 AIR 2012 SC 3235.
70 (1995) 5 SCC 691.
71 (1998) 8 SCC 343.
72 (2000) 2 SCC 360.

the inordinate delay in execution of the order was not satisfactorily explained. The court which granted the bail was not approached for cancellation of the bail and forfeiture of the amount. The court observed that no serious effort was taken to serve the order on the detenu without delay thereby violating the provisions in article 22(5) of the Constitution of India. The court came down heavily on the delay in issuing the detention order by observing that the inordinate and unreasonable delay in passing the detention order vitiates the detention itself.[73]

Appeal

In *Haripriya Traders* v. *Commissioner of Customs,*[74] the appellate tribunal while remanding the appeal for *de novo* consideration had expressed the opinion that the first secretary (Commerce) was a competent authority to furnish trade information from ASEAN countries. The appellant raised objection to this. The court felt that since the tribunal was remanding the matter for *de novo* adjudication, even the issue as to whether the first secretary (commerce) was a competent authority to furnish trade information from ASEAN countries could have been kept open so that the parties could have agitated this issue as well. That portion of the remand order was set aside with direction that the adjudicating authority will permit the appellant to raise this issue before him.

IV CONCLUSION

Adherence to precedent is generic in tax adjudication. In most of the cases surveyed, the apex court has derived strength from its earlier judgments. It may be submitted that there has been no substantial addition to the indirect tax jurisprudence under the surveyed year. However, the judgment in *CCE, Mumbai* v. *Fiat India (P) Ltd*[75] has been a value addition thereby holding that wherein the goods are sold at a price less than the cost of manufacture, that price cannot be held as 'normal price' for purposes of valuation under section 4 of the Central Excise Act, 1944. The decisions in *CCE, New Delhi* v. *Connaught Plaza Restaurant (P) Ltd*., *New Delhi*[76] and *Commissioner of Central Excise* v. *Wockhardt Life Sciences Ltd*[77] has ensured the preeminence of 'common parlance test' in the classification of products. The court has further in *Union of India* v. *Guwahati Carbon Ltd* [78]made it clear that the excise law is a complete code in order to seek redress in excise matters and hence it may not be appropriate for the writ court to entertain a petition under article 226 of the Constitution of India. The judgment in *N. K. Bajpai* v. *Union of India*[79] has cleared the position that a demitted member of CESTAT is not entitled to appear as counsel before the CESTAT.

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73 *Supra* note 69, para 22.
74 2012 (286) ELT 649(SC).
75 *Supra* note 6.
76 *Supra* note 13.
77 *Supra* note 27.
78 *Supra* note 45.
79 *Supra* note 58.